CUSTOMARY ARBITRATION THROUGH OATH TAKING: EXPANDING TRADITIONAL WAYS OF PROVING LAND OWNERSHIP*

Abstract
Oath taking is seen as one of the ways by which the truth is obtained from parties and witnesses to disputes under the native laws and customs of some parts of Nigeria. It is heralded as a way in which utmost truth could be ascertained, as it involves swearing before a deity that is said to be capable of meting out supernatural repercussions which are swift and oftentimes fatal, if the oath taker lied or misrepresented the truth. The fear of this deity often compels oath takers to state the truth without deviation. For this reason, some have said that this system should be accepted by the Nigerian Courts as a method of proving title to land under Nigerian customary adjudication. There have, however, been divergent opinions regarding the relevance and legal significance of traditional oaths. This study investigates the efficacy or otherwise of the adoption of oath taking as one of the ways of ascertaining land ownership.

Keywords: Oath taking, Custom, Customary arbitration, Ownership of Land.

1. Introduction

Though the word 'land' in its common parlance, means any ground, soil or earth or the solid part of the earth's surface'[1] In the African traditional context, there is a deeper meaning or value ascribed to land. Its value extends beyond economic derivatives or productive use, as land is seen as a gift from God as it belongs to generations past, present, and countless unborn.[2] The concept of land includes the ecological, cultural, cosmological, social, and spiritual aspects. Spiritual as it is seen as the permanent resting place of ancestors. No doubt, Land is usually subject to many great interests and derivative rights, thereby conflicts abound. These are often hard to explain, and when land is held by native customary tenure, both the individual and the group have rights and interests in it. Often, these rights and interests conflict with each other.[3] The courts have had its share of cases regarding proof of ownership to land and it has established ways in which ownership may be proved in the case of *Idundun v Okumagba.* [4] In this Supreme Court case, the ways by which a person may prove or establish his title to land in Nigeria, include traditional evidence; production of a document of grant or title; proving acts of possession and ownership extending over a sufficient length of time; proving acts of long possession and enjoyment of the land and by proof of possession of connected or adjacent land in circumstances which make it probable that the owner of such adjacent or connected land is probably the owner of the land in dispute.[5] Umezulike added two other means of proving ownership of land as; Graves of family members on the land and adverse possession of the land for twelve (12) years or more.[6] It may be safe to say that Oath taking forms a part of proof by traditional evidence. This article examines oath taking under customary arbitration to ascertain the judicial value as a means of proof of title to land.

Oath has been defined as a solemn declaration accompanied by swearing to a deity or revered person or thing, that one's statement is true or that one will be bound by a promise.[7] So it goes without saying that oath taking is an undertaken made by a person before a superior being. Elias described the process as involving the swearing before a council of elders, who would do the phrasing of the oath in a prescribed manner and the oath taker swears in accordance with their directive in respect to the offence or the issue in dispute.[8] Oath taking is not exclusive to Nigerian customary adjudication, but finds itself in the Nigerian judicial process from the received English laws which has history of evolution and inclusiveness of those whose religious beliefs preclude from swearing oaths.[9]

It is important to mention that there are certain people who believe in speaking the truth, at all times, in accordance with the Holy Bible which states, 'Let your yea be yea and your nay be nay.'[10] These people abstain from double standards set, and object to swearing oaths for purposes of testifying in court which they do not do so in their daily life. Such conscientious objectors are called Quakers and retain the right to make an affirmation instead as embodied in the Quakers Act 1695 and is also contained in the English Oaths Act of 1978. The case of *R v. William Brayn*[11] serves as an example of the need for such a right. In the case, William Brayn was accused of stealing Ambros Galloway's horse. Brayn pleaded not guilty. According to one witness, Ambros Galloway owned the horse. According to another witness, Ambros Galloway purchased it from Brayn. Galloway was unable to testify because, as a Quaker, he would not swear 'for the sake of conscience.' The court told the jury to find Brayn 'not guilty' due to a lack of proof, while the Quaker was sentenced to prison 'as a punishment of Felony' for 'refusing an Oath to Witness for the King.[12] Based on wordings of Matthew 5:34-37 of the Bible, some Christians refuse to swear to oaths. It is important to note the inclusiveness accorded to persons who are unable to swear oaths due to their religious beliefs under the English system which expression is like the Nigerian judicial process.[13] As the Nigerian Oaths Act states that:

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[1] *Salami v Gbodoolu* [1997] 4NWLR (Part 499), 277 at 287.
[2] *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399
[3] Olusegun Onakoya, Family Head Versus Family Members: Legal Issues in Management of Family Land Under Yoruba Customary Law [2015] (39) *Journal of Law, Policy and Globalization*.
[4] *Idundun & Ors v Okumagba* & Ors (1976) 9-10 SC 227. 246-250
[5] *ibid*
[6] I.A Umezulike, *A B C of Contemporary Land Law in Nigeria* (Snaap Press Nig Ltd, 2013).
[7] B A Garner, *Black's Law Dictionary* (8th edition, West Publishing Co) 413
[8] T.O Elias, *The Nature of African Customary Law* (Manchester University Publishing Press) 110
[9] Oaths Act
[10] James 5:12
[11] *R v. William Brayn* (1678)
[12] The Proceedings of the Old Baileys Londons Central Criminal Court 1674 to 1913<https://www.oldbaileyonline.org/browse.jsp?id=t16781211e-37&div=t16781211e-37> accessed 11/01/2023.
[13] S.4 of the Oaths Act of 1963

> Any person who objects to the taking of an oath and desires to make an affirmation in lieu thereof, may do so without being questioned as to the grounds of such objection or desire, or otherwise, and in any such case the form of the required oath shall be varied by the substitution for the words or swearing, the words, 'I solemnly, sincerely, and truthfully affirm that .... '; and such other consequential variations of form as may be necessary shall thereupon be made:[14]

One might wonder, whether the very act of swearing under oath is sufficient to guarantee that the truth has been said and if there is always a total compliance to the words of the oath. To that, the Criminal code states that, whoever, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony concerning any matter which is material to any question then pending in that proceeding, or intended to be raised in that proceeding is guilty of perjury. It is irrelevant whether the testimony is given under oath or any other sanction authorized by law.[15] It can be seen that there carries a penalty of varying degrees for the offence of lying under Oath. Under the Nigerian Criminal Code, a perjurer shall be liable to conviction of fourteen years imprisonment if he perjures, to secure the conviction of another person for a crime punishable by death or life in prison.[16] However, a separate trial needs be instituted to ascertain the guilt or otherwise of the perjurer before his conviction or acquittal. This is usually a long, laborious, and expensive process, which is one disadvantage over traditional oath taking according to native law and custom. Umezulike describes the traditional oath taking as active and resultant in comparison to the oaths taking by witnesses and public officials in public courts which he described as pious and passive.[17]

2. Oath Taking as Customary

Before delving into oath taking under customary law, certain contextual issues need to be clarified, such as, what is custom? Are the phrases customs and customary law synonyms or coterminous? Can a previously accepted culture become unacceptable? Must an act be practiced by a totality of a group to be determined as custom? Custom has been defined to mean, an established or common usage of a particular people.[18] The Evidence Act defines Customs as a rule which in a particular district has from long usage obtained the force of law.[19]Customary law is the law that captures the norms, traditions, and rules of behaviour of the people. It is the law propelled by the worldview, beliefs, philosophies, and value system of the people. Similarly, it has been defined as the unrecorded tradition and history of a people which has grown with the growth of the people to stability and eventually become an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of law with respect to the place or the subject matter to which it relates.[20] Nnamani[21] draws a distinction between customs and customary law based on the case of *Ojisua v. Aiyebelehin*[22]where Niki Tobi(JCA) (as he then was) gave a distinction that customs solely reflects common usage and practice whereas Customary Law goes further as it has obtained the force of law.[23] It is therefore insufficient to say that a long term practice is customary law; it must have been accepted by the people to be binding on them for it to become customary law. Hence, the key elements to note as proof of custom are long term established usage and acceptance. Acceptance is an indelible requirement for proof of custom as for it to be relied upon, it must be proved that at the time people in a particular area indeed accepted and acknowledged the existence of such a culture. For this reason, custom is referred to as a mirror of accepted usage.[24] One, however, wonders if oath taking was truly accepted by the generality of the people in every area. It is rather easier to determine with each distinct case if the parties to the dispute believed and accepted to settle their dispute via oath taking and accepted to be bound by such custom. This is assuming such procedure qualifies as customary practice and is valid. The yardsticks employed by the court for the determination of the validity of a custom are that it must be consistent with natural justice, equity, and good conscience and it must not be averse to public policy. It must also not contradict a law in force.[25]

In traditional societies, customary practices were largely unchallenged save by compelling innovations that re-channelled aspects of the practices of the people and subsequently altered its traditions. Factor that majorly altered customs in Nigeria are religion and colonization. They also altered the system of customary adjudication. Customary adjudication would represent the manner disputes were resolved before the advent of the received English laws and English styled courts in Nigeria, these systems for resolution of disputes of all nature. The resolution styles varied from region to region and community to community. British colonization did not result in the entire annihilation of Nigerian customary law and local level conflict resolution mechanisms such as customary arbitration.[26] The judicial system, introduced by the colonialists, however gained superiority over traditional judicial systems, and customary law became only enforceable on their terms and parameters.[27]This situation struck a death knell to customary arbitration, because a customary arbitral decision would not be valid and enforceable if it did not follow the rules established by the courts.[28] Some of these rules for the acceptance of customary arbitration have been laid out in a number of cases. In the case of *Ohieri v. Akabeze*[29]it was determined that for the award from customary arbitration to be accepted before a court of law, it must be proved that the parties voluntary submitted themselves for

[14] S.8
[15] S.117
[16] S.118
[17] I.A Umezulike, *A B C of Contemporary Land Law in Nigeria* (2013, Snaap Press Nig Ltd) 38.
[18] O N Ogbu, *Modern Nigerian Legal System* (2002, Cidjap Press) 75.
[19] Evidence Act; *Agbai v Okagbue* (1991) NWLR (pt204)391 at 416.
[20] *Aku v Aneku*
[21] O N Ogbu, *Modern Nigerian Legal System* (Cidjap Press, 2002)
[22] (2001)11NWLR pt 7730 44 at 52
[23] *Umeadi v Chibunze* (2020)10 NWLR (pt.1733)405
[24] *Owoniyi v Omotosho* (1961)1ALLNLR 304 at 309
[25] Section 18(3) of Evidence Act Cap E 14 Laws of the Federation of Nigeria, 2011.
[26] V.C. Igbokwe 'Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law Issues Revisited.' [1997] (41) (2) *Journal of African law* 201
[27] See generally Tobi N, *Sources of Nigerian Law* (MIJ Professional Publishers, Lagos 1996)
[28] M M. Akanbi and others, Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need for Paradigm Shift [2016] *Journal of Sustainable Development Law and Policy*.
[29] (1992)2NWLR (pt.22)

the arbitration, that they agreed to be bound by the arbitral decision, that such arbitration was done in accordance with the customs of the parties, that the arbitrators published their award and that the award was accepted by the parties.[30]In the more recent case of *Awonusi v. Awonusi*,[31]

> Okoro JCA stated …that for arbitration to be binding, there must be a voluntary submission of the dispute to the arbitration of the individual or body; Agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding; the arbitration must have been in accordance with the custom of the parties; and; the arbitrators reached a decision and published their award.

It must be mentioned that in the above case, acceptance of the award was not mentioned as one of the requirements, however in the case of *Achor v. Adejoh*[32] the Court of Appeal per Aboki JCA held that the parties must agree to be bound by the decision of the arbitration. The voluntary participation and acceptance in customary arbitration is necessary as without which enforcement and compliance will be difficult.[33] In *Assampong v. Amuaku*[34] the West African Court of Appeal (WACA) held that : '… where matters in dispute between parties are, by mutual consent investigated by the arbitrators at a meeting held in accordance with native law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce such decision'.[35] So, arbitration under customary law is basically on the parties' voluntary acceptance to the decision of the arbitrators, who are typically the chief or elders of their community, and their agreement to be bound by that decision or freedom to disagree when it is not in their favour.[36] A practical look at voluntariness of oath taking under customary arbitration,[37] one might wonder if the lines of voluntariness may not be blurry due to the mode of commencement which often originates from a complaint leading to a summon.[38] It is difficult to conceive how voluntary a summon might be when the summoned party is not informed of his right to appear or not to appear. It has been held that if either party to a customary arbitration hearing is forced to appear before a council of chiefs or elders, under threat of penalty, any result reached cannot be claimed to be in conformity with a legal customary arbitration. This is due to the absence of the aspect of willing submission.[39]

For clarification on the topic of oath taking, it is important to look at the procedure for oath taking under customary arbitration but first, it must be mentioned that the purpose of every system of adjudication is to ensure justice. Oftentimes, what is just may be unascertainable based on facts. That is why evidence, even when tendered sometimes does not help in the conclusive determination of a matter hence, the standard of proof in civil cases is on a balance of probabilities, or on a preponderance of evidence,[40] meaning judgement is given to the party with a seemingly stronger case. As the courts will, with the evidence before it, put on an imaginary scale of justice in its evaluation and give justice to the party in whose favour the scale tilts i.e. the party with better evidence. However, it is important to reiterate that law is a synthesis of order and justice and serves the purpose of resolving conflicts and protecting the interest of human aggregation in an orderly manner thus obviating the need for recourse to self-help or other illegal procedure which may give rise to insecurity and chaos.[41] Noting that Law has evolved as an alternative to private feud and vengeance and as a supplement to informal social processes by which men and groups deal with disputes. It provides an institutionalized means of settling disputes based on legal rights.[42] These guides such as rule of law and procedures serve as guardrails for the attainment of justice. As Plato said 'the rule of law is preferable to the rule of an individual.'[43] The rule of law gives expression to the prescriptive instinct for justice. People must be subject to the law for right to prevail over might as the guiding principle of society. In addition, there are four essential requirements that must be met by the law. First, it must be certain so that people may securely rely on it, just so that they will support its enforcement and ascertainment. Also, so that people are aware of their rights and obligations, and it must be enforced by impartial, ethical judges that the public has faith in.[44]

From the preceding argument it can be deduced that customary law is progressive and evolving, so it is possible that a rule of customary law which was previously accepted by the people may become obsolete and no longer recognized, accepted, and practiced by the people or just modified. In fact, evidence can be led before the courts to state that a previously accepted customary law is no longer applicable.[45]Was oath taking ever a custom? If it was, it still be regarded as custom?

3. Nature and Procedure of Oath Taking under Customary Law

Though the Supreme Court in *Umeadi v Chibunze*[46] gave credence in a recent judgement on customary law practices particularly in the aspect of oath taking as a means of proving title or ownership of land, it should be noted that the courts do not leap into the arena, but rather decide on that which is brought before them. So, what is unclear is if acceptance is due to fact that the matters brought before the courts are mainly to determine if valid procedures were followed and not to challenge the legality or validity of oath taking under customary law. However, academic research gives the leverage to view in totality and determine from all angles the validity or otherwise

[30] *Philip Njoku v. Felix Ekeocha* (1972) ECSLR 199 at 205
[31] (2007) All FWLR 1642 at 1662.
[32](2009) LCN/3295 (CA)
[33] *Agala v. Okusun* (2010) 10NWLR(pt1202) 412 at 448
[34] (1932) 1 WACA.192.
[35] (1932) 1 WACA.192.
[36] O K Edu, Effect of Customary Arbitral Awards on Substantive Litigation: Setting Matters Straight
[37]E O Ekhator, Traditional Oath-Taking as an Anti-Corruption Strategy in Nigeria September 2018 <(8) (PDF) Traditional Oath-Taking as an Anti-Corruption Strategy in Nigeria (researchgate.net)> accessed 30/1/23.
[38] A. Emiola, *The Principles of African Customary Law* (Emiola Publishers, 1977) 34-45; M M. Akanbi and others, Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need for Paradigm Shift [2016] *Journal of Sustainable Development Law and Policy*.
[39] *Adeyeri v Atanda* (1995) 5 SCNJ 157.
[40] *Osuji v. Ekeocha* (2009) ALL FWLR (Pt.490) 614; *Amukomowo v. Audu*(1985) 1NWLR (Pt.3) 530
[41] O N Ogbu. (n19) 2
[42] O N Ogbu (n19) 8
[43] E Baker, *The Political thought of Plato and Aristotle* (London, 1906) 7.
[44] A Denning, *The Changing Law* (2012, Universal Law Publishing) 3.
[45] *Danmole v Dawodu* (1958) 3 FSC 46; *Adeniji v Adeniji* (1972)1ALLNRL 298
[46] (2020)10NWLR (pt.1733)405

and if oath taking should be regarded as reliable for adoption as proof of ownership to land. To do this, one must at best understand what oath taking is under customary law.

Oath taking under Nigerian native customs can be described as a 'statement or assertion made under penalty of divine retribution for intentional falsity.'[47] The revered being under ancient customs happened to be various deities, Oath taking under traditional customs is said to be sworn before a deity with mystic or supernatural powers, capable of meting out retributive justice on guilty parties which is instant and quick. It has been said that women and children were not allowed to par take in oaths of a destructive nature.[48] In comparison to oaths under English law where it is an offence of perjury, to lie under oath and a separate trial needed be constituted, lying under oath under native custom is believed to incur the instant wrath of the gods. This is the reason proponents advocate its acceptance as reliable evidence. Customary oaths are different from common law oaths because in traditional processes, taking an oath is more like a prayer to the gods than it is a means of verifying or assuring the oath's sincerity, unlike in common law, where every witness is required to take an oath.[49]Under customary adjudication, which was largely unwritten, oaths were not merely rituals undertaken for the purpose of giving evidence, though the system of usage varied, oath taking was not done lightly as it involved the invocation of one of the local deities to visit witnesses with punitive judgement which could be fatal.[50]In contrast to the oaths taken in public courts in which perjury could incur a punishment stated by law, oaths under the native system were fearful rituals most often done with words that connote calamity and deaths are used to make pledge, stating that a person will keep to one's part of the agreement.

There are varied opinions on the procedure and scope for oath taking, Nwankwo identified four major reasons why oaths are taken in Igbo land as first, for the establishment of truth of what is said, second, for the maintenance of good human relations, third, to maintain the secrecy of an institution or an organization or and fourth, they are taken when criminals are being sorted out.'[51] So in Nwankwo's opinion, 'if the gravity of an offence committed is high and defies possible human solution, the accused is presented before the divinized spiritual forces for exoneration or punishment.'[52] In such rituals, death and wellbeing are used as guaranty to secure the agreements. Ikeora opines that parties to oath taking directly submitted to the supernatural tribune to settle disputes brought before the deity.[53]

On the procedure for the verdict, Nwakiby states that the workings of Oath taking rituals are coined to such a way that 'time is normally given within which the offending party is expected to either be killed by the gods or be sick so as to confirm that he is the offending party.[54] On the verdict, Oraegbunam states that it is believed that, an oath takers 'guilt or innocence is established depending on whether or not the accused dies or falls sick within the time given.[55]Under native jurisprudence a person staking his life in assertion of his right was seen as the highest appeal to conscience.[56]

> In *Bennedict Iwuchuwu v Christiana Ojiriereke and Anor* HOW/55/71 (unreported) Anya J, held 'it seems to me right also to hold that the swearing on juju by natives who traditionally resort to juju swearing in order to determine the ownership of land shall vest the land in the person who swears to the ownership provided he survives the oath and this creates an estoppel by way of res judicata in favour of such person'

It is interesting that in these customary arbitration cases, causation is divorced from the death/sickness of an oath taker, as it is curious how one can logically or rationally attribute health and fitness during the oaths incubation period, to innocence or disaster consequent upon a false oath to that oath? There is no mention of a medical examination to confirm the health status and fitness of the individuals before the swearing of the oath. Bear in mind that, traditional communities will ascribe any misfortune of any sort after oath taking to the oath.[57] Umezulike stated that in a land matter, for the establishment of evidence for proof of ownership to land, disputes were first referred to the native tribunal or panel which made up of a council of elders. Oath taking was suggested only after the evidence of disputant parties was determined as inconclusive. After being made to swear, with an invocation stating what will happen to the lying party within a given period, the party who survives or remains unscathed after the agreed period becomes the party with whom title is vested.[58] Oaths are typically employed in situations where the offender is unknown or when there is insufficient proof of someone's guilt or the accuracy of a claim.[59]The adoption of the oath eliminates the necessity to evaluate the parties' and witnesses' spoken testimony. In cases when oaths are administered, the verdict is simply 'swearing.'[60]This is probably why resort to oath taking is done only after all other evidence is inconclusive.[61]

It is clear to see that the courts have upheld the practice of oath taking as form of evidence in situations where the parties voluntarily submitted themselves to this form of customary arbitration.[62] In other words the consent of the parties is of prime importance for the courts to recognize oath taking as a form of evidence.[63] So, one might wonder, if oath taking should be an acceptable means of proof of ownership to land under native law and custom. That is whether the procedure or process of oath taking complies with the requirement

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[47] S. C. Nwankwo, *Understanding Religions Ethics: An Exercise in Afriocentric Ethicalism* (Rainbow Printing Press, 2017).
[48]A A Oba, Juju Oaths in Customary Law Arbitration and their Legal Validity in Nigerian Courts [2008] 52(1) *Journal of African Law*, 149.
[49]Elias, The Nature of African Customary Law, 229–32; and Okany, The Role of Customary Courts in Nigeria, 5–6.
[50] I.A Umezulike, *A B C of Contemporary Land Law in Nigeria* (2013, Snaap Press Nig Ltd) 38.
[51] S. C. Nwankwo, *Understanding Religions Ethics: An Exercise in Afriocentric Ethicalism* (Rainbow Printing Press, 2017).
[52] *ibid*
[53] M. Ikeora, The Role of African Traditional Religion and Juju in Human Trafficking; Implication for Anti Trafficking [2016] 17(1) *Journal of International Women's Studies*.
[54]G C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (Iyke Ventures Production, 2004).
[55] I K E Oraegbunam, The principle and Practice of Justice in Traditional Igbo Jurisprudence. [2009] (6) *Ogirisi: A New Journal of African Studies*.
[56] A A Oba, Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts, [2008] 52 (1) Journal *of African Law,* 139–158.
[57]ibid
[58] I.A Umezulike, *A B C of Contemporary Land Law in Nigeria* (2013, Snaap Press Nig Ltd)38
[59] Elias (n9) 229–32; and Okany, The Role of Customary Courts in Nigeria, above at note 2 at 5–6
[60] A A Oba, Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts, [2008] 52 (1) *Journal of African Law,* 139–158.
[61]I.A Umezulike, *A B C of Contemporary Land Law in Nigeria* (2013, Snaap Press Nig Ltd)38
[62] *Philip Njoku v. Felix Ekeocha* (1972) ECSLR 199 at 205
[63] *Agala v. Okusun* (2010) 10NWLR (pt1202) 412 at 448

for the validity that is not being repugnant to natural justice, equity and good conscience and contrary to public policy[64] and if it is not incompatible with any in force. Before we match the procedure for oath taking to applicable laws it may contravene, it is important to see the rationale for judicial acceptance of customary arbitration, which oath taking falls under. The constitution in Sections 315(3) and (4)(b) recognizes customary law as an 'existing law' and by implication upholds the validity of customary arbitration since it is derived from customary law. The Arbitration and Conciliation Act has provided additional support for the legitimacy of customary arbitration.[65] However S. 35 (b) of the Act states that arbitration should be in accordance with other laws.[66] Hence if Oath taking is not in compliance with other laws, then it will be deemed illegal.

It is important to view the rationale for the acceptance of oath taking by the courts. In *Ofomota & ors v Anoka & Ors*[67] Agbakoba J. held that:

> Oath taking is, … a recognized and accepted form of proof existing in certain customary judicature. Oath may be sworn extra-judicially but as a mode of judicial proof its esoteric and reverential feature, the solemnity of the choice of an oath by the disputants and imminent evil visitation to the oath breaker, if he swore falsely, are the deterrent sanctions of this form of customary judicial process which commends it alike to rural and urban indigenous courts. It is, therefore, my view that the decision to swear an oath is not illegal although it may be obnoxious to Christian ethics; Christianity, however, has not come to destroy, its mission in to edify, to correct and to reconcile.[68]

'Where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof of title to land no longer apply. In such situation, the proof of ownership or title to land will be based on the rules set by the traditional arbitration resulting in oath taking … In arbitration under customary law, the applicable law is customary law and not the common law principles with their characteristic certainty and ossification.'[69] Oba in support of oath taking and non-interference of customary arbitration by the courts sates that,

> Modern courts should recognize that customary law arbitrations determined by juju oaths are in a class of their own. Once oaths are resorted to, the matter is submitted to the gods; it is no longer open to human discretion. Neither can the courts re-open the matter again nor can the parties resile from the process at that stage.[70]

I think this is a dangerous view to hold, capable of degenerating fast, as parties should not be allowed to consent to an illegality. This is a recipe for anarchy and a deviation from a social contract theory. In any case, should an illegality be allowed to stand? Assuming that what really is bargained during oath taking is the life of the lying party, does the erring party have that authority to bargain his life? Is this not in contravention of section 326 of the Criminal Code: 'Any person who- (1) procures another to kill himself; or (2) counsels another to kill himself and thereby induces him to do so; or (3) aids another in killing himself; is guilty of a felony, and is liable, to imprisonment for life'. And is the deity that deprives the erring party of his life not in contravention of the constitution? **33.** (1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. That the party voluntarily consented to the oath should not be a defence as the person does not have a right to take his own life. To state that this should be done is to renege from the social contract theory and revert to the Stone Age where might was right. There are situations in which people should be allowed to be bound by decisions they make, but to state that humans should bargain life and death is akin to reverting to the middle ages.

Though there have been praises for traditional oaths stating that it was a system that was faster and cheaper and worked.[71] It is humbly stated that customary law which was largely undocumented and unrecorded could not have been said to work if there was no statistics or standard of measurement of its effectiveness. Therefore, a system which is inexplicable and may be unjust should not be allowed because it is fast and cheap and devoid of technicalities. There have been strident criticisms by the judiciary and scholars on the relevance of traditional oath-taking in Nigeria. For example, in *Nwoke v Okere*,[72] traditional oath-taking was heavily criticized by Justice Kutigi of the Supreme Court.

> Here Justice Kutigi stated inter alia, 'that its activities, methods and procedure would appear to belong to the realm of the unknown even though the effects may be real in the end. The worst of it all is that Juju decision or judgment is not subject to an appeal like the one we are witnessing now in the suit...'[73]

Furthermore, Nwakoby states 'that practice of [traditional]oath-taking is not only fetish, barbaric, uncivilized, outdated, anachronistic, criminal, illegal but also contrary to Nigerian jurisprudence as it is superstitious, mysterious, and spiritualistic'.[74] Also, traditional oath-taking is said to be very crude and a 'denial of the right to fair hearing against anyone who does not believe in traditional oath-taking due to religious beliefs or personal philosophy/conditions'.[75] To my mind this is what seems to have played out in the case of *Ume v Okoronkwo*[76]

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[64] Section 18(3) of Evidence Act Cap E 14 Laws of the Federation of Nigeria, 2011.
[65] Cap A18 Laws of the Federation of Nigeria 2004.
[66]Cap A18 Laws of the Federation of Nigeria 2004.
[67] [1974] 251; 254 [1974] 4 ECSLR 51.
[68] ibid
[69] *Onyenge v Ebere* (2004) 6 SCNJ 126.
[70] A A Oba, Juju Oaths in Customary Law Arbitration and their Legal Validity in Nigerian Courts, [2008] (52) 1 *Journal of African Law* 157.
[71] *Onyenge v Ebere* (2004) 6 SCNJ 126 143
[72] (1992) 2 N.W.L.R. (Part 249) 561.
[73] Olubayo Oluduro, 'Customary Arbitration in Nigeria: Development and Prospects' [2011] 19 (2) *African Journal of International and Comparative Law*. 325
[74] G. C Nwakoby, The Law and Practice of Commercial Arbitration in Nigeria. (Iyke Ventures Production, 2004).
[75]E O Ekhator, *Traditional Oath-Taking as an Anti-Corruption Strategy in Nigeria*. <https://www.researchgate.net/publication/327544962_Traditional_Oath-Taking_as_an_Anti-Corruption_Strategy_in_Nigeria >accessed Jan 30 2023.
[76] *Ume v Okoronkwo* [1996] 12 SCNJ 404.

> In this case, native arbitrators ordered the defendants to swear to a juju to be produced by the defendants. When eventually the defendants did not produce any juju, the arbitrators declared the plaintiffs the owners of the land in dispute. The Supreme Court affirmed this verdict.

Though the reason given is that once parties agree to be bound by a customary arbitral decision, they cannot resile after a decision has been reached. It is interesting that non production of a juju would be impliedly taken as a recant. In any case how easy is it to procure a juju that a decision would be hinged on its non-production?

In the light of the above inexplicable circumstances, it is important to consider the validity or otherwise of oath taking. On major question is if the juju/deity constitutes a valid judicial authority? Arbitration has to with the settling of disputes between two or more persons by a neutral person who has authority to settle the dispute and such a person is acceptable to the parties as a mediator.[77]The easiest criteria to be met under customary oath taking is the acceptance by the parties, however, it can clearly be seen that a juju is not a person and it is difficult if not impossible to truly ascertain the neutrality of a juju. So, how can the parties challenge the independence and neutrality of the juju or deity?[78] In the case of *Inyang v. Essien*,[79] it was held that or a customary arbitral award to be upheld by the court, the tribunal must be a body of persons having judicial authority. The courts in some other cases have continued to pronounce that submission to elders or chiefs is a requirement for the validity of customary arbitration. The deity has not in any of these circumstances been called an elder or chief. In a Supreme Court matter *Marcus Nwoke and Ors v Ahiwe Okere and Ors*[80] Justice Kutigi, stated something interesting on the position of the true arbiter in customary arbitration involving oath taking. In that case a group made up of local elders, were tasked with resolving the conflict. The appellants presented a juju, and the respondents swore to it that the land was theirs. They adjourned for a full year for the oath to take effect. The elders attested that the respondents had survived the oath on the postponed date, and the land had become theirs in accordance with Igbo tradition. The High Court dismissed the claim made by the respondents, The Court of Appeal upheld the validity of the oath, saying, 'The respondents were estopped by conduct to deny that the appellants were thereby adjudged owners of the land the latter having survived the oath for over a year. The appellant having been led to taking the oath on the 'Ala Obibi' juju provided by the third defendant at great risk to their lives, in the belief that that customary method would settle the dispute.' What is intended to highlight here is Justice Kutigi's comment. He said…

> …the elders did not possess the power of life and death. Only the juju had that power. As it turned out the respondents did not die. It was not their time to die! They were still all alive on the 'judgment date'. The elders again witnessed their survival on the day as set out in Exhibit C so one can safely say that the elders were never arbitrators in the real sense of the word. They were merely witnesses to the oath taking ceremony as well as the survival ceremony. The arbitrator in my view was the 'Ala Obibi' juju which they believed had the power of life and death. My own belief is that nobody died because it was not yet time for anyone to have died. Enough of that.'[81]

So once again it is important to ask, can a juju be an arbitrator? It is my impression that the juju or deity falls short of the expectation of a true arbiter as the parties cannot assert the right given parties in the Arbitration Act.

Furthermore, if it is the fear of the invocation that compelled the parties to speak the absolute truth, one wonders, if fear is the element that evokes truthful compliance, it begs the question does a person fear what he does not believe in? and are discordant native parties united in their belief of native deities? Obviously, the answer is in the negative. One also wonders the mode of operation of these deities in their application of judgement. Do they follow an establish rule of procedure? Do they follow precedents? Are they able to distinguish one case from the other? If there are no answers to these questions, then can it be said that justice has really been done in a case because the parties were made to swear before a deity? In Justice Kutugis further criticism, he highlighted the dangers of considering traditional oathtaking stating that;

> The 'juju' method as cheap and quick as it might appear to have been had [sic] its own disadvantages. For example, you cannot put a 'juju' in the witness box for any purpose. Its activities, methods and procedure would appear to belong to the realm of the unknown even though the effects may be real in the end. The worst of it is that a 'juju' 'judgment' or 'decision' is not subject to an appeal like the one we are witnessing in this suit. So that unless and until the 'juju' descends to the level on which we can all understand its workings, it would be difficult to enforce its 'decisions' in a law court. We have come a long way from the oracle!'[82]

In strict law, it is clear that oath taking under native law and custom would be regarded with suspicion. Certain authorities have repudiated it and refused to accord it any form of legal status and validity describing it as recidivist slide to the old time superstitious fear.[83]

> … a superior, nay, any reasonable and unbiased Court of Record, must be hesitant in accepting what amounted to a judgment by juju – an extra judicial object – unless it is manifestly shown (and there is no such evidence ex facie from Exhibit C) that the party who swore the juju implicitly irretrievably and religiously believed in the excruciating and definitive potency and finality of the juju, and that, in addition, once the Oath is taken the party taking the oath had no means of thwarting or placating its Wrath – were the party to have deliberately and misleadingly sworn falsely on the oath … for the oath to operate as an estoppel per rem judicatam, the form, nature and effect of the oath must be strictly proved ….[84]

[77]F C Amadi, Oath-taking in customary arbitration in Nigeria: Some Reflections on the Supreme Court Decision in *Umeadi v. Chibunze* 2020.
[78] S. 8(3) of the Arbitration and Conciliation Act.
[79] (1957) 2 FSC 39.
[80] [1994] 5 NWLR (pt 343) 159.
[81] [1994] 5 NWLR (pt 343) 159 at 172.
[82][1994] 5 NWLR (pt 343) 159 at 172–73.
[83] *Iwuchukwu v. Anyanwu* (1993) 8NWLR (Pt.311) 307.
[84] (2001) 7 SCNJ 583 at 604.

The correct stance seems to be that a difference must be made between human-led arbitrations and those using juju. If the arbitrators determine that the parties must swear to a juju, the parties are entitled to accept or reject this result. As we will see, however, after the disagreement has been brought to a juju and oaths have been taken, the parties are no longer able to opt out of the process; rather, they must wait for and accept the 'verdict' of the juju. Virtually no town in the nation would accept the parties' ability to opt out of the process after oaths have been taken. Sadly, the Supreme Court has yet to properly recognize this difference.[85]

4. Conclusion

It is submitted that evidence of oath taking should not be determinative of a suit in public courts where the issues relates to title. But where all the parties are pagans and idol worshippers, the court may be entitled to regard the fact and results of the native oath taking as relevant fact which may form a crucial basis of its decision. Nigeria is not subject to a single body of customary law. Different groups each have their own customary practices that are acceptable to and adaptable to their own particular community.[86] Recall that customs differ from place to place, so with the inconsistency of procedure and purpose of oaths it is safe to say that oath taking employed in the use customary arbitration differs from place to place which dampens general understanding of its mode of operation. From the foregoing it can be seen that these customary oaths have no uniformly acceptable code of administration and outcome, and it is unpredictable and generally not understood. With a lot of discretion left in the hands of the administering chief priest who is not subjected to a code of conduct. Though, these procedures are part and parcel of the traditional systems of evidence, and they have been recognized and upheld by the courts, it is however important for the courts to examine if oath taking is still the custom of the people, noting the progressive nature of custom. The courts should boldly do away with customs that are repressive after all, some of the customs that are to be subject of adjudication have either been declared by the court as inconsistent with the pillars of natural justice equity and good conscience or have evolved with time as such, the cannot be applied no matter the relief sought by the parties.[87]

On the application of oath taking as proof of ownership, bearing in mind the importance of land under native law and custom, and the value attached to land, and the fact that land transcends through generations, past, present and countless unborn. Should the future generations lose their heritage because someone subjected them to unverifiable mode of proof of land ownership? It is humbly submitted that the onus of proof for things which transcends generations should be higher and oaths should be binding on parties with regards to their personal properties. In view of the preceding, one would suggest that courts should not accept the issue of oath-taking without reservation. It is important that such adjudication and finality should be limited to personal property and a higher burden should be used to proof sacred property that should transcend generations. This is indeed why the onus of proof in criminal matters is of a standard, beyond reasonable doubt whereas in civil cases on a preponderance of evidence. Meaning when the stakes are high, the standard of proof should also be high. It is important that when posterity judges, it should be seen that a reasonable standard of justice was employed in a matter of importance that goes past generations. It is also a culture that devalues human life that will condone or advocate, extreme measures as fatality as punishment for a lie. Justice should seek commensurate punishment for the crime or the wrong. Not aim to use a sledgehammer to kill a fly. Besides it is an illegality law for anyone to bargain his life. [88] It is suggested that the illegality of oath taking be looked into and the criminalization of it be considered, as such repugnant customs is the reason the colonial judicial system gained superiority over the native laws and customs in the first place. Finally, patronage of oath taking should be a call to fix the judicial system and arbitral system run by professionals. Man without rules, when separated from law and justice, reverts to his state of nature and is the worst of animals.[89]Oath taking will lead to injustice as it will subject innocent parties to a series of inexplicable events and consequences.

[85] A A Oba, Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts, [2008] 52 (1) Journal *of African Law*, 139–158.
[86] *ibid*
[87] Mbiti, *African Religious and Philosophy* (Heineman London, 1969) 173.
[88] Constitution
[89] Sabine, *A History of Political Theory* (Dryden Press, 1973) 78.