

THE EFFICACY AND LEGITIMACY OF TRIAL ORDEAL IN NIGERIA

BY

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OCTOBER, 2024

TITLE PAGE

THE EFFICACY AND LEGITIMACY OF TRIAL BY ORDEAL IN NIGERIA

DECLARATION

This is to declare that this research project titled “The Efficacy and Legitimacy of Trial by Ordeal in Nigeria”, was carried out by Amuzie Divine-Favour Chinedu, and is solely the result of my work except where acknowledged as being derived from other person(s) or resources.

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October, 2024.

APPROVAL

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DEDICATION

This research work is dedicated to God Almighty for His love, mercy, grace and guidance all through my academic journey.

I dedicate this work to all those who have been done injustice, those who advocate for justice and those who do justice.

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LIST OF ABBREVIATIONS

ACHR- African Charter on Human and Peoples' Rights

ADR- Alternative Dispute Resolution

ALL NLR- All Nigeria Law Report

CA- Court of Appeal

CEDAW- Convention on the Elimination of all forms of Discrimination against Women

CFRN- Constitution of the Federal Republic of Nigeria

CRC- Convention on the Rights of the Child

FWLR- Federation Weekly Law Report

ICCPR- International Covenants on the Civil and Political Rights

ICEAFRD- International Convention on the Elimination of all Forms of Racial
Discrimination

ICESCR- International Covenants on Economic, Social and Cultural Rights

MDCH- Multi-Door Courthouse

NWLR- Nigeria Weekly Law Report

OHCHR- Office of the United Nations High Commissioner for Human Rights

SC- Supreme Court

UDHR- Universal Declaration of Human Rights

WACA- West African Court of Appeal

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ABSTRACT

In Nigeria, one of the prevalent practices is that of trial by ordeal. The practice of this ordeal is not recent as it has always been since the precolonial era. At the time, custom and tradition was the ruling force over the affairs of every Nigerian society. These customs provided for ordeals that would be employed when issues of crime arise. It was used to identify the guilty. They were not all the same in all communities, they were of various forms. Example is the practice of the Efik to subject suspects of witchcraft to swim a river of crocodile, other villages banish suspects or accused persons are poisoned to test their innocence. Ordeals of all types were dangerous, obnoxious and most times degrading. As time passed, Nigeria had an established legal system; here laws were enacted, institutional were established to enforce them. Having considered the nature of trial by ordeal, many laws were enacted to antagonize this practice; the 1999 constitution of Nigeria, the criminal code Act, the penal code Act among other national enactments bearing provisions that do not accommodate trial by ordeal. In addition, international treaties were made, which its provisions antagonized practices of ordeal. Despite these frameworks established, it is evident that the practice of trial by ordeal still occurs in modern times which could be traced to some reasons; the belief in trial by ordeal as the sure means of obtaining justice, the disbelief in the country's legal system and the country's ability to dispense justice, the intention not for true justice but to unleash vengeful actions upon accused persons etc. There is need to bring to light true understanding about trial by ordeal, and its long term effect on society. The reflex action of immediately resorting to trial by ordeal should be dissuaded and better means adopted to resolve issues of crime and/or conflict when they arise, thereby guaranteeing social order, justice and progress.

CHAPTER ONE INTRODUCTION

1.1 Background to the Study

Trial by Ordeal in Nigeria is a practice that has always been. This geographical territory called Nigeria is a country where its people were regulated by customary practices in their daily affairs long before the colonial era. They regulated marriage, community service and other human and social endeavors, even issues of offences or social wrong were addressed in communities. It was and still is a matter of concern that the methods employed to address misconduct were so crude, obnoxious, inhumane and sometimes critically life-threatening. These were all practices known as trial by ordeal. Trial by ordeal of all forms emanated from customary practices and though there may be similarities, they may vary from community to community in Nigeria. It does not involve court processes or legal processes but heeds only to custom when issues of conflict or certain offences/social wrongs arise.

Trial by ordeal is perceived as a judgment from God or a supernatural being, with the idea that the person in question is put through a harmful or sometimes life-threatening situation, if he is saved then it is taken that his “god’ has saved him thereby proving his innocence. It was during and after colonialism, that some of these customs which seemed too harsh and cruel were actually reviewed. These practices were even opposed by the colonial masters using the Repugnancy test. A legal system was introduced and Nigeria grew in that light. Both laws and legal institutions were established not only to invalidate those customs but also to provide a better alternative to customary practices of Trial by Ordeal. Unfortunately, even in this epoch where legal instruments and legal institutions are numerous, most people still resort to trial by ordeal. Mostly because their anger is immediately quenched when instant retribution is caused

via trial by ordeal or the disbelief that justice cannot come through any other form. In reality, these notions are not entirely true and the long-term effect is usually not put into consideration.

Even in modern times, concerning addressing social wrongs and offences, certain customary practices are still observed but now laws have been enacted and a legal system put in place to address issues of crime, the legislators who make laws, the courts etc. Despite this, most citizens of the country still think so backwardly. Most times those in the rural areas lack understanding of the effects and repercussions of adopting crazy mechanisms to address personal issues of offence. An understanding has to be brought to the people on the way forward and factors constituting the legal system must be up and doing to help remedy the situation of things. It is for this reason that this topic was chosen, for a reorientation so that the eyes of the average Nigerian are opened to a thorough analysis of the acceptability and legitimacy of these practices by law and the people, its effectiveness and to recommend better alternative ought to be embraced, more humane yet efficient means through which progress and justice and order can be maintained in Nigerian society.

1.2 Statement of the Problem

In a country like Nigeria, which has an established criminal legal system, it is very evident that the larger population believe in the ideology of adopting an outrageous method such as trial by ordeal. There prevails in the reorientation of the larger populace that trial by ordeal is the right option to resort to in handling issues of crimes, offences or social wrong. This orientation exists because people lack the understanding of its practical effects and how it takes a toll on society generally. They need a reorientation of this practice, influencing them to abandon it and resort to a far better efficient means of handling crimes and offences. There is also a very evident need for the Legal system of the country and its institutions to step up. The very practice of trial by ordeal

is known to infringe many rights of the people which the law protects but does not efficiently enforce, and this is yet a problem to be tackled.

The legal system, the laws, the courts and other legal institutions lack social proof, the legal system is meant to be the reliance of every citizen but in reality, it cannot happen until the system proves to be reliable. Even the courts and legal institutions established are not up and doing, giving people more reason to resort to trial by ordeal. This work is an appraisal addressing people who support trial by ordeal and the people opposing trial by ordeal pointing out how they need to step up.

Research Questions:

1. The extent to which the practice of trial by ordeal is accepted by the law and the people.
2. The extent of effectiveness or efficiency of this practice of trial by ordeal in addressing crimes and offences in the Nigerian communities.
3. Are there no more humane yet better means that could be utilized in efficiently addressing issues of crimes and conflict in Nigerian society while ensuring justice and positive impact in society?

1.3 Aim and Objectives of the Study

This research aims to analyze the effectiveness and legitimacy of trial by ordeal in Nigeria.

The objectives are to:

1. Ascertain the extent of the legitimacy of trial by ordeal in Nigeria.
2. Ascertain the extent of the efficacy of trial by ordeal in Nigeria.

3. Find and recommend a more humane and effective system or means of handling crimes and offences in Nigeria.

1.4 Scope and Limitation of the Study

This study shall cover, the concept of trial by ordeal. The extent of its practice in Nigeria, the extent of its efficacy, as well as its legitimacy in the eyes of the law, shall be deeply discussed. The flaws of this practice and its impact on society, necessitating its eradication from Nigeria shall be highlighted but possible alternatives for handling offences and/or conflicts such as Arbitration and other forms of Alternative Dispute Resolution (ADR), reformatory measures etc, shall be provided as well. An in-depth discussion about the flaws of the Nigerian legal system shall not be included in this study.

In discussing the history of trial by ordeal, Nigeria shall be the focus and the epoch covered shall be from the precolonial era till the modern-day Nigeria.

1.5 Significance of the Study

The study seeks to cause a reorientation in the minds of the larger populace, concerning handling issues of conflict, offences or social wrongs. This work not only appraises the practice of trial by ordeal but enables people to truly understand its shortcomings and harm to humanity and society, also highlighting the need to think in terms of adopting better methods. There are cases where people are falsely accused of offences and are immediately pounced on by trial by ordeal, leaving them inflicted despite their innocence. To these categories of persons, the outcome of this study shall contribute to protecting them, enlightening the people on how badly people could be affected without a proper means of addressing issues, and dissuading them from such harmful

practices. This work shall also provide in its recommendation, actionable steps that could be embraced to address the practice of trial by ordeal and issues of crimes and conflict in Nigeria.

1.6 Research Methodology

The research methodology for this work is the doctrinal Research Methodology. This work will rely on both primary and secondary sources such as statutory provisions/enactments, case laws, comments of legal practitioners, law textbooks, journals and articles, as well as other scholarly materials regarding this scope, shall be utilized.

1.7 Chapter Analysis

Chapter one provides background knowledge necessitating this research work on the efficacy and Legitimacy of trial by ordeal. It states the social problems intended to be solved while highlighting the aim and objectives of this work. It defines the scope of this and highlights the significance of this study and the research methodology adopted.

Chapter two discusses the history of trial by ordeal, as well as the theories, beliefs and ideologies which formed the basis of its practice.

Chapter three focuses on the laws, and norms surrounding the practices of ordeals, and the authorities upon which it thrives. It also highlights the position of the Laws emanating from the current Nigerian legal system as well as the relevant legal institutions established to enforce the eradication of this practice and to address the issues of crimes and disputes.

Chapter four analyzes the efficacy of trial by ordeal pointing out its advantages and its overwhelming shortcomings. In this chapter, the legitimacy of this practice shall be ascertained and its impact on society shall be revealed.

Chapter five delves into recommending the possible alternatives that could be embraced in handling issues of crimes and conflict. It highlights the need for the society as a whole; the people, government and relevant institutions to cooperate and intensify efforts to this call to duty, and upon compliance, a better Nigerian society shall be birthed where the social growth, progress, order and justice is maintained.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK AND REVIEW OF RELATED LITERATURE

2.1 Conceptual Framework

2.1.1 Concept of Trial by Ordeal

Trial by Ordeal encompasses traditional, cultural or customary ways or practices by which crime is controlled or dealt with in a society. Black's Law Dictionary (1999) defines ordeal as "A primitive form of trial in which an accused person was subjected to a dangerous or painful physical test, the result being considered a divine revelation of the person's guilt or innocence".¹ These practices have been operational before the introduction of a legal system in Nigerian societies, even to date.

The introduction of a legal system provided judicial means through which issues like conflicts and crimes could be controlled or resolved, but before this, ordeals were part and parcel of cultural or customary practices that were already operational in various Nigerian societies. Most African societies recognized ordeals and some other fetish practices as acceptable methods of proof. Where issues are, and there is a need to determine the guilt or innocence of accused persons, these methods are adopted. In this practice, the traditional beliefs in the gods were very predominant and it played a major role in determining guilt or innocence.

¹ BA Garner, Black's Law Dictionary Seventh Edition (West Group St Paul Minn 1999)

For instance, among the Igbos, cases of murder were dealt with by intervention of gods in Juju swearing.² One popular form of ordeal for a murder suspect was to wash the dead person and collect the water from the bath and compel the suspect to drink some of it. A relative took a sip of this water to ensure that no poison had been mixed with it, and then the accused took a mouthful. If the suspected murderer died within an agreed period usually twelve months, it is a confirmation of his guilt, but if he survived the period, that was seen as a vindication of his innocence.³

Ordeals are of different kinds, varying from community to community. The Ibibio and the Efik had an Ibiam oath capable of destroying those who swore falsely.⁴ Among the Kalabari, a person accused of witchcraft was asked to swim across a creek full of crocodiles. When a suspect for stealing is caught, mob justice is usually employed. In places like Lagos or Abia, the cruel practice of burning the suspect alive is practised. The Efik Uburutu people of present-day Nigeria have used the poisonous Calabar bean to detect guilt. There is a case where market people in Ejigbo punished two sisters and their mother for stealing pepper by beating them and pouring pepper into their private parts.⁵

In addition to the harshness and danger surrounding the process of the ordeals like the instance mentioned above, there are many offences of varying significance. The sanctions were not stated in advance but sanctions were reliant on the circumstances of the individual case.⁶ There were most times no fixed sentences for fixed crimes.⁷ When the need arose punishments were

² CA Oputa, 'Crime and the Nigerian Society' in Elias TO (Ed) (Government Printer 1975) *African Indigenous Laws* 11.

³ Ibid.

⁴ Olaoba, OB Anifowose, AR Yesufu and BD Oyedolapo, *African Traditional Methods of Conflict Resolution* (National Open University of Nigeria 2010) 114.

⁵ The State of Lagos v Isiaka Waidi & ORS [2017] 14 NWLR (Pt. 1581) 287.

⁶ Milner Alan, *The Nigerian Penal System* (Sweet and Maxwell 1972) 112.

⁷ SE Opolot James, *Criminal Justice and Nation Building in Africa* (University Press of America 1976) 150.

enforced. The heavy punishments include capital punishment and banishment, there were milder ones like fines, compensation and restoration. There are also less severe punishments against the violations of rules of the land and which may take different forms, such as minimal fines and levies, suspension and expulsion of membership from particular groups or the community.

Some offences such as murder and witchcraft were considered much more serious than the others, and often attract the death penalty, a capital punishment which at many epoch in the history of customary laws, hanging, beheading, stoning, drowning, burying alive and killing by the identical means used for a murderer had been allowed,⁸ commonly used for the most serious crimes, such as murder, sacrilege and other magic-religious offences. The death penalty has been administered as the ultimate sanction in offences other than murder: recidivist theft, gross troublemaking, witchcraft and treason.⁹ It was always very cruel, burning, roasting, torturing, amputation by piecemeal; now it is generally by gun, dagger, club, or drowning. For a debt that a creditor is seeking to recover, securities may be accepted. But if the accused then runs away, the person giving the security is tried and punished.¹⁰

Oputa accounts that under the Igbo customary law, it is a very atrocious crime for a man to wilfully and deliberately kill another member of the village. If such happens, the houses and property of the whole family of the slayer would be destroyed. In addition, the slayer is expected to hang himself, failing which he may take the option of running away from the village which is considered cowardly and believed that a course of murder is hanging over him wherever he ran.¹¹ If the killing is accidental, the offender is notified of the death of the victim of his Act and

⁸ Ibid 23.

⁹ Ibid.

¹⁰ “Fetichism in West Africa”, available at <<http://www.sacred-texts.com/afr/fiwa/fiwa03.htm>> accessed 20 October 2024.

¹¹ Ibid.

given the opportunity to flee the town. He remains in exile for a period fixed by local custom, usually 3 years, after which he may return if he so desires.¹² If he returns, he pays compensation to the relatives of the person he slew, usually in the form of the family of the accused handing over a girl to the family of the deceased. It is expected that the girl would stay in the family and bear children to redress the social imbalance caused by the death of the deceased.¹³ The absconding criminal must remain in exile until the bitter feelings towards him have died down. In some parts of Ibo land, a person guilty of murder was exiled for life while in other parts, the exile was for seven years.¹⁴

2.1.2 Concept of Banishment:

Banishment is one of the penalties resorted to in pre-colonial African societies. Serious crimes such as murder, and witchcraft may attract such penalties, which involve compelling offenders to leave a community for a specified period of time or for life. It is synonymous with exlement or deportation, importing a compulsory loss of one's country.¹⁵ The Pastoral Fulani of Northern Nigeria used temporal banishment as a penal sanction. This amounts to sending him into the bush until he repented.¹⁶

2.1.3 Concept of Fines:

Fines were imposed for retribution and deterrence.¹⁷ It had to be paid to the chief. The rationale was that all the people belonged to the chief and the injury therefore was to the chief but the

¹² Ibid 9.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ HC Black, *Black's Law Dictionary* (6th ed St. Paul Minn West Publishing co 1990), 144.

¹⁶ Ibid 36.

¹⁷ Ibid 141.

chief would usually give part of the fine to the family of the injured party.¹⁸ Apart from instances where the murderer must forfeit his life, fines could be paid for other offences. Where fines are required, the fines are paid with goods, each offence having its regulation price as a punishment¹⁹.

In some cases, corporal punishments are administered and done publicly for the whole town to witness it. The idea was to make people dread such deeds that would amount to such punishment. In the Yoruba legal culture, social crimes attract corporal punishment such as flogging, whipping, tying, putting in the stocks or yoke, lacerating wounds, banishment, castration or emasculation, etc.²⁰

The forms and practices of trial by ordeal were not exactly the same but were of a specific kind in the various societies that practiced them. Trial by Ordeal was extremely toxic coupled with the fact that there was almost no alternative. But the introduction of a legal system changed things. While the British ruled over the geographical territory, we now call Nigeria, they noticed the operation of some of these practices. They deemed it inhumane and outrageous so they abolished these practices. For instance, In Uzere, Delta State, trials by ordeal were performed at Eni-Lake before British colonial rule abolished it in 1903. It is sometimes argued that the abolition of trials by ordeal during the British colonial rule was not driven purely by humanitarian concerns by economic interests.²¹

¹⁸ G Wallace Mills, Law in African Societies, Hist. 322 4 African Societies, available at <http://stmarys.ca/~wmills/course322/4African_societies.html> accessed 20 October 2024

¹⁹ Ibid 18.

²⁰ Oladele Balogun, 'A Philosophical Defence of Punishment in Traditional African Legal Culture: The Yoruba Example' [2009] (3) (3) *The Journal of Pan African Studies* 46.

²¹ FE Oghi, 'Abolition of Trial by Ordeal at Eni-Lake, Uzere, Delta State of Nigeria, 1903: A Reconsideration'. [2013] (2) (1) *AFRREV IJAH: An International Journal of Arts and Humanities* 1.

Over time, the legal system in Nigeria advanced even after independence. Most trials by Ordeal were frowned upon because of its cruelty, brutality and unreliability in determining guilt or innocence, a gross violation of human rights inter alia. Legal instruments and institutions were established to oppose trial by ordeal.

Nigeria has several statutory provisions that prohibit trial by ordeal, including but not limited to:

1. The Guarantee for the right to a fair trial, which implies a trial based on evidence and not ordeal.²²
2. Prohibiting any person from conducting trial by ordeal.²³
3. Prohibition of unlawful trial by ordeal.²⁴
4. Prohibition of torture and other inhuman and degrading treatment²⁵; which includes trial by ordeal.

Institutions like the judiciary were created and it performs the role of interpreting the law so as to ensure the law is upheld. There are even case laws that emanated from the judiciary. For example: An English court rejected trial by ordeal, citing its unreliability.²⁶ Another case of a dispute over land ownership was decided by trial by battle, but the judge ultimately ruled that the outcome was not conclusive evidence of guilt or innocence.²⁷ Institutions like the police force are established and saddled with the responsibility of executing the provisions of the law and the judgments of the court.

²² The Constitution of the Federal Republic of Nigeria (1999), s 36 (1).

²³ Criminal Code Act, s 208, CAP 77, Laws of Federation of Nigeria (LFN) 1990.

²⁴ Criminal Code Act, s 207, CAP 77, Laws of Federation of Nigeria (LFN) 1990.

²⁵ The Torture and Other Inhuman Degrading Treatment (Prohibition) Act 2017, s 2.

²⁶ *Sweeney v Sullivan* (1212) 1 Eng R 112; [1212] All ER Rep 115.

²⁷ *Abbes of Shaftesbury* (1274-1377) Year Book, 22 Edw. I, fol. 57, pl. 15.

The abolition of the trial by ordeal was also greatly affected by international treaties. This practice violates human rights which goes against the international human rights standard. Treaties like the UDHR, the African Charter on Human and People's Right (Ratification and Enforcement Act)²⁸ and similar instruments are enforced in Nigeria. Since trials by Ordeal poses a threat to human rights, the law vehemently opposes it.

Customary criminal laws are no longer in force in Nigeria and the courts can only impose penalties stipulated in a written law. Most of the sanctions and procedures discussed in this work such as trials by ordeal²⁹, torture³⁰ and corporal punishment³¹ have been abolished by statute.

2.2 Theoretical Framework

The practice of trial by ordeal was not observed just on its own, there were ideologies surrounding its practice.

2.2.1 Traditional Religious Belief

In many African societies like Nigeria, Traditional religion was given a remarkable place in the indigenous law process. Indigenes were deeply rooted in their traditional practices and beliefs. Traditional Religious and ritual beliefs and practices were greatly relied upon in determining legal responsibility.³² They believed in the intervention of the divine, which is why in the definition of Trial by Ordeal, it is emphasized that not only are the persons in question subjected to harsh and dangerous processes but, they were subjected to the believe that divine

²⁸(1983)

²⁹ Ordeal, Witchcraft and Juju Proclamation 1903 (South), 1908 (North)

³⁰ s 9 Native Courts Proclamation 1900 (North) and s 9 Native Courts Ordinance, 1914 (South)

³¹ The *Lagos State Criminal Law 2011* expunged corporal punishment from the law.

³²AL Epstein, 'Introduction, Procedures', in Max Gluckman (Ed) (Oxford University Press, 1969) *Ideas and Procedures in African Customary Law* 22-23.

intervention would come through in determining the innocent or guilty.³³ In addition to explaining the supernatural power, the traditional religion that gave rise to certain belief systems also featured places of worship like shrines and woods, which later became the sites of numerous extrajudicial operations. Tradition religion promoted truth, equity and justice which were the primers of conflict resolution in traditional African societies³⁴. It is believed that the deities and ancestors were always at the place of conflict resolution.

2.2.2 Theory of Deterrence

African communities adopted ordeals which involved very extreme measures such as, poisoning, burning alive, and similar situations for the sake of deterrence. Punishments are given and made so severe to ensure that no one (both the offender and other members of society) would be willing to commit such crime in the future.³⁵ In most societies, having considered the great consequence of an offence when the offender is caught, most persons will likely withdraw from committing such a crime, as they may weigh the gains of that offence with the risk and deem it unworthy.

However, every society has a group of deviants called recidivists. These are persons who commit offences even more often regardless of how much or weighty the punishment is, even when they have experienced such punishment. These are set of persons who need help. These persons could become of great use to society but trials by ordeal cannot achieve that as they

³³ Trial by ordeal, a formerly used criminal trial in which the guilt or innocence of the accused was determined by subjection to dangerous or painful tests believed to be under divine control.

³⁴ *Ibid* 17

³⁵ Deterrence is of two types. General and specific. The former relies on the notion that the fear of punishment will prevent individuals from breaking the law. The latter focuses on preventing a particular offender from reoffending, a punishment is imposed that is severe enough to dissuade the individual from committing the same or similar crimes in the future.

rather birth more recidivists. It has been mostly achieved by reformatory measures³⁶ where these persons are taught, and their minds rightly and morally reengineered after which they are integrated back into society as they serve their community for the greater good.

2.2.3 Theory of Restorative Justice

Despite the harsh ordeals employed, the community usually pays attention to the problem of the victim of crime. It attempts to guarantee that the victim of the crime is put back in the same situation as before the crime was committed as closely as feasible. As a result, it bases its sentencing on the restorative justice philosophy. Compensation and/or Restitution is often imposed. Restitution relates to the return or restoration of movable property either stolen or otherwise dishonestly acquired.³⁷

Based on the Nigerian traditional system, the payment of compensation³⁸ by the offender to the offended was customary in many cases, even in the unlawful killing of a human being.³⁹ Even in murder situations, the punishments of recompense, restitution, reconciliation, and ceremonial cleansing may be applied unless the perpetrator exhibits little or no cooperating behaviour.⁴⁰ A common method of restitution is payment in kind, such as cattle, on a sliding scale that takes into account the victim's age, sex, possibility of having more children, criminal history, and current financial situation. Compensation for a woman is less than for a man, depending on her age

³⁷ AA Adeyemi, *The Place of Customary Law in Criminal Justice Administration in Nigeria*, 130.

³⁸ The payment of compensation which was also referred to as “blood money” was allowed even for cases of unlawful killing.

³⁹ *Ibid* 220.

⁴⁰ *Ibid* 150.

According to Milner, in certain Nigerian communities, particularly among the Ibos, an accidental death or injury would only be accepted if the perpetrator was required to cover the expenses of the funeral, including the cost of the victim's burial garments, the sacrificed animals, the food for the feast, or the cost of keeping the victim alive until he recovered.⁴¹

2.2.4 Theory of Human Rights

Trial by ordeal and related practices like mob justice and jungle justice are strongly criticized by academics and legal professionals in modern and contemporary discourses because they encourage violence and insecurity in communities. The Nigerian Constitution and international human rights treaties guarantee core human rights, including the right to a fair trial and the assumption of innocence, which are severely violated by such practices, according to legal experts. International human rights principles are significantly at odds with the trial-by-ordeal method.⁴² The concepts of natural justice and human rights are violated by instances of trial by ordeal and jungle justice, which involves mob action against accused criminals. Guilt or innocence cannot be determined using such methods.⁴³

Communities used quite hasty and ludicrous tactics. For instance, the Efik people of Old Calabar used the Calabar bean (*Physostigma venenosum*) in trials, where the accused drank a poison derived from the bean; survival indicated innocence, while death indicated guilt or. Common ordeals like drinking poisonous substances, walking on hot coals, or immersion in water with the belief that divine intervention would ensure the innocent survived unscathed

⁴¹ Milner (n 6) 36.

⁴² The Guardian News Paper, Criminality of Jungle Justice Trial by Ordeal and Imperative of Swift Punishment for Offenders (on 9 May 2023) available at < <https://guardian.ng/news/criminality-of-jungle-justice-trial-by-ordeal-and-imperative-of-swift-punishment-for-offenders/> > accessed 24 October 2024.

⁴³ *Ibid* 24.

while the guilty suffered harm or death.⁴⁴ These are many more are vehemently opposed as such practice infringe into many rights⁴⁵ which even the 1999 constitution of the Federal Republic of Nigeria provides.

2.3 LITERATURE REVIEW

According to Dr. Felicia Anyogu and Dr. Carol Arinze-Umobi⁴⁶, Trial by Ordeal is a practice which still persists till date even despite the criminalization of this act. The work not only explains the practice but also its impact on people especially the Igbos. They maintain the position that more efforts need to be made to stop the practice of this act. The impacts of legislations are applauded and recognized, in a bid to achieve this goal. In their work, recommendations of additional strategies were provided, which included, the need to create awareness for the common man especially in the rural areas about his human rights, the ignorance of which causes community to carry on such obnoxious practice. The need for traditional authorities to be enlightened on the limits of their function, was highlighted. Though they function, they must not act ultra vires, issues of criminality should be handed over to appropriate authorities. Protection of the women was emphasized as he pointed out their vulnerability and the need for their rights to be recognized and protected. This work, however, does not provide actionable steps that could be adopted by the people or the government which will ensure compliance in terminating the practice of trial by ordeal. This lacuna shall be filled by this work.

⁴⁴ *Ibid* 42.

⁴⁵ Right to Life, Right to Dignity and some others.

⁴⁶ Felicia Anyogu and Carol Arinze-Umobi, 'Trial by Ordeal and Human Rights Violation: The Case of the Igbo of Southeastern Nigeria'. [2013] (1) *Igbo Studies Review* 16-22.

In the collective work of Igwe et al,⁴⁷ there is an attempt to revive culture, especially in dispute resolutions. It explains how the old dispute resolution methods such as oath-taking, and trial by ordeal address issues of conflict and crime and that they were all watered down by the intervention of colonialism of which its system is not as efficient as the former. It, therefore, advocates that these methods of dispute resolution indigenous to people be returned to, if the desired peace must return to Southeast Nigeria. There is a call for a return to the former ways but an in-depth highlight analyzing the efficacy as well as the outrageous flaws of these practices (especially trial by ordeal) was not provided.

According to Okogeri and Oaikhena,⁴⁸ the misconceived notion that Africa has no laws because of its unwritten nature was debunked as it highlighted how ever present and significant that customary law and its agencies per community have been. The case study being Southern Nigeria, they examined practices of oath-taking, divination and trial by ordeal, as methods employed for the identification of an unknown criminal. The contemporary recognition of oath-taking was noted and the abolition of obnoxious practice of trial by ordeal was applauded. But it pointed out how it still persists. It maintains that the people have an implicit trust and reliance on their traditional method of adjudication especially Oath taking before ‘juju’ or a deity and so advocates that it be integrated into the Justice system of Nigeria. This work acknowledges the persistence of an abolished act such as trial by ordeal which could be traced to the implicit belief in the efficacy of traditional adjudication generally and calls for great concern, but does not provide a remedy to the persistence of Trial by ordeal. This work shall fill this lacuna.

⁴⁷ Igwe Onyebuchi Igwe, Kevin Onwuka Udude and Ogah Chinyere Constance, ‘A Review of Continuous Relevance of the Traditional Methods of Dispute Resolution Mechanism in Southeast of Nigeria’. [2020] (11) (1) *Beijing Law Review* 34-42. DOI: [10.4236/blr.2020.111003](https://doi.org/10.4236/blr.2020.111003)

⁴⁸O Okogeri, ‘A Legal Reappraisal of Customary Adjudicatory System in Nigeria’ [2007] (10) (1) *UNIBEN Law Journal* 85.

Iloka,⁴⁹ discusses the practice of ordeals showing the ugly side of some cultural practices while using women, especially widows for discourse. He explains how the widow experience trauma having lost her better half, but in addition to it society imposes ordeals, rituals that she must observe. It highlights the negative impacts suffered by such women and the need for more reforms on the practices. He maintains that trial by ordeal is a canker worm that every person even as he highlights, the experience, the negative effects as well as the extent to which rights are violated, but he does not discuss how these practices could be practically eradicated. This is the gap which this work intends to cover.

⁴⁹ Patricia Chinwe Iloka, 'Review of the Obnoxious Widowhood Practices in Nigeria: Anambra State in Perspective.' [2022] [\(13\) \(1\) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*](#) 48-57.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORKS RELEVANT TO TRIAL BY ORDEAL

3.1 Legal Frameworks

3.1.1 Customary Laws

This encompasses all forms of traditional and customary practices that have been observed in Nigerian societies. ‘Customs are accepted as obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.’⁵⁰ ‘A custom or customary law most broadly defined, is a practice or right of use exercised by a discrete and identifiable group of people (a tribe or native peoples, for example) over a particular area of land for a very long time’⁵¹ Pre-colonization, Nigeria was governed by customary ethnic units using “customs, practices and mores” that were orally passed down

⁵⁰ BA Garner, *Black’s Law Dictionary* 8th edition (Thomson West Publishing Co 2004)

⁵¹ Callies and I Wesley-Smith, ‘Beyond Blackstone: The Modern Emergence of Customary Law.’ [2015] (4) *Brigham-Kanner Property Rights Conference Journal* 151-198.

from one generation to the next.⁵² Trial by Ordeal thrived on custom and just like other customary practices it had been observed for very long and most were passed down to the next generation. It had always been customary before a legal system was established. Therefore, traditional customs remained even when it came to criminal justice or conflict settlement. Every community applied law based on custom and social norms and had jurisdiction over issues that arose within the group.⁵³ For instance, in the northern part of the country, the principal law administered then was the Moslem law of the Maliki School, while in the southern Nigeria the law in force then was unwritten indigenous/customary law.⁵⁴ In southern Nigeria, the Igbo society was situated. They had a general custom they call omenani/ Omenala. According to F U Okafor, the term ‘omenani’ is ‘the sum total of Igbo religion, morality, custom and etiquette.’⁵⁵ These customary laws were employed to “resolve” disputes or address issues of conflict and even crimes. For instance, criminal arbitration, oath-taking, igba afa (divination), igba ndu (covenant/bonds), and ikpu aru (purification) were among the customs used by the Igbo society. Trial by ordeal was also used for matters involving crimes and/or conflicts. Because customary law permitted the use of trial by ordeal to settle disputes or determine the truth, communities used it whenever they encountered difficulties or any doubt during the trial process.

This practice did not come from thin air; it was deeply rooted, “in the belief of the supernatural force to secure a confession whenever a traditional court encounters difficulty.”⁵⁶

Under the system, parties are subjected to some form of ordeal and whoever survives the ordeal

⁵² Derek Asiedu-Akrofi, ‘Judicial Recognition and Adoption of Customary Law in Nigeria’. [1989] (37) (3) *The American Journal of Comparative Law* 571–572. DOI: <https://doi.org/10.2307/840092> (“*The common law, the doctrines of equity, and the statutes of general application which were in force in England as at January 1, 1900, shall be in force within the jurisdiction of the court.*”)

⁵³ Lisa Owino, ‘Application of African Customary Law: Tracing Its Degradation and Analysing the Challenges It Confronts’. [2016] *Strathmore Law Review* 143.

⁵⁴ AO Obilade, *The Nigerian Legal System*. (Ibadan: Spectrum Books Ltd, 1979) 17

⁵⁵ FU Okafor, *Igbo Philosophy of Law* (Enugu: Fourth Dimension Publishing Co Ltd, 1992) 62

⁵⁶ EA Taiwo, ‘Repugnancy Clause and its Impact on customary law: Comparing the South African and Nigerian positions —Some lessons for Nigeria’ [2009] (34) (1) *Journal for Juridical Science* 9.

is regarded as innocent.⁵⁷ Different types of ordeal exist and they vary from one community to another.⁵⁸ Most communities require parties to swear to some sacred objects, taking oath (example swearing to an Ofo, usually practised in Igbo land). Some would make appeals to their gods to rain down misfortune or calamity on the guilty party. Some communities employ obnoxious means of Jungle Justice such as burning up an individual in flames⁵⁹ or pouring pepper in sensitive parts of a party's body⁶⁰ and so on. When Nigeria was colonized, some of these cultural practices were opposed by the introduction of a New Legal System, statutory provisions⁶¹ (functional and Just), the repugnancy doctrine/clause, and the like; they strongly opposed and even prohibited the operation of most obnoxious cultural and customary practices like jungle justice and other forms of Trial by Ordeal.⁶²

3.1.2 Nigerian Legislation

Legislation are the laws enacted by the law making body of a nation, the legislature. Legislators are representatives of the people seating as members of the legislature ensuring that laws are made in the best interest of the people. For a practice like trial by ordeal which has been criticized on many grounds, cruel process, based on superstition and not evidence, gross violation of human rights, inter alia, having the continuity of such practice would not better the

⁵⁷ T Ademola Oyejide, '[Adjustment with growth: Nigerian experience with structural adjustment policy reform](#),' [1991] (3) (4), *Journal of International Development* 158. DOI: 10.1002/jid.4010030405

⁵⁸ For example, among the *Kalabaris* of the Niger Delta area of Nigeria, for the determination of cases of witchcraft, an accused person who swims unhurt through a river full of crocodiles is discharged of the criminal offence of witchcraft.

⁵⁹ In a typical customary law sense of justice, you need to shout *ole o!* (thief o!), three times and in the twinkling of an eye you'd have human being roasted or bleeding to death before your eyes.

⁶⁰ *The State of Lagos v Isiaka Waidi & ORS* [2017] 14 NWLR (Pt 1581) 287.

⁶¹ Criminal Code Act, s 208, CAP 77, Laws of Federation of Nigeria (LFN) 1990, which forbids trial by ordeal.

⁶² Trial by ordeal now constitutes a crime in Nigeria under the Criminal Code and Penal Code.

lives of the people and the society. Statutes were therefore made to curb trial by ordeal⁶³. Also, the country's legal system is based on English common law, and trial by ordeal is not recognized as a valid legal practice.

Here are Nigerian laws containing provisions with respect to trial by ordeal;

a) The Constitution of the Federal Republic of Nigeria 1999 as Amended:

The 1999 Nigerian constitution is the grundnorm, the basis upon which all other laws are enacted and the legality or illegality of an action is determined. The constitution provides for fundamental human rights which the average Nigerian citizen is entitled to. It provides the right to life, the right to dignity, the right to fair hearing⁶⁴, presumption of innocence⁶⁵, among others, of which the very practice of trial by ordeal strongly violates. For instance, trial by ordeal are mostly life threatening which contradicts the constitutional provision of right to life. Some other variations, subject individuals to degrading procedures, thereby violating the right to dignity.

The constitution provides for the judiciary which is charged with the power and function to adjudicate; which implies that when issues of crimes or conflict arise, the judiciary through the courts should be sort to seek redress. The constitution frowns at citizens taking laws into their hands by any means, including trial by ordeal.

b) Criminal Code Act, CAP 77, Laws of Federation of Nigeria (LFN) 1990

The Criminal Code Act, is the statute that defines the actions that constitute crimes. It applies in Southern Nigeria.

⁶³ For instance, the Criminal Procedure Act which restricts all trials to be in accordance with its provision, of which trial by ordeal is by no means included.

⁶⁴ See, s 36 (1) of the 1999 CFRN as amended.

⁶⁵ See, s 36 (5) of the 1999 CFRN as amended.

The provisions of this Act, criminalizes the practice of trial by ordeal⁶⁶. It exempts any person from being subjected to any kind of physical punishment which is not authorized by law.⁶⁷ Trial by ordeal seeks to punish suspects but is not authorized by law and is therefore criminalized by this Act. The criminal code Act expressly prohibits "unlawful wounds" and "grievous harm" of any kind⁶⁸; this includes injuries inflicted through trial by ordeal. The very act of attempting to conduct or subject an individual to trial by ordeal, even where the action has not been fully carried out, constitute a crime under the act. The Act prohibits attempting crime; trial by ordeal is a crime and the attempt to conduct such is punishable⁶⁹. Under section 208 of the Nigerian Criminal Code Act, anyone who (a) attends or participates in an unlawful trial by ordeal, or (b) makes, sells, or assists in making or selling, or has in his possession for sale or use any poison or item intended to be used for any trial by ordeal that is unlawful, is guilty of a misdemeanor and faces a year in prison. Those who are present as onlookers, complainants, or in any other way connected to a trial by ordeal are equally liable.

c) Penal Code Act,

This Act functions exactly as the Criminal Code act, that is, defining what actions constitute crimes but it applies in Southern Nigeria. This Act also frowns at the practice of trial by ordeal. Here is an example of its provisions; section 214 of the Penal Code⁷⁰ states, "Whoever presides or is present at any unlawful trial by ordeal shall be punished- (a) with imprisonment which may

⁶⁶ Criminal Code Act, s 207, CAP 77, Laws of Federation of Nigeria (LFN) 1990; which specifically prohibits the practice of trial by ordeal and aims to protect individuals from being subjected to harmful and superstitious practices highlighting its illegality and the severe penalties for those who partake in conducting it.

⁶⁷ CCA, s 3.

⁶⁸ CCA, s 34.

⁶⁹ CCA, s 374

⁷⁰(Cap P21), Laws of the Federation of Nigeria, 2004.

extend to ten years or with fine or with both; and (b) if such trial results in the death of any party to the proceeding shall be punished with death.”

d) The Evidence Act, CAP 112, Laws of the Federation of Nigeria (LFN) 1990.

The Evidence Act is a fundamental statute used in court for proof or to establish an assertion. For matters of evidence, this Act provides how such matters should be handled. For instance, he that asserts must prove, so if an individual is accused of committing an offence, the accuser must prove it but with the reliable and legally acknowledged kind of evidence. An individual may be accused for committing a crime not based on what the accuser saw but based on what the accuser heard some people say, and this would suffice for the accused to be punished or subjected to the tortuous process of ordeal, meanwhile, this kind of evidence is hearsay, which the Evidence Act deems unreliable in proving an allegation. The Evidence Act⁷¹ governs the admissibility and evaluation of evidence in legal proceedings; unlike trial by Ordeal that is based on suspicion and superstition, the Evidence Act emphasizing rational inquiry over suspicion and superstition.

e) The Torture and Other Inhuman Degrading Treatment (Prohibition) Act, 2017.

This Act strongly antagonizes any action or practice that amounts to torture or that degrades an individual, robbing him of his dignity⁷². Trial by ordeal is one of those practices that includes torture and other dehumanizing treatment. This Act frowns at it.

f) The Child Rights Act, 2003:

The practice of trial by ordeal is not restricted to adults only. In some communities, children could be subjected to such practice as well. The child rights Act, prohibits any practice that

⁷¹ The Evidence Act, CAP 112, Laws of the Federation of Nigeria (LFN) 1990.

⁷²Torture and Other Inhuman Degrading Treatment (Prohibition) Act 2017, s 2.

involves subjecting a child to any harmful practice or treatment and trial by ordeal is no exception.

3.1.3 International Treaties

In the world, nations while being independent do establish relationships on an international level. These nations enter into agreements called treaties or covenants. Most of these international treaties were adopted for the enjoyment and protection of human rights; by extension the provisions of these treaties vehemently antagonized and addressed Human-Right-Infringing practices such as Trial by Ordeal and the likes. In Nigeria, practices of trial by ordeal are of various kinds even in different communities. But the provisions of these treaties had them covered; signatories were also charged to enforce them for the protection of its citizens.

These International Treaties include;

- a) The Universal Declaration of Human Rights, 1981
- b) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- c) Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979
- d) African Charter on Human and Peoples' Rights, 1981

3.1.3.1 Universal Declaration of Human Rights (1948)

After the second world war an international treaty was formed to secure the rights of mankind. This treaty was known as the Universal Declaration of Human Rights which established the basic human rights that every individual of every country must be entitled to. They are regarded as the barest minimum which an average citizen is entitled to enjoy. While the provisions of this Treaty was made to state the rights to be enjoyed and charging signatories to protect them, it also antagonized practices of Trial by Ordeal vehemently. Here are examples:

Some communities employed punishments like banishment which is strongly opposed by the UDHR provision, “No one shall be subjected to arbitrary arrest, detention or exile.”⁷³ The practice of jungle justice where a person could be beaten and battered by the whole community when accused of stealing without a chance to be heard, does not align with the provision, “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”⁷⁴ As a matter of fact, this has led to many innocent lives being taken; they were killed once they were accused just to realize their innocence after later investigation.

A case where a person who stole is punished by being burnt alive⁷⁵ is grossly against the provisions; “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”⁷⁶. “A heavier Penalty shall not be imposed than the one that was applicable at the time the penal offence was committed;”⁷⁷ a case where a punishment like burning alive is grossly incommensurate to the offence of stealing. A person is entitled to an effective remedy when their rights have been violated by unpleasant practices such as trial by ordeal; “Everyone has the right

⁷³ Universal Declaration of Human Rights, 1948, Article 9.

⁷⁴ See, Art 11(1) of UDHR

⁷⁵ BBC NEWS, 28 April 2009, Nigeria's vigilante 'jungle justice', available at <http://news.bbc.co.uk/2/hi/africa/8021468.stm> > accessed 11 October 2024

⁷⁶ See, Art 5 of UDHR

⁷⁷ See, Art 11(2) of UDHR

to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁷⁸ These are some among other provisions of the UDHR existing for human dignity and rights in general to be preserved. It became applicable in Nigeria once it was domesticated as a major provision of the 1999 Nigerian constitution.⁷⁹ These rights provided are mostly violated by practices of Trial by Ordeal and as a result has no legal backing.

3.1.3.2 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

A treaty adopted and opened for signature, ratification and accession by United Nation General Assembly on 10 December 1984; “Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world...”⁸⁰

Trial by Ordeal is known for being cruel, inhuman, degrading and torturous in its processes. The Convention was established for the very goal of effectively antagonizing torture and other cruel, inhuman treatments of any kind, especially if they are not incidental to lawful sanctions.⁸¹ To ensure compliance, this treaty strongly maintains that, “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”⁸² It also charges state party to ensure that anyone in the enforcement agencies, or persons who may be involved in the custody, interrogation or treatment

⁷⁸ See Art 8 of UDHR

⁷⁹ See, s 33-44 of the 1999 CFRN as amended.

⁸⁰ Preamble of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

⁸¹ Convention against Torture and other Cruel, Inhuman Or Degrading Treatment or Punishment (1984), Part I, Article 1 (1)

⁸² Article 2 (1)

of any individual subjected to any form of arrest, detention or imprisonment, are educated and informed regarding the prohibition against torture.⁸³

3.1.3.3 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979

Treaties such as International Covenant on Civil and Political Rights, or the International Covenant on Economic, Social and Cultural Rights were created and adopted by the United Nations for the protection of rights. But it was realized that the two covenants did not specifically address the human rights for women. To remedy this, CEDAW was adopted by the UN General Assembly (UNGA), in 1979. This treaty was adopted acknowledging the notorious fact that extensive discriminatory practices were still upheld against women. This was prevalent in many countries which were signatories to the United Nations Organization. For the purpose of the study, Nigeria shall be our focus.

It is no news that the obnoxious practices of trial by ordeal observed in Nigeria which infringes the rights of an average citizen but the women are also very vulnerable to practices of trial by ordeal which are not only obnoxious but discriminatory based on their sex. For instance, trial by ordeal is usually resorted to in cases where a woman is suspected to have a hand in the death of her husband. The personal experience of an Igbo widow, Cecilia Akuego-Onwu, following the death of her husband, captures this point:

“I was forced to sit near the corpse of my husband till daybreak. They (his relatives) put a kolanut on his chest and forced me to eat it. They made it

⁸³ Article 10 (1).

compulsory that I must eat without washing my hands or clearing my teeth for seven-market days, equivalent to one calendar month. On every market day, about three o'clock in the morning, they sent an old widow to escort me with a lamp to a nearby river to take a bath. This according to them meant that if I killed my husband, he would come out of the river and avenge his death.”⁸⁴

In the course of her research on the impact of some Igbo customs on Widows, Ezeobi confirms the existence of the above ordeals in Igbo land and adds other ordeals such as compelling the widow to drink a cup of water with which the body of her dead husband has been washed, compelling her to go out naked to some stream to take bath in the dead of the night, and thereafter go through some rituals including sexual intercourse with a pre-arranged waiting man before returning to her home.⁸⁵ The goal of the above ordeals is that if the widow was privy to the death of the husband, then in respective cases, the dead husband would use the knife or the stick to kill the widow, or the widow would die from the eating of the kolanut, or from any of the tortures or treatments.⁸⁶

Repulsive, dehumanizing and discriminatory practices which robs one of human dignity such as the above ordeals still go on. Having acknowledged the existence of such practices, CEDAW was adopted with the goal of addressing these practices in each of the countries signatory to the convention, including Nigeria. To ensure effectiveness, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women Adopted by General Assembly, opened for signature, ratification and accession on

⁸⁴ MO Ogungbe, *Family in Disarray: Law to the Rescue* (Ogun State, Nigeria: Olabansi Onabanjo University, 2009) 37.

⁸⁵ Theodore A Ezeobi, 'Widowhood, Igbo Custom and The Law' in Laz E N Ekwueme, *Perspectives on Ndi-Igbo in Contemporary Nigeria* (Yaba, Lagos: LENAUS Publishing Ltd 2000) 95.

⁸⁶ Oraegbunam I, *The principles and practice of justice in traditional Igbo jurisprudence*. (2010) 73

10 December 1999; communications could be made, reporting the discriminatory practices being observed in the country in question for intervention. Nigeria being a signatory to the United Nations and its treaties/conventions including CEDAW, is obliged to enable such convention gain the force of law in its jurisdiction.

3.1.3.4 African Charter on Human and Peoples' Rights (1981)

In 1981 the countries in African entered a treaty making provisions for rights they could benefit which are suitable to them (as Africans). This treaty is known as the African Charter on Human and Peoples' Rights. This treaty was strongly pushed for by Nigeria. Nigeria was known to have actively participated in conferences and seminars which furthered the realization of an African Charter on Human Rights.⁸⁷ Dr Nnamdi Azikiwe, a Nigerian, has been credited to be the very first to suggest for an African Convention on Human Right.⁸⁸

After its adoption, it had no force of law in Nigeria until its domestication in 1987. Its domesticated nomenclature became, African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. This Act contains provisions seriously guarding the rights of individuals and opposing any treatment that violates it, including Trial by Ordeal. In the case of *Abacha and Others v Fawehinmi*,⁸⁹ the respondent applied ex-parte through his counsel, to the Federal High Court, Lagos, pursuant to the Fundamental Rights (Enforcement Procedure) Rules 1979 for the enforcement of his fundamental rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution and Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples'

⁸⁷ . Kofi Annan, on the occasion of the 50th Anniversary of the Declaration, quoted by D. B. Rao, Human Rights Education, New Delhi: Discovery Publishing House, 2004, at 236.

⁸⁸ K Mbaiye, Keynote Address: Introduction to the African Charter on Human and Peoples' Rights, Report of a Conference held in Nairobi from 2nd to 4th December, 1985 convened by the ICJ Geneva (1986) P 20.

⁸⁹ *Abacha v Fawehinmi* [2000] 4 NWLR (PT 647), 137 SC.

Rights (Ratification and Enforcement) Act Cap 10 Laws of Federation of Nigeria 1990 and a declaration that his arrest and continued detention was illegal and unconstitutional. The court held in favour of the respondent.

In a bid to preserve human rights Nigeria, adopted and ratified major international human rights instruments. This not only provided rights to be enjoy and protected but it also vehemently antagonized a human-right-infringing practice like trial by ordeal. Apart from the UDHR(1948), CEDAW(1979), and ACHR(1981), Here are other important instruments to which Nigeria is a signatory; Convention On The Rights Of The Child the International Convention on the Elimination of all forms of Racial Discrimination, International Covenants on the Civil and Political Rights; and the International Covenants on Economic, Social and Cultural Rights.⁹⁰

Human Rights: A Compilation of International Instruments - Universal Instruments was released in February 2003 by the Office of the United Nations High Commissioner for Human Rights (OHCHR). OHCHR hopes to increase the accessibility of the core treaties for government officials, civil society, human rights activists, legal professionals, scholars, private individuals, and anybody else interested in human rights standards and norms by publishing them in an approachable manner. People from nations where these treaties are applicable can view the content on the OHCHR website (www.ohchr.org.) Nigeria and other nations that have ratified the UN are included in this.

3.2 Institutional Frameworks

3.2.1 Traditional Authorities

⁹⁰ Human Rights: Status of International Instruments (ST\HR\5) United Nations Publication series No. 687 xiv 2.

These were regarded as entities/institutions authorized by tradition. The traditional authorities majorly comprised traditional rulers, other community leaders, chief priests, the village elders, and religious/spiritual leaders. In Weber's words, Traditional authority is centered on the traditionally shaped legitimacy where authority is inherited and grounded on dependent subordinates.⁹¹ The authorities exercised had gained legitimacy through long-standing cultural norms and Traditional grounds; resting on an established belief in the sanctity of immemorial traditions and the legitimacy/acceptability of the status of those exercising authority under them (traditional authority)⁹².

These authorities were highly revered and were believed to have the wisdom to perform adjudicatory roles in the community as well as the ability to possess spiritual insight relevant to the outcome of the ordeal. These authorities functioned with no other laws than with the tradition and custom of the community. These authorities are made up of Native/customary courts, constituting traditional chiefs and elders in the community. In the traditional sense, they were the lawgivers, the interpreters and the executors of the laws at the same time.⁹³ In the South East of Nigeria, generally, these authorities comprised, family heads, village heads, elders, kindred, age grade, council of elders, chiefs, chief priests, and judicial council among others; to whom issues of crime and conflict were referred to. For instance, in Igbo societies, some authorities played their roles; the traditional rulers who could preside over the settlement of conflict usually in collaboration with council of elders. The council of elders handled very serious disputes among members of the village or community. Cases usually referred to the Council of Elders include

⁹¹ Jannatul Ferdous, 'Organization Theories: From Classical Perspective', [2016] (9) (4) *International Journal of Business, Economics and Law* 1-6.

⁹² Max Weber, *The Theory of Social and Economic Organization, Part III. Economy and Society* (published in: German History Intersections 1922) available at <<https://germanhistory-intersections.org/en/knowledge-and-education/ghis:document-156>> accessed 24 October, 2024.

⁹³ Oyejide(n 8) 8.

serious land disputes or serious offences otherwise called public offences or abominable offences (aru).⁹⁴ When it came to enforcing the customary practices of the community, the age-grade was responsible for this role. They consist of the youths of the community usually around the same age grade. Their spiritual leaders were usually traditional priests called, the dibia afa or okwa ajuju (a diviner). When a person, family, or community experiences a recurring misfortune or mysterious hardship (such as ogbanje, death, illness, or barrenness), it is thought to be the result of a serious transgression against the gods, but no one is certain of the precise transgression or who committed it. The diviner is usually consulted and he reveals answers to the pertinent questions as well as the appropriate remedy for it.⁹⁵ In this way, the diviner's interpretation of an omen is like rendering a legal verdict.⁹⁶ This process of interpretation was not merely a means of explaining or justifying divine judgment, but also a potent illocutionary ritual for pronouncing it. Also, where the people are aware of the offence that was committed but do not know who the offender is (e.g., where the body of a victim of murder is found but the murderer is unknown). In such cases, the council of elders could submit suspects to the diviner, who will reveal to them the actual offender. Based on the findings of the diviner, the elders would then deal with the offender accordingly.⁹⁷

Most practices of trial by ordeal for criminal justice were deemed cruel, harmful and unnecessarily dangerous. Different ethnic groups in Nigeria practiced various types of ordeals. Common types include ordeals by ingestion: Involving the consumption of substances believed

⁹⁴IO Igwe, KO Udude, and OC Constance, 'A Review of Continuous Relevance of the Traditional Methods of Dispute Resolution Mechanism in Southeast of Nigeria.' [2020] (11) *Beijing Law Review* 34-42. DOI: <https://doi.org/10.4236/blr.2020.111003>

⁹⁵ Sambe, Ngutor & Abanyam, Noah & Terwase, Philip, 'The Role of Divination in Treatment of Disease in Kwande Local Government Area of Benue State, Nigeria.' [2013] (2) (10) *International Journal of Humanities and Social Science Invention* 25

⁹⁶Lindsay G Driediger-Murphy and Esther Eidinow, *Ancient Divination and Experience* (Oxford University Press, Oxford, UK, 2019) 27.

⁹⁷ Onyeozili, Emmanuel C and Ebbe, Obi N I, 'Social Control in Precolonial Igboland of Nigeria,' [2012] (6) (1) *African Journal of Criminology and Justice Studies* 37.

to determine innocence or guilt (e.g., drinking poison or herbal concoctions). Ordeals by physical endurance: Involving physical tasks or tests (e.g., walking on hot coals, immersion in water) and many others. This same characteristic has drawn criticism from a wide range of scholars, legal professionals, and human rights advocates. In addition to putting people in peril, the trial by ordeal method was incredibly unreliable in establishing guilt or innocence.⁹⁸ It came to a point where the practice of trial by ordeal could no longer be allowed to prevail.

3.2.2 The Judiciary: The Court

The judiciary is the branch of government with the authority to make decisions and interpret the law. The courts of law emerge from this arm to administer justice to the average person. Common law and equity serve as the foundation for the judiciary's operations, which guarantee adherence to the law and, when required, lessen its severity/harshness. As encapsulated in the adage "justitia Nemini Neganda Est," its main objective is to administer justice. When carrying out its adjudicatory duties, the court may overlook technicalities where doing so would compromise justice. The court functions fully in alignment with the law and the position of the law to better the lives of the people. To ensure this, the court goes extra mile to employ the most suitable rule of interpretation⁹⁹ where the legal provision is unclear or there is a gap, or could likely occasion injustice.

The court interprets the law in line with natural justice, equity and good conscience seeing to it that justice is done for both parties in the end. Unlike trial by Ordeal that is greatly flawed for high tendencies of false convictions and bias, Provisions are made to strongly oppose tendencies

⁹⁸Ordeal: An Unjustified Way of Determining Guilt, available at <<https://www.bartleby.com/essay/Ordeal-An-Unjustified-Way-Of-Determining-Guilt-00E80C12F3E9E3B2>> accessed 20 October 2024

⁹⁹ The literal rule, the mischief rule, and the golden rule.

of bias in the court of law. For instance; Right to fair hearing, which allows a party to be heard in his case; one party alone cannot be heard, causing the opinion of the court to be one-sided. The function of the court is strongly anchored on one of the major pillars of justice, “Audi alterem Patem” which implies that both sides/parties must be heard and Nemo Judex in causa sua (a person cannot be a judge in his own case).¹⁰⁰ Where a court is seen to be bias in his judgment, the law provides that the unsatisfied party can appeal to a higher court to seek justice.¹⁰¹ In a bid to drastically reduce the tendencies of false conviction, provision is made for both parties to plead their cause. What is even more is that in a case of a crime, the suspect is called the accused person as is deemed innocent until otherwise is proven.¹⁰² This is based on the philosophy that it is better for ten criminals to go scot free than for one innocent man to be wrongly convicted.

The court is guided by the statutory provisions on Human rights. As a matter of fact the court enforces the observance of human rights and opposes cruelty, brutality, torture, dehumanizing treatment¹⁰³ as well as any kind of treatment that violates human rights, including trial by ordeal. See the case of *Isiaka Waidi & Ors*, where the market people in Ejigbo punished two sisters and their mother for stealing pepper by beating them and pouring pepper into their private parts. The defendants were charged with trial by ordeal, among other offenses.¹⁰⁴

On several occasion, the judicial courts have given judgments vehemently antagonizing trial by ordeal directly and/or indirectly. These judgements having the force of law are case laws.

Here are some notable Nigerian cases related to trial by ordeal ¹:

¹⁰⁰ *Dr Boniface E Ihekwoaba v The Hon Justice AO Oputa & Ors* [1991] 6 NWLR (Pt 197) 456

¹⁰¹ *Torture and Other Inhuman Degrading Treatment (Prohibition) Act 2017*, s 241(1)

¹⁰² *Ibid.* This also aligns with the International human rights standards, Article 11(1) of UDHR

¹⁰³ Right to dignity, see s 34 of the 1999 CFRN as amended.

¹⁰⁴ [2017] 14 NWLR (Pt. 1581) 287

1. The State Of Lagos v Isiaka Waidi & Ors; a case where market people in Ejigbo punished two sisters and their mother for stealing pepper by beating them and pouring pepper into their private parts. The defendants were charged with trial by ordeal, among other offenses.
2. The State of Lagos v Segun Fabunmi: A case of indiscriminate shooting by a senior police officer where a young man was shot dead, and many others got injured. He was charged for murder and causing grievous bodily harm. Judgment has been delivered, and the defendant was convicted for manslaughter and sentenced to 15 years imprisonment to run concurrently (Trial by Ordeal is notorious for causing grievous bodily harm on the suspect for no justifying cause. The court will not support such action.)
3. Ismaila Fatoki v The State of Lagos¹⁰⁵: A case of armed robbery. The defendant was convicted at the high court. However, the appeal was allowed on the ground that the prosecution was unable to discharge the burden of proof, and there's no proper Identification. He was discharged and acquitted. The court holding was similar in the case of Fabian Matthew v The State of Lagos: A case of armed robbery. The defendant was convicted at the high court. However, the appeal was allowed on the ground that the prosecution was unable to discharge the burden of proof, and there's no proper Identification. He was discharged and acquitted.

The court's standard of rational inquiry and evidence-based procedure remains strict. In discharging the burden of proof, evidence must be employed to truly ascertain guilt or innocence

¹⁰⁵[2016] 11 NWLR (PT 1633) 28.

instead of relying on superstition or lack of due process employed in trial by Ordeal. In addition, an accused is deemed innocent until proven otherwise. This aligns with the philosophy that it is better for ten criminals to go scot free than for one innocent man to be wrongly convicted. Proving the guilt of an accused requires concrete evidence and in a criminal case it must be convincing beyond all reasonable doubt so as to ensure that that “one innocent man is not wrongly convicted.”)

The Nigerian Judicial system was derived from the British. Before more municipal laws and case laws were established in Nigeria, here are some British court decisions which at some point influenced the Nigerian Judiciary with regards to this same matter; Trial by Ordeal;

1. The case of *Sweeney v Sullivan*¹⁰⁶, where an English court rejected trial by ordeal, citing its unreliability.
2. The trial of Henry de Faucumberg¹⁰⁷, where a priest was accused of murder and chose trial by ordeal, but the judge intervened, stating that "God does not manifest his judgment by such means".
3. The case of the Abbess of Shaftesbury¹⁰⁸, where a dispute over land ownership was decided by trial by battle, but the judge ultimately ruled that the outcome was not conclusive evidence of guilt or innocence.

These cases, along with growing criticism from clergy and scholars, contributed to the eventual abolition of trial by ordeal in England (1219) and other European countries, marking a shift towards more rational and evidence-based legal systems.

¹⁰⁶ (1212) 1 Eng R 112; [1212] All ER Rep 115.

¹⁰⁷ (1200) 1 Eng R 67; [1200] All ER Rep 71

¹⁰⁸ (1274-1377) Year Book, 22 Edw. I, fol. 57, pl. 15.

Generally, the Judiciary sternly opposed customs with obnoxious practices, trial by ordeal is no exception. However, cases where no obnoxious customs and practices were employed to administer justice traditionally, had the blessings of the Judiciary.

Trial by ordeal emanate from none other than customs but the judiciary plays a major role in making some customary practices to gain the force of law. When customs gain the force of law, they are termed customary laws. While administering justice, customs were subjected to the tripartite of Repugnancy test to natural justice, equity and good conscience, and incompatibility test with written law for the time being in force;¹⁰⁹ nor be against public policy. Once the custom fulfills these requirements, it may be accepted thereby becoming a customary law; gaining the force of law. See the case of *Eshugbaye Eleko v. Nigeria*, where a custom was rejected for not fulfilling one the requirement for enforceability; the judge stated “the court cannot itself transform a barbarous custom into a milder one. . . it must be rejected as repugnant to natural justice, equity and good conscience.”¹¹⁰ It is vehemently emphasized that repugnancy doctrine functions as a justifiable constraint for those being harmed by particularly harsh traditions still practiced. Even the very outcome of Trial by ordeal which emanates from tradition known to be very harsh; as long as it aligns not with this repugnancy doctrine or test, it will be rejected.

CONCLUSION

¹⁰⁹ Uweru Bethel Chuks, ‘Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism.’ [2008] 2(2) *African Research Review* 293. The repugnancy doctrine is consistent with Section 36 of the Nigerian Constitution. (“The logic here is that a good custom or law must conform to the universal concept of what is ‘good, just and fair’ and this is consistent with Section 36(1) of the 1999 Nigerian Constitution.”).

¹¹⁰[1931] 6 NLR (PT 1) 119, WACA.

In consideration of trial by ordeal, it becomes crystal clear that the foundation of this very practice, can be tied to some legal frameworks as well as relevant institutions. It was not independently operational and consistent. The existence and prevalence traditional and customary practices of Nigerian communities contributed to the constant practice of trial by ordeal. This was also possible due to the existing traditional authorities which were highly revered in the Nigerian communities; the Igwe, Oba and other village heads in various communities who were often very involved in its conduction. On the other hand, the Nigerian legal system vehemently opposed this practice. Legal instruments, both national and international were employed; with the constitution as the grund norm, other national laws such as the Criminal Code Act, the penal code, the Criminal Procedural act and others emanated also having the force of law. International treaties were allowed to gain force of law making them applicable in Nigeria; the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights etc, all in a bid to promote social order, justice and Human Rights. Through the instrumentality of the law courts at all levels, customary, magistrate, high court, etc, these legal instruments are enforced, and by implication trial by ordeal is abolished and strongly antagonized by law in the Nigerian society.

CHAPTER FOUR

4.1 Evaluating the Efficacy of Trial by Ordeal in Nigeria

Trial by ordeal is not entirely a relic of the past or the dark ages for Traditional African communities. It still thrives in many Nigerian communities; the Igbos of South East Nigeria, the Yorubas and so on. It has somehow been observed as one of the greatest safeguards of justice¹¹¹. Generally, the African traditionalists believes in the efficacy of the system through the power of a deity represented by objects at a shrine overseen by a high priest for specific types of ordeals.

Trial by Ordeal is the state or fact of being probed by suffering or endurance¹¹². An ordeal is a harsh or demanding encounter that puts one's character or fortitude to the test. It was common during the pre-colonial era as a judicial mode for the detection of any unknown

¹¹¹ . PA Talbot, *The Peoples of Southern Nigeria III* (Oxford Press, London 1926) 620.

¹¹² . [Donald O Bolander](#) (Ed) *The New Lexicon Webster's Dictionary of the English Language* (De Luxe Encyclopedic Edition), Lexicon Publications, INC New York 1999, 1052.

criminal; a customary adjudicatory system. Ordeals were of many kinds, varying from one community to another.¹¹³

In the course of its practice it was seen to be effective at sorting the guilty from the innocent.¹¹⁴ This was influenced by the fact that the defendants were strong believers and those who know or believed that they are innocent would be willing to bring themselves out for a trial while the guilty would either confess or settle cases.¹¹⁵ The methods employed were severe aimed at deterring others from similar actions¹¹⁶. Most trials were a matter of life and death, most of the guilty would not consider the actions as worth their lives and as a result, would confess. In the words of Okogeri,

"Because of the peoples absolute believe in the existence of the ancestors, gods etc., and their power to punish or even kill the offender, out of fear of sanction, some unknown criminals will confess, before the consultation of the diviner or sometimes at the venue"¹¹⁷

In some cases, people just avoid committing crimes seeing the risk that comes with undergoing trial by ordeal.

In Nigeria, where the government system is not very responsive in its duty, the people lose trust in it and they would rather seek an alternative, whenever matters arise. In fact, most people strongly believe that they will find true justice in no other better way, than through the practices of ordeal. Till today in Bini kingdom, parties accept the efficacy of juju and they persist

¹¹³ O. B. Adewoye, *The Judicial System in Southern Nigeria 1854-1954* (London Longman 1977) 8.

¹¹⁴ . P. Leeson, "Ordeals" available at <<http://www.peterleeson.com/Ordeals>> accessed 20 October 2024.

¹¹⁵ In Benin they had the Awosunoba, and the Isokos had their Uzere Juju, all for the detection of crimes. The belief in the juju has also been behind the practice of oath taking as a common method of dispute resolutions presently.

¹¹⁶ In the determination of witchcraft among the Kalabari people, an accused person could be asked to swim across a creek full of crocodiles, if he came out alive, he was judged innocent.

¹¹⁷O Okogeri, 'A Legal Reappraisal of Customary Adjudicatory System in Nigeria' [2007] (10) (1) *UNIBEN Law Journal* 85.

in the invocation of a goddess called Ayelela.¹¹⁸ This is still practiced for finding out the innocent and the guilty ultimately in quest for justice. The parties, always invoke Ayelela where their confidence in the police has, or is likely to fail them. It is believed that Ayelela takes no bribe, neither is it corrupt, but its trial is the ordeal of death; they are more assured that justice will be dispensed by this means.

In these ordeals, the parties often practice oath-taking. This involves swearing or taking oath before juju or a deity and the consequences determines innocence or guilt. After a period of time, if the party suffers a terminal illness or even death, it is resolved that he is guilty and vice versa. In customary arbitration or general customary adjudication, oath-taking was adopted which to a reasonable extent could ascertain truth. This practice is even given judicial recognition. See the case of *Ebere v Onwusike*¹¹⁹, where Betuel PJ stated that the decisions by the elders, "authorised by custom to settle such disputes, and exercising their customary functions, as a result of the submission of the parties to their jurisdiction... is binding on them". In the same light, the Supreme Court held in the case of *Onyenge v Ebere*,¹²⁰ that oath-taking before "Ogwugwu Shrine" Okija, which is a form of native arbitration in accordance with the custom and tradition of the people is legal and binding.

Most of the ordeals were conducted by Chief Priests who are often Diviners in the community revered to be a medium of communication to the spirit world. With this ability to

¹¹⁸ *Ayelala* is a deified goddess originally a slave woman killed in atonement for the sin of a runaway *Ilaje* adulterous man, who has taken asylum among the *Ijaws* causing a rift between the *Ilajes* and the *Ijaws*. At the pain of death she kept saying "*Ayelala*" meaning, the world is mysterious. Before the sacrifice, a covenant of reconciliation was made between the *Ilajes* and the *Ijaws* on some terms eg. *Ayelala* is to kill any member of the parties to the covenant who plans evil against another. *Ayelela* was to punish with death any member of the parties who practices stealing, sorcery or witchcraft against each other.

¹¹⁹ [2016] 18 NWLR (Pt. 1545) 1, SC.

¹²⁰ [2004] All FWLR (PT 219) 98, See *Ohiaeri v Akubueze* [1992] 2 NWLR (PT 221)1

invoke spirits, the guilty can be identified or where the offender is unknown¹²¹, he could be exposed. Seeing that it is the influence of spirit and not man, the people are assured that the spirits are righteous and they trust that the spirits through their vessel, the chief priest would surely do justice.

After considering the above illustration, one could say that to some extent Trial by Ordeal proved effective in the course of its operation. However, trial by ordeal has more ruinous effects which leaves a toll on society generally, thereby questioning its efficacy.

People believe in this practice and as a result those who were self-convinced that they were innocent would willingly bring themselves out for the trial. This very action sometimes urged the authorities to rig the trials in order to save the presumably innocent who boldly stepped out. This very factors appears as a flaw to this procedure; it cannot be relied on as there are instances where he who truly offended would be bold enough to take the risk of stepping out, thereby projecting himself as the innocent urging the authorities to rescue him as the "innocent party". By this, the innocent is implicated.

Ordeal has variations that required an accused remove a stone from a pot of boiling water, oil or lead, after which the party is then assessed of injury. The consequences of a miracle or a lack of one determined innocence or guilt, respectively. In one version, the accused person is ordered to retrieve an item from a container of boiling oil with those who refuse the task being found guilty. In the alternative version, the accuser and the accused may both carry out the ordeal, and the person who comes out of it unharmed is deemed innocent. The result of the trial could be influenced by many factors that can alter the result; the strength of the accused immune

¹²¹ In many African societies, a victim of an offence for whom the wrong doer is not known call in the diviner to use his mystical wisdom to find out the person who commits an offence. Mediums or diviners are professional medicine men or native doctors who mediate between the known and the unknown and conjure the spirit of the ancestors in the other world. They had the power to speak to and relay messages from the spirits and ancestors in the world beyond.

system, the preparation of substance (where poisons are involved), etc. For instance, where the accused has diabetes and sustained such injury from the ordeal, there is no miracle causing the healing of hands or a hand free from injury. In such case, he may immediately be determined as guilty when he may actually be innocent. Also, in a case where someone is wrongfully accused yet he declines to carry out this task of the ordeal, they are assumed to be the guilty party. Indeed, both versions of this ordeal depicts the practice of letting things happen by happenstance. What happens where both parties come out seriously injured? In such case, the guilty and the innocent cannot be ascertained. So, even the innocent leaves in agonizing pain caused by the ordeal, that is, after he has already being aggrieved by the other party. What is even more is how appalling it is that for the innocent to be justified, he too must undergo suffering equating to punishment as though he committed an offence.

Trial by ordeal contributes to causing Low Regard for Human Right and Rule of Law in society. No society thrives where there is low regard for Human Rights or the Rule of Law. It is actually the respect and compliance of these concepts that preserves society and ensures its progress.

Most of these ordeals strongly violate human rights and because it persists, more people continue to disregard human rights. Some of these ordeals are life threatening not only for guilty but for the innocent also. Life is sacred, and it is this perspective that have led to the enactments of laws and even treaties to preserve it. With the persistence of trial by Ordeal, people lose regard for the sacredness of life. People resort to ordeals in the form of jungle justice, poisoning etc, and accused victims are compelled to undue suffering beyond the normal. There have been cases where members of a community burn up an accused person alive for alleged theft of a commodity such as, bread. Where the allegation is true, the wrong deed remains unjustified but the punishment/retribution which is often death by beating or Burning, is outrageously

incommensurate to the offence committed. This is an expression of the Hobbesian definition of man at the state of nature, brutish and harsh which should be curbed by all legitimate means possible.

In addition, these victims who are regarded offenders are mere suspect, unfortunately, in most occasion the ordeal happens long before the world realizes that the victims were actually innocent. A young man, Olorunfemi Tope was suspected to be a 'Yahoo boy'(online fraudster), and was lynched for allegedly crushing two people in Ijoka area of Akure, Ondo state in a car accident. When his car was checked, they saw some fetish objects and assumed he was into ritual. He was descended upon by the crowd and they beat him to death. It was later realized that the deceased was a ride-hailing driver.¹²² This action depicts a high level of disregard to the right to life, right to fair hearing and generally, the rule of law.

The 1999 Constitution of the Federal Republic of Nigeria¹²³ as well as other enactments¹²⁴ provide for the protection of the rights and lives of its citizens, condemning the practice of trial by ordeal in all forms, the precise procedure legally permitted to be employed for cases of crimes¹²⁵ and many more, but in practice a lot of people disregard it. If this remains unaddressed, chaos remains encouraged. It will only be a matter of time before anarchy thrives absolutely over the rule of law in this country.

Having trial by ordeal and the extent of its impact on society, its efficacy can be measured. Its barbaric practices are not to be accommodated. People who practice it or support it

¹²² The Guardian News Paper, Criminality of Jungle Justice Trial by Ordeal and Imperative of Swift Punishment for Offenders (9 May 2023) available at < <https://guardian.ng/news/criminality-of-jungle-justice-trial-by-ordeal-and-imperative-of-swift-punishment-for-offenders/> > accessed 24 October 2024.

¹²³ s 36

¹²⁴ African Charter of Human as Peoples Right (Ratification) Act 1981

¹²⁵ In accordance to the Criminal Procedurec, CAP C41, Laws of the Federation of Nigeria (LFN), 2004

by any means¹²⁶ must be curbed and offenders punished accordingly. Otherwise, anarchy will be encouraged, people will resort to any means available just to get their way and would totally disregard the rule of law. People will live in fear, the country's growth will remain stunted and what is even more, true justice will never realized; social order and justice will just be washed down the drain.

4.2 Examining the Legitimacy of Trial by Ordeal

A thing or practice has legitimacy when it conforms to recognized principles or accepted rules and standards¹²⁷. With trial by ordeal being the subject matter, its legitimacy can be weighed. In many Nigerian societies, this practice persist majorly because of tradition. Tradition and customs strongly empower this practice; the custom is recognized by the specific community as an accepted standard thereby legitimizing its practice in the eyes of the people in their village or community. But where the term “Legitimacy” applies as, a practice that is in accordance with law or with established legal forms and requirements¹²⁸, it is seen in a different light, having a different effect or implication. Here, a thing or practice is legitimate solely based on the condition that it aligns with the law in force and its legal requirements.

In ascertaining, the legitimacy of trial by Ordeal, relevant legal instruments must be considered, including decisions of court, as well as other statutory provisions. This practice is characterized by very dangerous processes¹²⁹ likely to cause great harm, and worse case, death. Having considered the nature of the practice, the law responds. In Nigeria, the constitution,

¹²⁶ Selling the materials used for the ordeal, inciting the hearts of the people to proceed with lawlessness, or anyone participating in such conduct.

¹²⁷ *Merriam-Webster.com Dictionary*, Merriam-Webster, available at <<https://www.merriam-webster.com/dictionary/legitimate>> accessed 21 October 2024.

¹²⁸ *Ibid.*

¹²⁹ In the determination of witchcraft among the Kalabari people, an accused person could be asked to swim across a creek full of crocodiles, if he came out alive, he was judged innocent.

criminal code Act, provides express prohibition against this practice. The Laws show no acceptance to these practices of any variation; ordeal by boiling water, sassy wood, crocodile etc¹³⁰, even the person who precedes over an ordeal will face the music¹³¹

The judicial attitude is in agreement with the law and by implication opposes this practice. There have been many decided cases supporting this.

In the case of *Ahuruonye and Anor v Ikonne and ors*¹³², the court held that those who claim to be witches/wizard ought to be reported to the police in and not subjected to trial by ordeal. In view of the court, such report is not strange to the Nigerian laws and it is in consonance with Sections 35(1)(b)(c) and (4) and (5), 38(4) of the Constitution of the Federal Republic of Nigeria, 1999 and Section 210 of the Criminal Code which prohibits unlawful secret societies, witchcraft and criminal juju.¹³³ The court vehemently opposes the idea of gathering suspects in a place and torturing them to confess. A practice that has caused some to own up to crimes they did not commit. Such matters should rather be reported when they arise.

Another supporting case is, *The State of Lagos v Isiaka Waidi & Ors*¹³⁴, a case where market people in Ejigbo took the law into their hands when they punished two Sisters and their mother for stealing pepper by beating them and pouring pepper into their private parts. The defendants were charged with the offences of unlawful assembly, trial by ordeal, assault occasioning

¹³⁰ Criminal Code Act, s 207, C38 Laws of the Federation of Nigeria (LFN) 2004

¹³¹ Criminal Code Act, s 208, C38 Laws of the Federation of Nigeria (LFN) 2004

¹³² [2015] 15 NWLR (PT 1482) 405, CA.

¹³³ The Hope Newspaper, Trial by ordeal (2 April 2023) available at <https://www.thehopenewspaper.com/trial-by-ordeal/> accessed 22 October 2024

¹³⁴ [2017] 14 NWLR (PT 1581) 287

harm, causing grievous harm, maliciously administering poison with intent to harm, deprivation of liberty, attempted murder, and sexual assault by penetration.¹³⁵

There are cases where practices of oath-taking receives judicial blessing, though on the condition that it is known to their customary law and accepted by both parties.¹³⁶

It is important to note that though the court opposes trial by ordeal which is mostly customary by origin, but it does not reject all customary practices. It gives judicial blessings, empowering them to gain the force of law only when they have passed the three examination of Repugnancy¹³⁷, Incompatibility¹³⁸ and Public Policy¹³⁹.

4.3 Critical Issues in the Administration of Trial by Ordeal

4.3.1 The Problem of Bias

Trial by ordeal in different variations are headed by humans. The people consulted are usually diviners/spiritual men. They are highly revered as medium between the physical and the spiritual. Because of this, the people trust that whatever they say is right as it is believed to have been prompted by spirits of their ancestors or their deity, who by no means shall uphold evil.

However, the tendencies of bias cannot be taken away from the nature of man. Bias, means to exhibit a pre-existing inclination or prejudice for or against someone or something.¹⁴⁰

¹³⁵Notable Cases Instituted by Directorate of Public Prosecutions, available at <https://lagosstatemoj.org/notable-cases-instituted-by-directorate-of-public-prosecutions/> accessed on 19 October 2024.

¹³⁶*Umeadi v Chibunze* [2020] 10 NWLR (PT 1733) 405

¹³⁷ *Mojekwu v. Mojekwu* [1997] 7 NWLR (PT 512) 283 CA.

¹³⁸ *Ukeje v. Ukeje* [2014] 11 NWLR (PT 1418) 384

¹³⁹ *Meribe v. Egbu* [2016] 12 NWLR (PT 1526) 171, SC.

¹⁴⁰Cornell law Dictionary,

<<https://www.law.cornell.edu/wex/bias#:~:text=In%20the%20context%20of%20evidence,case%20of%20United%20States%20v>> accessed 21 October 2024

The chief priest or diviner presides as an arbiter; knowing fully well that whatever he says shall be binding, there is the likelihood of his own pre-existing notion, either about the accused or the circumstances to influence his verdict. Where, the accused is his relative, he is likely to avert the process which may sometimes end up implicating another. Where the accused is an enemy of his, he may enforce punishment on him, even where the accused may actually be innocent.

Another form is, gender bias. It is projected against a particular gender. Gender Bias entails a limitation or sub standardizing a gender. In Nigeria, the female gender are often victims, even in the practice of Trial by Ordeal.

In various Igbo communities till date, widows go through various forms of ordeals if they are suspected of having a hand in their husband's death. These women remain in grieve having lost their spouse but their lives are made a living hell as some communities ensure to impose very humiliating and terrible ordeals on them, because they are suspected to have a hand in the death of their spouse.

Some of such ordeals demands the widow to drink the water used in washing the husband's corpse, made to pick a kola-nut from the dead man's chest with her mouth (not minding all the chemicals used in embalming) not taking a bath for a specific long period of time and not being allowed to touch her own body with her hands. She is supposed to hold a knife or a stick for the purpose of touching her body. The belief is generally that if she killed him, she would die from these ordeals. In fact one of the arms that may be used by the husband in killing her is the knife she holds.¹⁴¹

¹⁴¹ Felicia Anyogu and Carol Arinze-Umobi, *'Trial by Ordeal and Human Rights Violation: The Case of the Igbo of Southeastern Nigeria'* (Golden and Jacobs Publishing) [2013] (1) *Igbo Studies Review* 16-22

Here a widow, Priscilla Ogbachi narrated her own ordeal at the death of her husband whom she was accused of killing.

‘I stayed inside a room for one month without having my bath (washing my body with water, soap and sponge) not to talk of rubbing pomade on my body. I was only allowed to go and urinate or use the toilet. They said that I killed my husband . . . the one that pains so much is that they took my son away from me and I cannot see him.’¹⁴²

In all these, it is believed that if the widows are guilty as charged, they will not survive the ordeal.

It is unfortunate that such a humiliating and degrading practice is imposed on women. When a woman dies, the husband is never made to go through a similar thing. But besides the gender factor, these kind of practices should be completely obliterated and should not be tolerated in our society.

Here is another example, where efforts are made in a bid to curb promiscuity:

The Yorubas use Magun' a charm used on their women to keep them from have an affair. There are no deadly mixtures, there is only trial by death. When a wife has an affair, two things will likely happen; the adulterous man may fall off and die, or the sexual organs of both the adulterous partners will glue together, and no effort by anyone would disunite them until they both die together.¹⁴³

Encouraging faithfulness in marriage is one thing but subject women to outrageous practices like this is totally degrading, discriminatory, unfair and unacceptable.

¹⁴² E Nwadinobi (Ed), *Widowhood : Facts, Feelings and the Law* (Widows Development Organization 2008) ¹¹.

¹⁴³ *Ibid* 31.

4.3.2 Gross Violation of Human Rights

Trial by Ordeal is a practice very known for violating human rights. This practice has been criminalized and the statutory provisions are carved out from deep consideration of the rights of Nigerian citizens that must be preserved. For instance, the 1999 Nigerian Constitution¹⁴⁴ provides the fundamental human rights of Nigerians, among which include, the right to life, the right to freedom of speech, the right to movement, the right to dignity, the right to freedom from discrimination, the right to fair hearing etc. But, trial by Ordeal in its all forms without exception have successfully violated human rights one way or the other.

Here are examples,

This was the testimony of a widow (Cecilia Akugo-Onwus) and her experience as she was subjected to some ordeals. Cecilia Akugo-Onwus recount of her ordeal at her husbands death;

"I was forced to sit near the corpse of my husband till daybreak. They (his relations) put kola-nut on his chest and forced me to eat it. They made it compulsory that I must eat without washing my hands or cleaning my teeth for several market-days equivalent to one calendar month. On every market day, about three o'clock in the morning, they sent an old widow to escort me with a lamp to a nearby river to take a bath. This according to them meant that if I killed my husband, he would come out of the river and avenge his death."¹⁴⁵

This widow was denied her right to dignity of human person. She was forced to comply with a degrading routine for an equivalent to a month. She had no freedom to move at will. She still

¹⁴⁴ s 33-44

¹⁴⁵ Carol Arinze Umobi, Felicia Anyogu, "The Widow in South-East of Nigeria in Legal and Customary Turbulence: Need for Mandatory, Paradigm Shift." A paper presented to the Igbo Studies Association on the 9th Annual Conference in Washington D. C 7th-9th April 2011.

had life but for an experience of being subjected to such inhuman and degrading treatment, can that be called life? By no means.

Deborah Emmanuel, A student of Shehu Shagari College of education, Sokoto was murdered by her co-students for an alleged blasphemy¹⁴⁶. It is appealing that she was deprived of her right to life by her fellow students.

Another instance is of Okolie Arinze, a student of Obafemi Awolowo University (OAU), Ile Ife, was beaten to death by his co-student in the university hostel after being a caused of phone theft, without the opportunity for him to be heard.¹⁴⁷ The deceased was accused and the presumption of innocence was overlooked, he was denied his right to fair hearing as he was never given a chance to speak for himself and they ended his life in painful way, violating his right to life.

There are still more instances similar to the above, but in conclusion what must be acknowledged is that trial by ordeal of all forms should be completely obliterated and the government (including the enforcement agencies) must see to it that compliance is ensured down to the grass roots of society. When there rule of law prevails, issues of crimes rightly addressed, human rights upheld and practices like trial by ordeal obliterated, social order and justice is ensured, the country's growth and its future is preserved.

¹⁴⁶*Ibid* 12.

¹⁴⁷*Ibid*.

CHAPTER 5

CONCLUSION

5.1 Summary of Findings

- Most members of the society just disbelief in the effectiveness of the Nigerian legal system. An example is, the confidence in the police and the judiciary; the people belief even more in the efficacy of Trial by Ordeal.
- Trial by Ordeal is actually a means through which most people unleash their anger and vengeful desires and intention on ‘criminals’, not truly as a means to effectively do justice.
- Trial by Ordeal has been practiced till date, it is an indication that it thrives based on the tradition and customary practices of a people or community. However, the Laws and statutes of the country out rightly condemns the practice of Trial by Ordeal, but there is need for more efficiency in enforcement.
- Trial by Ordeal has more overwhelming drawbacks than its "advantages". In the end, the practice of Trial by Ordeal takes a huge on society as a whole, thereby questioning whether or not this practice is truly effective.
- There are better means to adopt in addressing issues of crimes and conflict, instead of trial of ordeal.

5.2 Recommendations

5.2.1 Proactive Enforcement and Accountability:

Nigeria is one country with lots of beautiful laws having wonderful provisions and protection, the only problem being proactive or efficient enforcement. With regards to this practice of trial by ordeal, chapter three made clear the position of the law, which out rightly condemns the practice. But, there has to be proactive enforcement and accountability, ensuring that these good laws come alive and the social order and justice is preserved. The Masses, the government and its agencies are the ones to be held accountable.

5.2.1.1 The Masses

The masses form the greater populace of the country and it is in the best interest of the society that the people have rules and abide by them. Without rules, People can do as they will which may be detrimental on a large scale. Trial by ordeal is one out of numerous examples that illustrates this. It is great that laws and relevant institutions have been enacted and established, but a closer look at our society will reveal that this obnoxious practice is still in vogue.

Enforcement agencies should be steadily present and active to ensure order is followed. In many situations, villagers lynch accused persons but if the enforcement agencies such as the police are active, they can intervene, protecting such person from the angry mob, and investigate to truly ascertain the facts of the case and take legal actions if need be. Also, these enforcement agencies should arrest individuals that participated in conduct or inducing others to carry out trial by ordeal. After arrest, legal action should be carried out against them, that they may face the legal consequences.

The village authorities such as, the Igwe, or Chiefs, Oba and other village heads or leaders in various communities, must be held accountable for the people. Everything rises and falls based on Leadership. Through these leaders, the practice of trial by ordeal have thrived.

Through them, the practice can be efficiently curbed. The leaders in the villages or communities should be held accountable to ensure that their people do not take extreme measures and that order is maintained and that the law is not breached.

5.2.1.2 The Government

The government is the power house of the state. It must be accountable to ensure effectiveness in function. Laws should be enacted seriously punishing members of the executive arm who fail in their duty to enforce order. For instance, a group of police men are stationed in Yaba, Lagos, where a person was accused of theft, beaten and burnt alive, and such police men should be severely punished if they did not take sufficient actions to redeem the life of the victim. Life is sacred and police officers are obliged to up hold the sacred duty of ensuring social order, justice and by extension the life of a citizen.

The executive arm of government should adopt modern technologies such as video surveillance technology, drones and so on, to keep watch and be ready to intervene promptly when problems arise rather than having to show up at a time long after the occurrence of such problem where irretrievable damages done and culprits unable to be caught.

The enforcement agencies; such as the police and Nigerian Armed forces should be checked and held accountable as well. It should go in two ways;

1. Accountability ensuring their function in enforcement; whenever matters of trial by ordeal, or jungle justice arise, the nearby Police should be held accountable for that situation. The order and prevalence of rule of law in that area must be ensured.

2. They must be held accountable to prevent abuse of office. Some police men, use their positions as officers to intimidate people and subject them to tortuous treatment for purposes of extortion, eliciting information etc. They must be prevented and held accountable so as not to promote such practice among them. They must be made to uphold the law being living examples and appearing justified even in the eyes of the people.

The Judiciary has its role as well. The judiciary need to step up and gain the trust of the people. Discouraging corruption and upholding justice such that it becomes the hope of the common man, not just in theory but in practice. It should be progressive and steady in its proceedings, avoiding unnecessary delays such as incessant adjournments so as to ensure a steady flow, speed and efficiency in court proceedings.

With these in place, the masses will have little or no reasons to resort to trial by ordeal, they would rather run to the judiciary to seek redress.

5.2.2 Creating Awareness of the *Effectiveness* of Alternative Dispute Resolution (ADR):

Most citizens are frustrated by the judicial system with its flaws of corruption, delay occasioned by incessant adjournments etc. Currently, Alternative Dispute Resolutions (ADR), has been integrated into the Justice administration system of Nigeria. Alternative Dispute Resolutions generally entails the various flexible means of settling disputes besides litigation in court which include, arbitration, conciliation, mediation and negotiation.

The practice has proved to aid cost-effectiveness, accessibility, simple procedures and timely processes in which relationships are restored, confidentiality maintained, and aggrieved parties receive satisfaction while at the same time attaining Justice by Compromise. It has proved

reliable in Lagos, via the Multi-Door Courthouse¹⁴⁸ system, in the Lagos High Court among others. This multi-door courthouse helps in decongesting court dockets allowing judicial officers more time to deal with other cases effectively thereby increasing productivity and improving access to justice.

But there is a low level of awareness. Sensitization programs, seminars, even conferences should be held more often educating the people about the concept of ADR and its advantage. The media, the National News channels should be utilized for this purpose. Legal practitioners should also enlighten their clients on the option of ADR. Creating high level of awareness among the people, strengthens their hope in the justice system and they will be led to adopt it when disputes arise.

5.2.3. Reformation/Reformatory Measures:

To ensure the progress of society, change must be effected in the mindset of its people. The people should be sensitized as to why trial by ordeal should not be resorted to, its impact on the society as a whole and the adoption of better means for addressing crimes and conflicts. When the people are made to think of not only themselves but the betterment of the society too, their attitude changes in this light. Where the people have the right attitude, they would be ready to drop and antagonize any practice that would hinder the growth of the community even if that practice is trial by ordeal.

The government should conduct programs that are community oriented in achieving this purpose, helping the citizens become more interested in the betterment of the society.

¹⁴⁸ A concept that a Harvard Law School Professor, Frank Sander first proposed at the Pound Conference in 1976; a multifaceted dispute-resolution scheme currently utilized worldwide. It has the sole aim of providing alternative practice and procedures such as litigation, arbitration, negotiation and mediation in resolving disputes among parties in a courthouse.

Non-Governmental organizations, the Churches, organizations for community service also have influence on society. It is recommended that they also make efforts to influence the people to work in light of communal growth and development.

Rehabilitation centers should be maximized as a means to Influence change among deviants and to get them integrated back into society. It is a reformatory measure. When these persons are taught and their mindset positively influenced, they too can become a great asset for the society. For instance, a deviant who gets integrated into society but is also skilled in internet hacking could be of great help to the police or the military as they perform their duties to ensure societal order. Such a person can intercept the operations of many online fraudster thereby saving more citizens from being victimized.

Trial by ordeal, just like other vices in society cannot be changed or curbed by one man or one institute. It will take a greater populace if not all to effect the change needed. If more individuals antagonize trial by ordeal because of its barbaric features then the rate of such practice will drastically drop even before the intervention of any government agency even.¹⁴⁹

Even with Laws and punishment in place, the perspective and the minds of the people has to be rightly positioned, rightly transformed. When their perspective is influenced, it shows in their attitude; both the government and the people collaborate. In the end, the rate of practices like trial by ordeal will decline alongside other practices that are not detrimental to the society as a whole.

5.3 Contributions to Knowledge

¹⁴⁹ When problems arise, the people would find a way to resolve it, without going on rampage even before the police arrives, or they may just hand over the suspect o the authorities.

This work shall contribute to already existing literatures serving as a proficient aid for scholars and/or researchers who wish to delve into concepts of punishment, trial by ordeal, human rights. It will also be a valuable tool for policy makers where policies are to be made to enforce the preservation of human rights and the compliance to the rule of law.

5.4 Areas for Further Studies

Enforcement against Police Brutality, and Torture for Eliciting Information; the people of the Nigerian society should be checked but those serving as public officers should be checked as well. The issues of violating human rights does not exist only among people but also government agencies. To this end, studies could be made on how to enforce against Police violation of human rights by means of brutality or torture for eliciting information.

Alternative dispute resolution is often restricted to civil matters in Nigeria and it proves reliable in aiding the justice administration. Apart for criminal litigation, ADR or a similar procedure being adopted to handle criminal matters also is a subject that further studies should be made on.

As time passes, technology advances. There is also the need to investigate modern technologies that could be of great use in maintaining social order.

5.5 Conclusion

Having analyzed the concept and the practice of trial by ordeal, various perspectives and arguments were presented especially with regards to the extent of its efficacy in Nigerian society, and the extent of its legitimacy. The great shortcomings of this practice and the huge toll on our society cannot be overlooked. It is true that most citizens of the country are frustrated with the weak legal system of the country and are prompted to resort to all manner of self-help but such

should not be encouraged, because doing so would only make the state of order worse in the country. The growth and progress of the country should be born at heart by all and to this end, trial by ordeal is not a practice that should be encouraged. By all legal means, it should be opposed and better means of addressing crimes and conflict, such as the court, arbitration and other forms of ADR, should be adopted. In the end, growth, progress, social order and justice will be achieved.

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