

PRE-COLONIAL LEGAL SYSTEM IN AFRICA: AN ASSESSMENT OF INDIGENOUS LAWS OF BENIN KINGDOM BEFORE 1897

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Abstract

There were salient novelties in the legal system of the Benin Kingdom and other areas in pre-colonial Africa that promoted justice, peace, and order among people and communities. Special provisions such as collective responsibility in legal personality, the law of primogeniture, the fusion of laws and religion in theory and practice, and the recognition of societal status and political position in legal proceedings amongst other legal concepts were incorporated into the body of laws in Benin. Previous intellectual efforts center on the political, economic, and social aspects of history, largely neglecting these legal dynamics and other vital areas of the kingdom's organization. Hence, this study analyzes indigenous legal concepts in the Benin Kingdom using several varieties of primary and secondary sources. It contends that Benin, like other African societies, developed practical and useful legal concepts that helped in the consolidation of peace and harmony throughout its length and breadth, and that these indigenous Benin legal concepts were in force till 1897.

Keywords: Indigenous Laws, Benin, Collective Responsibility, Individual Responsibility, Religious law, Law of Primogeniture

Introduction

This study is based on the idea that there were special provisions in the laws of the Benin Kingdom and other areas in pre-colonial Africa that promoted societal peace and harmony. The Benin Kingdom was a powerful state in West Africa between the twelfth and nineteenth centuries and it is one of the most discussed in contemporary European writings.¹ Gaps in the academic literature on the Benin Kingdom abound, especially from the perspective of pre-colonial legal history. For example, the major aspect of Benin legal history on which there are various academic materials is the over-flogged Igiogbe controversy.² However, there has been some research conducted on the Benin legal system and indigenous laws during the colonial and postcolonial eras. Academics including historian Philip Igbafe,³ anthropologist Flora Kaplan,⁴ and historian Frank Ikponmwosa and Ali Evbayiro (Linguistics)⁵ among other scholars have carried out studies on native administration and native courts during the colonial era, although leaving out special laws in the kingdom's history. Thus, there are significant lacunae in the academic materials on African legal history. This relates in a large part to the unwritten or undocumented nature of laws in pre-colonial Africa. According to comparative law professor Richard Opong, "African legal

¹ See Benson Osadolor, "The Military System of Benin Kingdom, c. 1440-1897," (PhD diss., University of Hamburg, Germany 2001), 2 and Alan Ryder, *Benin and the Europeans, 1485-1897* (Harlow: Longmans, 1977).

² However, see Rufus A. Ogbobine, *Materials and Cases in Benin Land Law* (Benin City: Midwest Newspaper Corporation, 1974); "Igiogbe/Property Inheritance Law Controversy," *Benin Studies Newsletter* 3, no.1 (May-August 1998): 1; Solo Eghobamien, "Idehen Vs Idehen Revisited," *Benin Studies Newsletter* 3, no.1 (May-August 1998): 2-3; Nosa Osarunmwense, "Re: Idehen vs Idehen Revisited," *Benin Studies Newsletter* 3, no.1 (May-August 1998): 3-4; Ernest Ugiagbe, Kokunre Eghafona and Tracy B.E. Omorogiuwa, "An Evaluation of the Principles of Primogeniture and Inheritance Laws among the Benin People of Edo State," *Journal of Family History* 32, no.1 (2007): 90-101; Felix Oghi, "Conflict Resolution in Pre-colonial Benin," *Global Journal of Human-Social Science: History, Archaeology and Anthropology* 14, no.6 (2004): 6-14; and Paula Girshick and John Thornton, "Civil War in the Kingdom of Benin, 1689–1721: Continuity or Political Change?" *The Journal of African History* 42, no.3 (2001): 353-376.

³ Philip Igbafe, "British Rule in Benin 1897-1920: Direct or Indirect?" *Journal of the Historical Society of Nigeria* 3, no.4 (1967): 701-717.

⁴ Flora Kaplan, "Runaway Wives: Native Law and Custom in Benin, and Early Colonial Courts, Nigeria," *Annals of the New York Academy of Sciences* 810, no. 1 (1997): 245-313.

⁵ Frank Ikponmwosa and Ali Evbayiro, "The Native Courts System in Benin Division 1900-1945," *University of Benin Journal of Humanities* 5, no.1 (2017): 154.

history is still virgin academic territory."⁶ This is especially true of the pre-colonial legal history of Benin, which has been under-researched from an African legal history perspective.⁷ Hence, this study aims to contribute to the academic field of African legal history by critically analyzing some special provisions in the laws of pre-colonial Benin.

This article contends that the people of the pre-colonial Benin kingdom developed legal concepts that were well thought out, practicable, and immensely useful in the consolidation of peace and harmony both in the kingdom and the empire in general. A closer examination of these legal concepts reveals that they were designed to fit economic, polytheistic, and other characteristics of Benin society at the time. For example, the interconnected nature of religion and law was evident in the Benin Kingdom because the Benin people were highly religious, and religion formed the basis of culture and government. Religious laws of the kingdom were resolutely tied to judicial laws making religious practice inseparable from law.

This study is divided into nine sections. Following this introduction is the second section that focuses on the methodology and justifies this study's reliance on oral traditions, linguistic evidence, and secondary sources in its analysis. The third part of the paper briefly provides a background to pre-colonial Benin and highlights its social and political institutions. The fourth part discusses collective responsibility as enshrined in the laws of the Kingdom. The fifth part discusses the intermingling of religious and state matters under indigenous laws in Benin, while the sixth part gives an overview of the law of primogeniture. The seventh part of the study discusses laws against rough justice and the eighth section dwells on the recognition or importance of societal status in the judicial process in pre-colonial Benin. The ninth part concludes the paper.

⁶ Richard Oppong, "Private International Law in Africa: The Past, Present, and Future," *The American Journal of Comparative Law* 55, no. 4 (2007): 687. Also see Jay Gordon, "African Law and the Historian," *The Journal of African History* 8, no.2 (1967): 335-340

⁷ However, there has been a recent explosion of academic materials on African legal history from an international law perspective. See Jakob Zollmann, "African International Legal Histories—International Law in Africa: Perspectives and Possibilities," *Leiden Journal of International Law* 31, no.4 (2018): 897-914; Jeremy Levitt, "The African Origins of International Law: Myth or Reality," *UCLA Journal of International Legal Foreign Affairs*, 19 (2015): 113; Bonny Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (New York: State University of New York Press, 2008). Ibhawoh discusses human rights from an African (including pre-colonial) perspective.

Methodology

This essay relies primarily on oral interviews and oral traditions, and such secondary materials as academic articles and books in its analysis. Arguably, Western legal history methodologies will not be appropriate for the type of research conducted in this study. However, Western military history scholarship increasingly relies on oral historical methodology.⁸ The foundations of modern legal history (from a western legal perspective) started at the end of the 19th century and early years of the 20th century.⁹ Western legal history is primarily focused on the analysis of written texts such as printed case law and medieval legal archives or sources amongst others.¹⁰ Indigenous pre-colonial laws were mainly unwritten because many African kingdoms (including Benin) did not have a writing system or literate culture.¹¹ In present day Nigeria, customary law is one of the sources of the Nigerian legal system and generally, it is said to be unwritten as opposed to English law which is written.¹² Despite that much modern or post-colonial customary law is unwritten in Nigeria and other parts of Africa, there has been a rising body of “treatises and court decisions setting down customary rules of law as the authors judge them to be. Therefore, it is now much easier to state the rule of customary law on a particular issue.”¹³ Hence,

⁸ See Stephen Morillo and Michael Pavkovic, *What is Military History?* (Cambridge: Polity Press, 2017).

⁹ Two writers in particular set the agenda: Frederic William Maitland, Downing Professor at Cambridge, in England, and James Barr Ames, Dane Professor at Harvard, in the United States, according to David Ibbetson, "Historical research in law," in *The Oxford Handbook of Legal Studies*, eds. Mark Tushnet and Peter Cane (Oxford: Oxford University Press, 2005), 864. See also David Ibbetson, "What is legal history a history of?" in *Law and History: Current Legal Issues 2003 vol. 6*, eds. Andrew Lewis and Michael Lobban (Oxford: Oxford University Press, 2004), 33.

¹⁰ Maitland, one of the pioneers of historical legal research in England “...pioneered the use of Plea Rolls—the records of the central courts of common law from the end of the twelfth century onwards—as well as moving outside the traditional sources of (legal) authority into such materials as private charters.” Ibbetson, "Historical research in law," 865.

¹¹ See Modibo Ocran, "The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa," *Akron Law Review* 39, no. 2 (2006): 465-481 and Eghosa Ekhaton, "Precolonial Legal System in Africa: Preliminary thoughts on Benin Kingdom," (Conference Paper, African Studies Association of the UK (ASAUK) Biennial Conference, University of Birmingham 11-13 September 2018).

¹² See Eghosa Ekhaton, "Traditional oath-taking as an anti-corruption strategy in Nigeria," in *Combating the Challenges of Corruption in Nigeria: A Multidisciplinary Conversation*, ed. Akogwu Agada (Awka, Nigeria: Black Towers Publishers, 2019), 323-324; Philip Oamen and President Aigbokhan, "Customary Law Arbitration in Nigeria: An Appraisal of Contending Legal Issues," *Benin Bar Journal* 1, no.1 (2018): 214-247.

¹³ Ocran, "The Clash of Legal Cultures," 467; See also Abdulmumini Oba who notes that "Writing is now recognized in customary transactions. Some customs are now contained in statutory declarations" in Abdulmumini Oba, "The administration of customary law in a post-colonial Nigerian state," *Cambrian Law Review* 37 (2006): 97.

western legal history methods can be used to analyze colonial and post-colonial customary laws in Nigeria.¹⁴ For example, Ibhawoh analyzed caselaw arising from the Judicial Committee of the Privy Council, colonial regional appeal courts for West Africa and East Africa in his book.¹⁵ Some scholars have also analyzed native courts and customary courts in the colonial and postcolonial eras in Nigeria.¹⁶ However, it will be difficult to rely on the methods of western legal history for the analysis of pre-colonial laws in Africa. Therefore, this paper relies on the use of oral interviews, oral traditions (including proverbs) and analysis of secondary materials such as books, articles, and reports, among others.¹⁷

Benin oral traditions are of “good grounds criterion of knowledge especially as they reflect the identity and knowledge of the Benin people, and also serve as their collective memory.”¹⁸ Even though reliance on oral history has been subject to strident criticisms, it remains valid and credible. Early researchers on Benin history such as Joseph Egharevba and R.E. Bradbury relied extensively on oral traditions.¹⁹ The use of archival materials or documents also would have been useful. Moreover, Samuel Daly contends that “the sources of post-colonial African history are increasingly found outside of state archives.”²⁰ However, we were unable to utilize or rely on archival materials due to time and funding constraints. Egharevba extensively relied on oral

¹⁴ See Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford: Oxford University Press, 2013). The methodology used in this book was an analysis of selected landmark cases and reliance on archives.

¹⁵ Ibhawoh, “Imperial Justice,” 4.

¹⁶ See Kaplan, “Runaway Wives” and Ikponmwosa and Evbayiro, “Native Courts.” Also, some scholars have analyzed the intellectual property law dimensions of the art of Benin bronze casting in modern-day Nigeria. See Desmond Oriakhogba and Alero Fenemigho, “Exploring the Intellectual Property, Traditional Cultural Expression, and Gender Dimensions of the Benin Bronze Casting Art: An Agenda for Research” in *National Development and Human Security*, eds. F.F.O. Orunmwense *et al.* (Benin: Uniben Press, 2019): Chapter 3.

¹⁷ Due to the largely unwritten nature of indigenous law in Africa, Agbakoba and Nwauche writing about the Igbo indigenous legal system state: “Consequently, the legal philosopher has to rely on the interpretation and evaluation of oral sources such as proverbs, myths, legends, and customs, institutions and practices of the people.” Joseph Agbakoba and Enyinna Nwauche, “African conceptions of justice, responsibility and punishment, *Cambrian Law Review* 37 (2006): 73. This is akin to what Professor Falola has referred to as “ritual archives,” that is, “the conglomeration of words as well as texts, ideas, symbols, shrines, images, performances, and indeed objects that document as well as speak to those religious experiences and practises that allow us to understand the African world through various bodies of philosophies, literatures, languages, histories and much more.” Toyin Falola, “Ritual Archives” in *The Palgrave Handbook of African Philosophy*, Adeshina Afolayan and Toyin Falola, eds. (New York: Springer Nature, 2017), 703.

¹⁸ Osadolor, “Military System,” 32.

¹⁹ Girshick and Thornton, “Civil War,” 355

²⁰ Samuel Daly, “Archival Research in Africa,” *African Affairs* 116, no. 463 (2017): 311-320.

informants in many of his publications and several of the oral traditions as discussed by Egharevba were subsequently confirmed by writers such as Ryder and Bradbury via unpublished documentary evidence which was independent of Egharevba's writing.²¹ However, anthropologist Paula Ben-Amos Girshick and historian John Thornton assert that due to the fact that Ryder and Bradbury privileged the oral tradition version as exemplified in Egharevba's works, even when there were discrepancies, they (Ryder and Bradbury) posited that these omissions or discrepancies were minor or observer errors.²² Hence, Girshick and Thornton's reinterpretation of Benin history places "more emphasis on documentary evidence and re-examines the raw traditional data that Egharevba used. The documentary sources have the advantage of being contemporary to the events they describe and are mostly the work of eyewitnesses."²³ Notwithstanding the criticisms of oral traditions or oral historical methodology, "in West Africa, history is an oral genre, held and recounted by professional historians known as praise singers, or griots, whose patrons ask them to sing important histories at key public events and commemorations."²⁴ Benin kingdom is not an exception. Thus, the reliance on oral traditions and oral interviews in this study is valid and justified.²⁵

Brief History of Benin Kingdom

The Benin Kingdom was one of the most important states in the forest region of West Africa in the pre-colonial era. Benin was a recurring topic in contemporary Western or European writing.²⁶

²¹ Girshick and Thornton, "Civil War" 355. Generally, see Uyilawa Usuanlele, and Toyin Falola, "The Scholarship of Jacob Egharevba of Benin," *History in Africa* 21 (1994): 303-318 for analysis of some of Egharevba's publications.

²² Girshick and Thornton, "Civil War," 355.

²³ Girshick and Thornton, "Civil War," 355.

²⁴ Furthermore, Toby Green states that "Oral accounts offer the experience of history, the importance of the past in present memory and a sense of what may have been socially meaningful in distant times. They also offer an incomparable window on to the way that history was performed, its sounds and textures, and what is meant for ordinary men and women. Perhaps most significantly, they offer a different model of history, one that can challenge the dominance of traditional model which have misrepresented the African past." Toby Green, *A Fistful of Shells* (UK: Penguin, 2019), xxi-xxii.

²⁵ See Ruth Finnegan, "A note on oral tradition and historical evidence," *History and Theory* 9, no. 2 (1970): 195-201.

²⁶ Osadolor, "Military System," 2.

According to Osadolor, some of Benin's attributes included "organised form of decision-making and governance; sovereign or supreme authority; clearly defined boundaries; clearly defined population; and security for the society."²⁷ Furthermore, the Benin Kingdom had over 1,400 years of uninterrupted history to develop a well-formulated civilization that encapsulated the way of life, and indeed, the panoramic view of the people.²⁸ While outstanding successes were observed in varied aspects of culture such as law, art, administration, medicine, and architecture, the system was open to influences from nearby kingdoms or groups as well as foreign influences from the Portuguese and other European countries.²⁹ Hence, the Benin Kingdom was one of the most successful and developed "states" in pre-colonial Africa.³⁰

The Benin kingdom was the first place to be visited by European explorers in Black Africa. Victor Osaro Edo and Idahosa Osagie Ojo report that it is noteworthy that the Portuguese missionary attempts of the later fifteenth and early sixteenth centuries resulted in the baptism of some of the chiefs of the Oba and his son in 1538 and that earlier in 1516, they founded a church in the capital city and taught the king's eldest son and two important chiefs how to read.³¹ The first Catholic churches (in what is now the present-day Nigeria) were established in the Benin Kingdom by the Portuguese in the 16th century.³² Firearms were also introduced to the Benin Kingdom by the Portuguese in the 16th century.³³ Also, the Benin Kingdom had ambassadors

²⁷ Osadolor, "Military System," 4.

²⁸ Eghosa Osagie, *Benin in Contemporary Nigeria: An Agenda for the Twenty-first Century*, Vol. 1 (Benin City: Institute for Benin Studies, 1999). Also available online at: [BENIN IN CONTEMPORARY NIGERIA \(edo-nation.net\)](http://BENIN_IN_CONTEMPORARY_NIGERIA(edo-nation.net))

²⁹ Peter Ekeh, "Benin, the Western Niger Delta, and the Development of the Atlantic World," *Umewaen: Journal of Benin and Edo Studies* 1 (2016): 4-41.

³⁰ See Gbenga Oduntan, "Legal and Evidential Implications of Emerging Satellite Imagery of Ancient African Relict Boundaries," *Chinese Journal of International Law* 16, no.1 (2017): 77-108.

³¹ Osaro Victor Edo and Idahosa Osagie Ojo, "Benin Traditional Religious Practices: Origin of Worship at Holy Aruosa Cathedral in Benin" in *The Benin Monarchy: An Anthology of Benin History*, ed. Oriiz Onuwaje (Benin City: Alizarin Crimson, 2017): 179.

³² Robert Bradbury, *The Benin Kingdom and the Edo-Speaking Peoples of South-Western Nigeria: Western Africa* (London: International African Institute, 1957), 20.

³³ Bradbury, "The Benin Kingdom," 20. However, see Ekeh who argues that the Portuguese did not provide firearms to the Benin Kingdom, "Benin and Western Niger Delta," 18.

posted to Portugal in this era.³⁴ According to David Olusoga, “it was Benin, of all African Kingdoms with which the Europeans traded in the sixteenth century, that the traders found most impressive.”³⁵

Unfortunately, the incursion of British colonial control over Benin affected its sovereignty. In the 19th century, Britain entered treaties with many African kingdoms and many of these treaties were crafted to cede sovereignty from the kingdoms or kings to the British colonialists.³⁶ The British did not consider the African kingdoms as equal partners in international relations in the 19th century. This reflected the Eurocentric racist ideology of the 19th and early 20th centuries that influenced the scholarship in international law and was perpetuated by Western scholars and colonial administrators. These scholars and administrators believed that Africans were not “civilized” and therefore, African kingdoms were not “subjects” of international law.³⁷ Hence, Africa was excluded from the development of mainstream international law in that era. Furthermore, Elias stated that African rulers were “styled ‘kings’ before the execution of the treaties, but more often regarded or treated for all practical purposes thereafter as ‘chiefs’ only, implying that they had full sovereign powers to sign the treaties which ipso facto turned them into subordinates of the new sovereigns.”³⁸ Thus, the “signing” of the Treaty of Benin with the British on March 26, 1892 was the beginning of the end of the sovereignty of the Benin kingdom and this became total in 1897 when the British invaded the kingdom of Benin.³⁹ The political

³⁴ Generally, see Ryder, “Benin and the Europeans,” 30 for a discussion of the diplomatic relations between Benin Kingdom and Western/European countries. Also see Ekhaguosa Aisien, *Ewuare: The Oba of Benin* (Aisien Publishers, 2012), 68.

³⁵ David Olusoga, *Black and British: A forgotten history* (London: Pan Macmillan, 2016), 49.

³⁶ See Akin Oyebo, “The 1892 British-Benin Treaty: Legal and Diplomatic Implications for Contemporary Nigeria,” (Paper presented at the 10th Jacob Egharevba Memorial Lecture in Benin, November 2008).

³⁷ See Dakas, C. Dakas “Interrogating Colonialism: Bakassi, the Colonial Question and the Imperative of Exorcising the Ghost of Eurocentric International Law,” in *Nigerian Yearbook of International Law 2017* (Switzerland: Springer, 2018), 113-141. See also Babatunde Fagbayibo, “Studying the past in present tense: International law in the Benin Empire” (unpublished paper on file with authors) who “looks at the practise of internationality in the Benin Empire, which was one of the most formidable pre-colonial African Kingdoms.”

³⁸ Taslim Elias, “International Relations in Africa: A Historical Survey,” in *African International History*, ed. A.K. Mensah-Brown (United Nations Institute for Training and Research, 1975), 98. Cited in Oyebo, “The 1892 British-Benin Treaty,” 9.

³⁹ For an incisive analysis of the treaty, see Oyebo, “The 1892 British-Benin Treaty,” *passim*.

independence and sovereignty of Benin was terminated in 1897 and this led to the destruction of its traditional or indigenous system of government.

Political structures in pre-colonial Benin comprised the Oba, the Enogie (village heads) and the Ekhaevben (chiefs or title holders) of different categories.⁴⁰ While the Oba oversaw the entire kingdom, at the District and Village level, he was aided by the Enogie and the titled chiefs who had distinct functions or responsibilities allocated to them.⁴¹ Hence, officials in the political or administrative structure of the Benin kingdom were the holders of titles (*egie*).⁴² Furthermore, a small number of these titles were hereditary (*egie-asegbere*).⁴³ The three major categories of title holders administering Benin have been the Uzama n’ihinron (seven Uzama), the Eghaevbo n’Ogbe (palace chiefs), and the Eghaevbo n’Ore (town chiefs).⁴⁴

The Oba was both head of state and head of government in pre-colonial Benin. He epitomized the judicial, legislative, and executive powers of the Benin kingdom. However, Girshick and Thornton argue that the civil war in the Kingdom in the 17th century fundamentally altered the powers of the Oba.⁴⁵ They aver that before 1640, Benin was centrally governed by the Oba with the support of royally appointed officials.⁴⁶ However, the ensuing “civil war matched different levels of the administration and the kings against each other, and transformed Benin from a centrally governed to a more collectively governed kingdom.”⁴⁷ Even though the Benin kingdom operated a centralized political system in the pre-colonial era in which the Oba was at the apex, there were built-in political checks and balances on the Oba’s authority.⁴⁸ The use of checks and balances as a counterpoint to the authority of the monarchs was not limited to pre-colonial Benin. Edo argues that in many pre-colonial kingdoms (in present day Nigeria), despite views to the contrary, embedded democratic features (such as checks and balances) were

⁴⁰ Oghi, “Conflict Resolution, 7.

⁴¹ Oghi, “Conflict Resolution,” 7.

⁴² Girshick and Thornton, “Civil War,” 356.

⁴³ Girshick and Thornton, “Civil War,” 356.

⁴⁴ Girshick and Thornton, “Civil War,” 356.

⁴⁵ Girshick and Thornton, “Civil War,” 353.

⁴⁶ Girshick and Thornton, “Civil War,” 353.

⁴⁷ Girshick and Thornton, “Civil War,” 353.

⁴⁸ According to Bradbury, “the *Oba* was the official source of all legislation and state policy; he alone could take the decision to prosecute a war and all national campaigns were carried out in his name” (*The Benin Kingdom*, 42).

present in the political and administrative systems.⁴⁹ Furthermore, contrary to the ethnocentric view that pre-colonial Africa had no form of governance,⁵⁰ “African societies have always had a form of governance peculiar to them, and which operated in accordance with their traditions and belief systems.”⁵¹ In pre-colonial Benin, the three major groups of titleholders or chiefs acted as checks on the powers exercised by the Oba.⁵² Hence, “the most important political and ceremonial offices in the Benin Kingdom are linked with chiefly titles (*egie*) of which there are a very large number, organized into a complex system of grades and ranks.”⁵³ The Uzama are seven in number. They are said to be the earliest and highest-ranking order of chiefs.⁵⁴ They perform political functions, but their main duty as a body is the installation or crowning of a new Oba.⁵⁵ The Ezomo, also a member of the Uzama, is said to wage or conduct war on behalf of the Oba.⁵⁶ Thus, the Uzama played (and continues to play) an indispensable role in the political administration of Benin Kingdom.

Furthermore, this paper adopts Justice Ocran’s definition of indigenous law in pre-colonial Africa.⁵⁷ According to Justice Ocran,

Indigenous or customary law in pre-colonial Africa is simply defined as rules of custom, morality, and religion that the indigenous people of a given locality view as enforceable either by the central political system or authority, in the case of very serious forms of misconduct, or by various social units such as the family.⁵⁸

⁴⁹ Victor Edo, “The Practice of Democracy in Nigeria: The Pre-Colonial Antecedent,” *LUMINA* 21, no. 2 (2010):1-7. A good example is the role of the Oyomesi in the old Oyo Empire.

⁵⁰ John Westlake, *Chapters on the Principles of International Law* (Cambridge, Cambridge University Press, 1894) 149. Cited in Dakas, “Interrogating Colonialism” 118.

⁵¹ Funmi Abioye, “The Rule of Law in English-speaking African Countries: The Case of Nigeria and South Africa,” (PhD diss., University of Pretoria, South Africa, 2011), 23.

⁵² Bradbury, “The Benin Kingdom,” 44.

⁵³ Bradbury, “The Benin Kingdom,” 35.

⁵⁴ Bradbury, “The Benin Kingdom,” 35.

⁵⁵ Bradbury, “The Benin Kingdom,” 36.

⁵⁶ Bradbury, “The Benin Kingdom,” 36.

⁵⁷ Ocran, “The Clash of Legal Cultures.”

⁵⁸ Ocran, “The Clash of Legal Cultures,” 467. Also, Kaplan defines indigenous law in the Benin Kingdom as “it refers as well to the informal cultural system of normative behavior and its sanctions that constituted ‘native law and custom’ that was widely practiced among the Edo speaking peoples.” Kaplan, “Runaway Wives,” 247.

Collective Responsibility in Legal Personality

Individual and collective responsibility cuts across different legal systems including Western and African indigenous law or traditional African legal thought. For example, under English law, a legal person is an “individual personality or a body corporate.”⁵⁹ In African indigenous law, including the Yoruba indigenous legal system, group legal personality may trump the individual legal personality.⁶⁰ Pre-colonial Benin is no exception and collective responsibility is central to Benin’s indigenous legal system.

There were several salient novelties in the law of the Benin kingdom that promoted justice and the consolidation of peace and order. The recognition of group or collective responsibility in legal personality is an example of such a novelty, particularly when accountability is demanded of a litigant or suspect.⁶¹ In pre-colonial Benin, even to date, legal personality is so broad that the law imposed collective responsibility on the extended family and close friends. The rationale behind this collective responsibility was to ensure a continuous, harmonious relationship among all the members of the community as a corporate body. It also became necessary because interdependence among the people was so strong that much was shared, making it nearly impossible to isolate the individual. The family members of a deviant and others close to him were, therefore, held accountable for his actions and treated as his guarantors.” This is evidenced in the Benin adage, “*ekhue mu oyi vbe no mueo etioen*” translated as “the thief is

⁵⁹ Lukman Ayinla, "African Philosophy of Law: A Critique." *Journal of International Comparative Law* 6 (2002): 155. However, Professor Nnona argues that customary corporate law existed in pre-colonial Africa. He avers thus “...pre-colonial customary law created and regulated corporations and that customary corporate law, which is clearly now in disuse, can be rejuvenated by the customary law process to great advantage for corporate law, the broader customary law process and beyond.” George Nnona, "Customary Corporate Law in Common Law Africa," *The American Journal of Comparative Law* 66, no. 3 (2018): 640.

⁶⁰ Ayinla, “African Philosophy of Law.” See also Motsamai Molefe who states that “One of the outstanding debates in African philosophy involves accounting for the relationship between the individual and community. The debate precisely resides on the questions whether (1) the community takes priority over the individual or (2) the individual takes priority over the community.” Motsamai Molefe, "Solving the Conundrum of African Philosophy Through Personhood: The Individual or Community?" *The Journal of Value Inquiry*, 54, no. 1 (2020): 41.

⁶¹ See Ifeanyi Menkiti, "Person and Community in African Traditional Thought," *African Philosophy: An Introduction*, 3 (1984): 171-182 for discussion of personhood in African traditional thought.

not as ashamed as his brethren.”⁶² Thus, biological relations, friends, entire households and even property, whether animate or inanimate, shared in the guilt of a person including his punishment and required atonement. This makes sense when it is considered against the fact that the “pollution of the individual” is recognized and treated as the pollution of those related to that individual whether they are “human beings, animals or material goods.”⁶³ Also, since society was not purely individualistic but shared several collective features to such a degree that the individual was always connected to those in proximity and, by extension, to other members of society. It therefore would make no sense to purge him of his sins and ignore other members of society who were tightly bound to him.

Laws in Benin entwined legal personalities of the individuals among his close relatives and associates and “presupposes collective responsibility and a kind of interdependence” among them.⁶⁴ It was quite common in pre-colonial Benin society for a dispute to involve not only the direct parties to the incident which caused it, but also the family or relatives of the immediate parties.⁶⁵ Thus, a member of a family might incur a legal penalty or even suffer indignity when a relation was involved in a scandal. The laws of the Kingdom allowed the relevant arms of the justice system to seize someone’s goat or any other livestock to appease the Gods for the desecrations or sacrileges of close relatives or pay the fine imposed on them by the authorities.⁶⁶ Thus, it was a common practice for a law-abiding person to atone for the crime(s) of a deviant when the latter had insufficient economic means and was closely related to the former or shared the same household.

The practice whereby people were held responsible and made to account for delinquent behavior of their close relatives was not peculiar to the Benin people. It was a common practice among various peoples of the pre-colonial era. Adewoye observes that generally in Africa, “a

⁶² Oral Interview conducted with Iseherhien Eghaghe, a farmer and the Odionwere of Iguohoho, age 83 at his residence in Iguohoho Town, Ovia North East Local Government Area, Edo State, May 2, 2011.

⁶³ Ayinla, “African philosophy of Law,” 155.

⁶⁴ Ayinla, “African philosophy of Law,” 155.

⁶⁵ Ayinla, “African philosophy of Law,” 155.

⁶⁶ Oral interview conducted with Idahosa Idemudia (Born March 1950), the Odionwere of Oke-Oghohon Village, Ovia North East Local Government Area, Edo State held at his house, in Oke-Oghohon, September 10, 2020.

family unit took collective responsibility for the conduct of its members' and he added that "this fact was evident both in civil and criminal cases."⁶⁷ In the case of murder in many pre-colonial African societies, the punishment could also be meted out to close relatives unless the murderer or some other member of his family paid adequate compensation or made the necessary sacrifices. When describing the pre-British punishment procedure in Southern Nigerian, a British administrative officer reported that "most violations of peace and order were not punished on the individual so much as on his family."⁶⁸ In the case of Benin, even if the offender died, the living close relatives could be made to atone for his crimes. The authorities in the family justice system, the Oba's courts, and, in fact, all pre-British judicial authorities in Benin, could punish any heir for the offence of a deceased parent even, if the offence were discovered after the death of the offender. This is in line with the explanation or clarification in relation to adultery provided by Idahosa Idemudia. Should anyone commit adultery and die, their close relatives are still expected to perform the proper rituals of atonement. Also, if a man desecrated the elders, the gods, or any holy place and died as a result, the eldest son had to atone for it.⁶⁹ Although, these laws were not written, they were well known among the practitioners and were sometimes very rigid.

This provision for collective responsibility in the laws of the Kingdom also compelled everyone to assist in bringing a culprit to justice, and it would be regarded as morally reprehensible for anyone to overlook a known and obvious disturber of the social equilibrium in the society. Such oversight might in certain circumstances implicate the persons known to have so shielded a culprit, who, if not punished to deter others, could become a spoke in society's wheel of progress. If a grave offence, such as theft, libel, or assault were committed openly, the parties present were mandated by the laws of the kingdom to raise alarm, with a view to apprehending the criminal and taking him to trial.⁷⁰ Elias observes that:

⁶⁷ Omoniyi Adewoye, *The Judicial System in Southern Nigeria, 1854-1954: Law and Justice in a Dependency* (London: Longman, 1977), 6.

⁶⁸ Adewoye, "The Judicial System," 6.

⁶⁹ Idahosa Idemudia, Oral interview, September 10, 2020.

⁷⁰ Taslim Elias, *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956), 215.

in addition to this general responsibility of members of the community for the due apprehension of a criminal, many African societies with strong political organisations, administrative machinery and military force have developed a system of public functionaries who perform a variety of police duties, including the forcible production of recalcitrant offenders before the king or paramount chief.⁷¹

In civil disputes, members of a family had to ensure the attendance of one of their members who involved in a case to answer at the village court. If a suspect fled from the community, members of the family, including the extended family, could be called upon to pay any fines or damages incurred.⁷² With all the parties present, examination and cross-examination of them and other interested parties and witnesses normally ensued. Furthermore, opportunity was given to the judges or interlocutors to ask questions designed to clarify issues and keep all parties and witnesses to the salient points in the case.⁷³ The model for resolving a case among Benin people is aptly described by the Benin proverb that states *Ya ru egbe ghe ẹ re a ya bu ohiẹn nẹ Edo* – meaning “put yourself in the position of the belligerents concerned.”

The pre-British justice system in Benin also allowed *Iyoha*, an economic principle where “debtors offered their children or close relations as a pledge for their debts.”⁷⁴ The *Iyoha* contract, and other similar contracts, were embedded in the Benin justice system. Such contracts were fully recognized by law, which also specified how the money could be retrieved should the culprit fail to redeem his pledge.⁷⁵ Philip Igbafe reports that, if a culprit failed to pay his fine, his

⁷¹ Elias, *The Nature of African Customary Law*, 216.

⁷² Adewoye, “The Judicial System,” 6.

⁷³ Elias, *The Nature of African Customary Law*, 248.

⁷⁴ Philip Igbafe, “Slavery and Emancipation in Benin, 1897-1945,” *Journal of African History* 16, no. 3 (1975): 409-429, 414. See also Philip Igbafe, *Benin under British Administration: The Impact of Colonial Rule on an African Kingdom, 1897-1938* (London: Longman, 1979), 30.

⁷⁵ See also Paul Lovejoy, “Pawnship, Debt, and ‘Freedom’ in Atlantic Africa during the era of the Slave Trade: A Reassessment,” *The Journal of African History* 55, no.1 (2014): 55 who states: “Contrary to the assumptions of some

livestock or that of his family members would be seized. In the event of non-payment and where neither he nor his family possessed livestock, he was sent to Benin where he was detained in the Oba's prison for a specified period during which time he was forced to render obligatory services to the Oba.⁷⁶ Among the Igbo and several other groups during pre-colonial times, "a creditor who failed to recover his money from a debtor could go to the compound of any of the debtor's relatives and capture goats or any other valuable property equivalent to or exceeding the value of the debt."⁷⁷

This principle of collective responsibility as recognized by indigenous Benin law renders the people related biologically or otherwise to act as watchdogs in checking the activities of one another. Arguably, it strengthened kinship solidarity among Benin people, and minimized or prevented crimes. This idea of the whole family suffering for the crime of one of its members was "probably the strongest deterrent against crimes."⁷⁸ Everyone monitored the behavior of other members of society, and this helped the entire populace to adhere to legal and civic responsibilities. Obviously, collective responsibility as practiced in the Kingdom made policing easier, deviant behavior rarer, and the society more peaceful. It also empowered every member of society to be active in the justice system. Since deviant characters were not shielded, criminality was reduced to the bare minimum. There is strong evidence that "enforcement of peace and order was the responsibility of everyone" in pre-colonial Benin, ensuring peaceful dealings, enforcing market rules, and helping to avoid bitter disputes.⁷⁹ This position is supported by Jacob Egharevba who asserts that if there was fighting or quarrelling, anyone could pronounce

scholars, pawnship was not related to poverty and enslavement for debt but rather to commercial liquidity and the mechanisms by which funds were acquired to promote trade or to cover the expenses of funerals, weddings, and religious obligations."

⁷⁶ Igbafe, "Slavery and Emancipation." 415. See also Uyilawa Usuanlele, "Pawnship in Edo Society: From Benin Kingdom to Benin Province under Colonial Rule" in *Pawnship, Slavery and Colonialism in Africa*, eds. Toyin Falola and Paul Lovejoy (Trenton, New Jersey: Africa World Press, 2003), 105.

⁷⁷ Adewoye, "The Judicial System," 7.

⁷⁸ Adewoye, "The Judicial System," 7.

⁷⁹ Idahosa Osagie Ojo, "The Benin Kingdom, 1800-1897: A Study in Political Economy" (MA Thesis, History and International Studies, University of Benin, Benin City, June 2012), 36.

the following saying to the belligerents, "A *wua ne Ere*, meaning 'quarrelling is forbidden for Ogiso Ere' and 'at once peace would be restored.'"⁸⁰

Law in Benin had strong provisions that ensured that close relations of the accused were held accountable for his behavior. Even cases referred to the gods had serious consequences for all close relatives of a suspect. It was even believed in some quarters that the consequences could affect different generations in a family. For example, the invocation of ordeal in trying a case of theft, is viewed as being capable of harming not only the thief, but also those who had shared innocently in the stolen goods. This was widely believed to be responsible for cases of otherwise unaccountable illnesses.⁸¹ This appears to be a means of broadly securing the sanctity of private property, discouraging not only the thief, but also any accomplices. Collective responsibility as practiced in pre-colonial Benin helped propelled community policing - a situation where the members of a given community monitored one another. Perhaps this made it easier to identify a culprit in the case of a criminal act.

A closer study of the principle of collective responsibility among close associates for legal accountability demonstrates that it is a necessity in communal settings such as the Benin Kingdom of pre-colonial times where families shared their gains and pains. A person was continually in a "social relation with others (both living and dead) and [could]...not exist outside the society."⁸² Nor could he enjoy peace and affluence in isolation, as happens in the modern individualistic world. Man, according to Godwin Sogolo (who is a Nigerian philosopher), was seen in terms of his relation to other beings and his role among other men and he was, therefore, incomplete without his brothers and neighbors.⁸³ For example, Benin people, did not regard a person as complete without his family members and individuals were mere persons until identified with their brethren or kindred. Nigerian philosopher Nkem Emeghara writes that each

⁸⁰ Jacob Egharevba, *A Short History of Benin* (Ibadan: Ibadan University Press, 1968), 8.

⁸¹ Elias, *The Nature of African Customary Law*, 229.

⁸² Elvis Imafidon, "The Concept of Person in an African Culture and its Implications for Social Order," *Lumina* 23, no. 2 (2012): 8.

⁸³ Godwin Sogolo, *Foundations of African Philosophy: A Definitive Analysis of Conceptual Issues in African Thought* (Ibadan: Ibadan University Press, 1993), 108.

African must belong to kith and kin, to parents, brothers, sisters, and to a wider relationship within the extended family.⁸⁴ For the purpose of wellbeing and progress, communal Africa sees a person as belonging to an immediate family, hamlet, village, and town. This sense of belonging, according to Emeghara, enhances knowledge about most people in the society, improving security and chances of economic survival and equality. Among the Benin people, the saying *Idefiagbon ne ovbi orisa* may be interpreted contextually as “an individual without family is an anomaly,” for the family makes the person, and there is peaceful co-existence through sharing, mutual support, and brotherliness. This value is shown using the pronoun “our” rather than “my” in many pre-colonial African societies.⁸⁵

Kenyan philosopher John Mbiti has observed that the African man was conscious of his own being, duties, privileges, and responsibilities towards himself and other people.⁸⁶ With deliberate and conscious efforts, the leaders developed these attributes to ensure that everyone understood civic duties and responsibilities directed towards better life for all. Through this self-driven system, most aspects of the development process, including economic wellbeing were not concentrated in a few hands but spread through the communities by a strong sense of mutual support and brotherliness.⁸⁷ This was true to such an extent that Mbiti could categorically state of the African that when he suffered, he did not suffer alone but with the corporate group, and that when he rejoices, he rejoices not alone but with his kinsmen, his neighbors and relatives whether dead or alive.⁸⁸ This principle of collective responsibility was enshrined in all aspects of African life, not only in legal matters. For example, in the economic sphere, losses and gains were shared across the board in pre-colonial African society. Among the Benin people, the daily duties of individuals who were ill, were taken over by companions in the same age group or extended family members. Despite poor health or incapacitation of any members of society, their sources

⁸⁴ Nkem Emeghara, "The Dignity of the Human Person in African Belief," *Theology Annual* 14 (1992): 126-137. Available at: [THE DIGNITY OF THE HUMAN PERSON IN AFRICAN BELIEF \(hsscol.org.hk\)](http://hsscol.org.hk)

⁸⁵ Emeghara, "The Dignity of the Human Person," 132.

⁸⁶ John Mbiti, *African Religions and Philosophy* (London: Heinemann Publishers, 1969), 108-109.

⁸⁷ Idahosa Ojo, "Attaining Peace and Progress for Everyone: A Study in Pristine African Development Philosophies" (Paper, International Conference on *African Monarchy, Development and the Future*, University of Benin and Institute for Benin Studies, Benin City, 9-10 July 2014), 7.

⁸⁸ Mbiti, "African Religions," 109.

of livelihood were expected to be cared for through collective farming, building, and harvesting activities that were part of their daily experiences.⁸⁹

This principle of collective responsibility that allowed a family member to be held accountable for the crimes of his relative is justified when considered in the context of economic goals being jointly pursued. Chike Ekeopara explains that within the extended family system in African communities, economic activities were often jointly pursued based on the communal nature of life. Thus, progress and development in one unit meant progress and development in the other components.⁹⁰ Furthermore, wealth or poverty, honor, or shame, and gain or loss reflected on the image of the entire extended family and not only on individuals. Everyone was, therefore, “his brother’s keeper. Human dignity was highly preserved for that dignity was part of a person’s immortal soul or life essence.”⁹¹ What affected one member of the kinship unit, whether positive or negative, affected other members because they were inseparable and intricately united by blood. Everyone’s actions were considered to affect others, the entire society, for good or bad.⁹² This is exemplified by the adage that states *Agha wu, ẹgbẹ ọmwan ẹ re a wia gbe* or “When an individual dies, it is person’s extended family that the smell surrounds.”

The Intermingling of Religious and State Matters

Another observable distinction in the law of Benin was its fusion with religion. For example, Idumwonyi and Ikhidero state that “Justice in the indigenous Benin society is inseparable from traditional religion.”⁹³ Religious laws of the kingdom were resolutely tied to judicial laws making religious practice inseparable from law. The deities and gods also took care of the penalties for the enforcement of various crimes, particularly when the criminal was unknown.⁹⁴ For example, Ogun took care of theft; Olokun took care of bad medicine against pregnancy and fertility of the

⁸⁹ Emeghara, “The Dignity of the Human Person,” 130.

⁹⁰ Chike Ekeopara, “The Impact of the Extended Family System on Socio-ethical Order in Igboland,” *American Journal of Social Issues & Humanities* 2, no. 4 (2012): 262-267.

⁹¹ Ekeopara, “The Extended Family,” 265.

⁹² Ekeopara, “The Extended Family,” 265.

⁹³ Mercy Itohan Idumwonyi and Solomon Ijeweimen Ikhidero, “Resurgence of the Traditional Justice System in Postcolonial Benin (Nigeria) Society,” *African Journal of Legal Studies* 6, no.1 (2013): 127.

⁹⁴ A.J. Oviawe, “Religion and Justice in Pre-colonial Benin” (BA Honors Essay, Department of History, University of Ibadan, 1975), 19-20.

soil, Ovia took care of witchcraft; Okhuaihe took care of diseases affecting both young and old as a consequence of the evil machinations of the wicked.⁹⁵ Since sexual intercourse on the ground was considered sacrilegious, Oṭṭ, the god of Earth, punished such offences.⁹⁶ If no god was directly in charge of a crime, such crime could be revealed through divination that forced the criminals to make sub-conscious confessional statements.⁹⁷ Adewoye asserts that African law never worked alone, “as an agency of social control and peace-keeping.”⁹⁸ And that, according to Adewoye, religion was one of its major props.⁹⁹ The whole fabric of Benin society, including law and the administration of justice, was interwoven with religion which has been described as “the engine of the law.”¹⁰⁰

The interconnected nature of religion and law was evident in Benin Kingdom because the Benin people were highly religious, and religion formed the basis of culture and government. Successes and failures were given religious explanations. For example, success in war against other kingdoms or states, good harvest, and good health were regarded as indicators of the acceptance of sacrifices to the gods of the kingdom. Defeats in war, epidemics, drought, and famine were believed to be the consequences imposed by the gods for dishonesty and deviation from religious tenets.¹⁰¹

At the heart of the connection between traditional religion and law was a strong belief in the oversight provided by several deities, including the spirits of departed ancestors.¹⁰² The ancestors were said to be particularly interested in the solidarity of the community, hence their role in the process of keeping the peace and administering justice. The law itself was believed to have the moral backing of the ancestors – a powerful element in ensuring due regard and

⁹⁵ Oviawe, “Religion and Justice,” 20-21. See also Uyilawa Usuanlele, “Tracing the African Origins of Obeah (Obia): Some Conjectures and Inferences from the History of Benin kingdom,” *West Bohemian Historical Review* VI, no.2 (2016): 165-184.

⁹⁶ Oviawe, “Religion and Justice,” 16-18

⁹⁷ Oviawe, “Religion and Justice,” 22.

⁹⁸ Adewoye, “The Judicial System,” 7.

⁹⁹ Adewoye, “The Judicial System,” 7.

¹⁰⁰ Adewoye, “The Judicial System,” 7.

¹⁰¹ Oviawe, “Religion and Justice,” iv.

¹⁰² See Bradbury “Benin Kingdom” 54-57. See also, Rex Osagiede, “Re-examination of Edo Concept of Enikaro (Ancestors) as a Basis for Ontological Understanding of Man” (MA Thesis, University of Lagos, December 2019), passim.

compliance.¹⁰³ In addition, those who “administered the law were in popular estimation the representatives of the ancestors.”¹⁰⁴ They were likely to be impartial in their duty as peace-makers, and like the rest of the community, believed they were under the ancestors’ constant watch. Thus, when a dispute occurred or an offence was committed and the wellbeing of society was threatened by someone’s actions, it served no useful purpose for those involved to fabricate lies before the community elders or at court. Furthermore, the ancestors and their personal deities said to be capable of applying retributive justice to the guilty parties could punish suspects. The belief in the supernatural was a strong regulator of behavior and had its place in the administration of justice in Benin and many other pre-colonial African societies.¹⁰⁵

The use of ordeals also stemmed from the belief that the deities would assist society to accomplish those things that the society itself failed to accomplish. Christopher Okungbowa explains that the gods and deities were believed to be members of the community who performed their roles in safeguarding peace and social justice. According to him, “if human attempt at getting the truth out of the accused or litigants failed, at least the unseen forces would not err.”¹⁰⁶ Thus, the accuser, the accused (the suspect) was subjected to an ordeal and was believed to be declared innocent by supernatural forces if he survived it.

Arguably, the use of ordeals over a long period tends to have some effect on the moral standards of society. Hence, the reliance on trial by ordeal tended to inculcate conformity with the law in members of pre-colonial African societies. Furthermore, anyone who witnessed the obvious and dramatic effects of an ordeal might be less prone to tell lies or commit crimes. Consciousness among people that a dispute might be resolved by ordeal “was assuredly one of the greatest safeguards of justice” and it “made perjury a rare phenomenon.”¹⁰⁷ Idahosa Idemudia explains that if the offender was not known, the supernatural was consulted more directly.¹⁰⁸ A priest or a diviner was normally brought in as he was expected to have a broad

¹⁰³ Adewoye, “The Judicial System,” 7

¹⁰⁴ Adewoye, “The Judicial System,” 7.

¹⁰⁵ Adewoye, “The Judicial System,” 7.

¹⁰⁶ Oral interview conducted with Professor C. A. Okungbowa, and a member of the Ibiwe Order of Chiefs in Benin City, at his house on Egbean Road, off Upper Siluko Road, Benin City, February 10, 2016.

¹⁰⁷ Adewoye, “The Judicial System,” 8. See also Idumwonyi and Ikhidero, “Resurgence of the traditional,” 129.

¹⁰⁸ Idahosa Idemudia, Oral Interview, September 10, 2020.

knowledge of the community. A group of suspects would then be made to swear their innocence. The individual or party who refused to swear ran the risk of being held as the likely offender. The diviner's superior intelligence enabled him to hoodwink the unsuspecting majority that his efforts had supernatural origin. Elias states that "all sorts of *mumbo-jumbo* were produced in the process—cowrie shells, bowls of water, sands in a sack are manipulated to yield an answer to coincide with the diviner's personal predilections" and those of the populace.¹⁰⁹ Hence, in many instances, the pronouncements ensuing from divination were not necessarily just and equitable for the parties. Furthermore, "it will thus be seen that divination as employed in the detection of crime by African societies has no *juridical* character but is only an extra-legal prelude either to the ordeal or the oath-taking, which are both legal."¹¹⁰ In many cases, the victims of theft or other unsolved crimes would not trouble to consult a diviner since they might consider the case or matter not worth the troubles.¹¹¹

The priests known as *Ohen* were held in awe and this extended to their property and dwellings. Nobody could enter their sacred groves uninvited and should anyone venture there, that person would be compelled to make atonement.¹¹² The people's consciousness of the gods and other unseen supernatural forces watching over them and overseeing justice rooted the system in fear.¹¹³ This fear of the supernatural was complemented by fear of ordeals, fear of the ancestors and even fear of the elders. Certainly, many of the law's religious or spiritual props flourished on fear.¹¹⁴ In Benin, *Ikhokho*, *Ovato*, *Ason*, *Azelu* and *Osun-Oba* were the most fearsome forces and just the threat of using them to resolve conflicts normally put the matter to rest.¹¹⁵ These deities were regarded as presiding during oath taking. It was believed doing evil was tantamount to death unless propitiating sacrifices were made. The strong belief (or fear of

¹⁰⁹ Elias, *The Nature of African Customary Law*, 229.

¹¹⁰ Elias, *The Nature of African Customary Law*, 229.

¹¹¹ Elias, *The Nature of African Customary Law*, 221. Also see Adewoye "Judicial System," 8-11 for criticisms of the justice machinery in pre-colonial Africa.

¹¹² Jacob Egharevba, *Benin Law and Custom* (Port Harcourt: Niger Press, 1946), 52.

¹¹³ See Precious Diagboya, "Oath taking in Edo: Usages and Misappropriations of the Native Justice System," *IFRA-Nigeria Working Papers Series*, no. 55 (02/03/2019): 15

¹¹⁴ Adewoye, "The Judicial System," 10.

¹¹⁵ See Bradbury, *Benin Kingdom*, 52-60 for an analysis of the various deities in pre-colonial Benin.

the unknown) among members of society kept them in constant apprehension.¹¹⁶ Anyone suspected of committing evil deeds or crimes was brought before the shrine to swear. This was believed to have fatal consequences not only for anyone swearing falsely, but also for their family and close associates. In pre-colonial Benin, oath taking was commonly used to extract the truth. It was a feared process that enhanced the authority of the justice system and compelled obedience among the old and the young alike. Both fear of supernatural consequences and community self-monitoring had significant impact on those who committed any offence, making it easy to discipline recalcitrant elements in society.¹¹⁷ If a particular person were charged with the commission of a crime by the victim without any prior consultation with the appropriate diviner, the assembled elders or the chief would then subject each party in turn to the form of ordeal considered appropriate given the circumstances of the case. The ordeal might take the form of a toxic drink made from sasswood, a hot knife, or dunking in a pond or stream.¹¹⁸ Anyone who drank the water and became sick, was burned by the red-hot knife, or sank when immersed in the water was pronounced guilty.¹¹⁹

The Law of Primogeniture

Another salient characteristic that was part and parcel of the law in Benin and helped to stabilize the kingdom, particularly during the period between the death of one Oba and the emergence of a new Oba, is the rule of primogeniture. The law of primogeniture has been in existence in Benin for a long time. However, it was strengthened by Oba Ewuare and Oba Ewuakpe in the 13th and the 16th centuries, respectively.¹²⁰ Ewuare instituted the Edaiken (Crown Prince) title to resolve succession crises, Ewuakpe maintained it to ensure that the position of Oba passed to the eldest surviving son of the deceased Oba. Igbafe explains that under the system of primogeniture, succession rights to property, hereditary titles, and ritual duties devolve to the

¹¹⁶ Oviawe, "Religion and Justice," 2.

¹¹⁷ Oviawe, "Religion and Justice," 2.

¹¹⁸ See Elias, *The Nature of African Customary Law*, 229

¹¹⁹ See Elias, *The Nature of African Customary Law*, 229. Fortunately, these methods of oath-taking have now been abandoned. See Bradbury, "The Benin Kingdom," 59.

¹²⁰ See Ugiagbe, Agbontaen-Eghafona, and Omorogiuwa, "An Evaluation of the Principles of Primogeniture...": 90-101.

eldest son as soon as he performs the funeral ceremonies of his deceased father and inherits his house and lands.¹²¹ Younger sons were not evicted. However, they generally moved off to build their own houses on reaching their majority. Beginning Ewuare's time, it was the custom for the Oba's eldest son, on reaching maturity, to be shown to the people and installed as the Edaiken, heir to the throne. He was then sent to live in Uselu to be trained in the dignity and responsibilities of kingship. The Queen Mother, known as Iyoba, was also sent to live in this village once the son left to take up residence in the palace on his accession to the throne. These precautions were taken to ensure that after the Oba's death and the performance of the funeral obsequies, the Edaiken's accession would be a logical conclusion to a process already initiated.¹²² If an Oba has no surviving male child, a brother may ascend to the throne.¹²³ In infancy, the heir apparent is put under the guardianship of two important chiefs, one of the Eghaevbo n'Ogbe (palace chiefs) and one of the Eghaevbo n'Ore (town chiefs). When the child is of age, the Oba invites both the high and minor titled chiefs to the palace and presents the heir to them. He does this more than once, and on one of the occasions he says "Ye elders of my people, see herewith my eldest son and heir apparent to my throne, whom I present you this day" (Edion, ghe ovbi-mwen no'odion, I ro nu mien vbe ere na, no khian rrie Oba I gha rrie awua) and then the Uwangué will announce this more loudly so that the assembled company of the chiefs and people of Benin may hear.¹²⁴ The Iyase will reply on behalf of the chiefs and people "*Ghara omo*" or "Your Highness, we have seen your eldest son and heir apparent to your throne. We are pleased with him and accept him"¹²⁵

Gradually, the law recognized the system of primogeniture extended to the crown and subsequently to all inherited property throughout the kingdom. Hence, it became valid in Benin that the eldest son was the heir and received the greatest share of his father's property although

¹²¹ Igbafe, *Benin under British Administration*, 28.

¹²² Igbafe, *Benin under British Administration*, 28.

¹²³ See Mercy Itohan Idumwonyi, "An Ethnographic Study of Gender Dynamics in Benin Religion and a Pentecostal Congregation in Benin City, Nigeria" (PhD diss., Rice University, 2018), 55-61 for a detailed analysis of the ousting of 'women Obas' from Benin Historiography. On the other hand, Onaiwu Ogbomo argues "...that contemporary gender relations in Africa is not a true reflection of women's exercise of power and influence on the continent in the past" in "Women, Power and Society in Pre-colonial Africa," *Lagos Historical Review* 5 (2005): 49.

¹²⁴ Igbafe, *Benin under British Administration*, 28.

¹²⁵ Egharevba, *Benin Law and Custom*, 37.

the other children got some small share. For example, after a father dies and the funeral ceremonies are over, the elderly members of the family, i.e., uncles, aunts, and other relations share the property among the children according to their age, including younger wives, betrothed maidens and childless wives, slaves, coral beads, money, clothes, cattle, yams, and cocoyams. What was given to the senior son was also give in a lesser quantity to the second and third sons respectively and to the other children, according to the position held by their mothers. This system of sharing the remnants of the estate of a polygamous man among his surviving sons according to the status of their mothers at his demise is called Urho. The Urho law, according to oral tradition, complements the rule of primogeniture to allow the eldest son of each wife to benefit from the estate, sometimes with the caveat that they should use their inheritance to take care of their younger siblings.¹²⁶ If the eldest son does not perform the funeral ceremonies at once, and dies before he has completed them, the right of inheritance goes to the second son and his children, provided he carries out the funeral rites as requested by the family head or Okaegbe.¹²⁷ The only means by which a younger son could assume direct inheritance of his father's property was by performing the father's funeral rites if the eldest son failed to live up to his duties or responsibility before dying. This pattern of succession produced a system where large family groups did not act commonly in close co-operation but focused on titles and associations. Possibly what helped to produce this absence of corporate rights among descent groups was the low density of population. There was always room for younger "sons to build and establish their own houses and aspire after titles that were not hereditary."¹²⁸ In sum, the rule of primogeniture, deeply entrenched in the Benin traditional way of life, produced a social structure where the idea of family property or corporate rights held by groups with a common descent was not strongly developed.¹²⁹

¹²⁶ Oral interview conducted with Solomon Edebiri, the *Esogban* of Benin Kingdom at his residence at Airport Road, Benin City, February 8, 2016.

¹²⁷ Okungbowa, Oral Interview, February 10, 2016.

¹²⁸ Igbafe, *Benin under British Administration*, 27.

¹²⁹ Igbafe, *Benin under British Administration*, 27.

Laws against Rough Justice

There were also provisions in Benin law that allowed an accused to beat a retreat and be protected from arbitrary justice, create time for tempers to cool, and present the issues to the elders or council for proper judicial hearing. Some of the protective options are encapsulated in standardized phrases such as *Ile gbina Aro Osa*, *Ile gbinedion*, *Ile gbine'gie*, *Ile gbina baba*, and several others. These are translated as "I take protection in the sacred glove of Aruosa," "I take protection in the court of the ancestors," "I take protection at the foot/house of Enogie," and "I take protection at the foot of the father," respectively.¹³⁰ Furthermore, Elias states that in pre-colonial Africa, "if an offence committed by an accused person was so grievous as to excite the crowd or the injured party into instant retaliation," the offender might escape summary justice¹³¹ by seeking sanctuary in a sacred shrine, king's palace, Enogie's residence, or with any nearby authority "pending the hearing of the case against him."¹³²

Oral interviews conducted around Benin City corroborated the view that a person being pursued could take shelter with a higher authority and be protected by that authority from the assailant until the case was heard. The Benin word, *Igbina* according to Okungbowa means "take protection under," while *Igbinedion* means "I take protection under the Edion (elders)." Similarly, *Igbinovia* means "I take protection under the cover of the Ovia deity."¹³³ In many African societies, Elias explains, "once a supposed or even an actual criminal has sought the refuge of a sanctuary - be it ever so ramshackle as a flimsy grove of bare thatch, none of his pursuers dare touch him."¹³⁴

There was also a universal reverence for established institutions in many pre-colonial African societies. It was obligatory for the chief or authority being used as a lifeline to take charge of the situation, bring the accused to proper judicial hearing, and, if possible, speak in his defense. This provision for a lifeline that could be used to avoid immediate punishment for an alleged offence until a proper judicial hearing could be conducted was not only institutionalized by law

¹³⁰ Aruosa, translated as God's eye is a sacred temple of God. There are several of them and are spread over the kingdom and they are the historical relics of churches established by the Portuguese in Benin in the 16th century.

¹³¹ Elias, *The Nature of African Customary Law*, 215.

¹³² Okungbowa, Oral Interview, February 10, 2016.

¹³³ Okungbowa, Oral Interview, February 10, 2016.

¹³⁴ Elias, *The Nature of African Customary Law*, 215.

and practice in the Benin kingdom, but it was also practiced in most pre-colonial African societies. The situation of Ikemefuna running to take protection at the foot of Okonkwo as recorded in Achebe's *Things Fall Apart* is a good example among the Igbo people of South-eastern Nigeria. His assailants, who were bent on sacrificing him, had to halt and wait for Okonkwo to act.¹³⁵ Categorizing this principle is a quite common adage in Benin--*aigbe omo yedion akharha*, translated as "a person should not be scourged when he or she is taking shelter at the foot of an elder or the ancestors." In other words, the supposed offender who runs to a higher authority for protection should be left with that authority to handle the matter and discipline the offender if need be. If the pursuers were so overwhelmed by anger that they struck the supposed offender who had taken shelter at the foot of the higher authority, they were said by law to have struck the higher authority. The accused could seek protection in many places in Benin: the Enogie's palace, the Oguedion shrine, and homes of the most important members of the Edion council, among others. What was important was that protecting authority had to be both higher and respected by the assailant.¹³⁶ Elias asserts that lifelines of this nature were devised by Africans to serve as protection against free and frequent "indulgence in vendetta by the populace."¹³⁷ However the situation differed if the criminal or suspect were caught by the injured party and/or his sympathizers before reaching the security of a sanctuary.

Recognition of Societal Status in Judicial Process

The laws in pre-colonial Benin recognized societal status in the judicial process with several of its legal instruments. Since the social and economic status of the accused or suspects were recognized in the judicial system, each person in pre-British Benin had to act appropriately to suit that status. This also meant that a poor member of society, aggrieved by injustices suffered at the hand of a powerful chief, would best be represented by a chief equally powerful to have any chance of obtaining substantial justice. For instance, in a dispute between the head of a family

¹³⁵ Chinua Achebe, *Things Fall Apart* (London: Heinemann Publishers, 1958), 61.

¹³⁶ Oral interview with Aigbowa Idemudia, a Place chief, conducted at his residence in Ibiwe Street, Benin City, Edo State.

¹³⁷ Elias, *The Nature of African Customary Law*, 215.

and a minor not belonging to his family, the youth had to be represented by someone of the same status as the accuser.¹³⁸ Similarly, a man could not take the wife, son, or any member of his neighbor's household to Odionwere-in-Council or Enogie-in-Council for trial; instead, he would charge the compound head (Odafen) who would in turn defend the household at the Council.¹³⁹ Status was, therefore, all-important in regulating the conduct of men and women throughout life.

Also, a slave, a commoner, and a high-ranking chief would not be tried or punished in the same way for any given offence. Although a slave or a commoner would kneel when being tried for a serious offence such as sacrilege, eminent members of the society would not.¹⁴⁰ Thus, "the accused made his statement, and for this he must kneel while speaking. A chief of high rank or a priest was however exempted from 'kneeling as befits the dignity of their office and may sit even before the Oba."¹⁴¹

Another legal provision that recognized the social status of the individual in the judicial process was the one that required separate punishment for eminent persons. High profile individuals, such as any member of the Eghaevbo or Uzama groups of title holders, could not be executed like other criminals. If found guilty of offence punishable by death, a Benin man that was highly regarded in the society was not handed over to Isienmweno, the public executioners, or the Amaghezemwen, the head of the guild of executioners.¹⁴² Instead, the law, according to oral tradition, required the Oba to simply instruct him to leave the palace immediately and commit suicide, using either of the following phrases: *Yà ri'ùkó rhó* or *Ya dolegbe yi*.¹⁴³ Oba Ohen broke this law c.1370 when he ordered the death of the Iyase, his Prime Minister, in the night.

¹³⁸ Adewoye, "The Judicial System," 3

¹³⁹ Oral interview Conducted with Pa. Richard Osayande, aged 74, at his residence, 65 Edaiken Primary School Road, Uselu, Benin City, 28/01/2021.

¹⁴⁰ Egharevba, *Benin Law and Custom*, 54.

¹⁴¹ Idahosa Osagie Ojo, "Hierarchies of Courts and Judicial Authorities in Benin Before 1897" in *Benin Studies under the Scalpel: Essays in Honor of Ekhaguosa Aisien*, ed. Uyilawa Usuanlele (Benin City: Institute of Benin Studies, Benin City, Edo State 2020), 240.

¹⁴² Egharevba, *Benin Law and Custom*, p. 36.

¹⁴³ Oral interview conducted with Osahenigharu Omoruyi aged 59 years old at his home in Oke-Oghohon Village, Ovia North East local government areas of Edo state, December 27, 2015. Literally, "Yà ri'ùkó rhó" means "Go and hang calabash," and "Ya dolegbe yi" means "Go and prepare your body." However, the real meaning is same for the both phrases: "Go and die."

For this crime, the State Council stoned the Oba to death.¹⁴⁴ Similarly, the Odionwere-in-Council or Enogie-in-Council were not allowed by law to try some individuals due to the office they held. In several instances, special courts existed solely for chiefs and other high-ranking individuals in the kingdom. Some of these distinct courts include:

...the special courts for the professionals within each guild often refer[red] to as the Guild Council [that were] established for the members only and could appeal directly to the appropriate Oba's court; the courts of the various palace societies that handled cases between members only; the court in the various palaces of the major chiefs that handled dispute[s] referred to them by the Oba; the courts in the various homes of the chiefs that handled dispute[s] in the villages allocated to them as *Onotueyevbo* and the various courts at the Oba palace and headed by the Oba of which the *Oguamaton* was the apex.¹⁴⁵

These courts were not for all and sundry but designated for special people with regard to their closeness to the Oba as well their offices and status.

Conclusion

This study has discussed some of the special provisions in the laws of the Benin Kingdom that supported the establishment of peace and order. This essay also discusses different legal concepts including collective responsibility, laws against rough justice, religious law, and the law of primogeniture, among others. Since religious law was resolutely tied to judicial law, religious practice was inseparable from the law. Furthermore, the express recognition of group or collective responsibility in legal personality among other indigenous legal principles in pre-colonial Benin promoted justice and the consolidation of peace and order. Even though these indigenous legal principles were primarily oral in nature, they were respected and enforced

¹⁴⁴ For details of this event see Idahosa Osagie Ojo, "British Colonial Rule and the Internationalization of the Benin Bronze Artefacts, 1897–1960: A Preliminary Research Finding," (Seminar Paper, University of Hamburg, Germany, and the Nigerian Defense Academy, Kaduna, March 9, 2020).

¹⁴⁵ Ojo, "Hierarchies of Courts and Judicial Authorities in Benin Before 1897," 241.

throughout Kingdom and provided the legal architecture underpinning society. Thus, this study posits that pre-colonial Benin had an effective and efficient legal system despite some academic arguments to the contrary and the certain inherent weaknesses of the indigenous laws and regulations. Finally, the authors conclude by adopting the words of Andreas Joshua Ulsheimer who stated the following about pre-colonial Benin during the voyage of 1603/04: "Of this kingdom and its inhabitants, especially their system of justice, their regulations and laws, warfare, marriage and so on, there would still be much to write. But because it would take too long in view of the short time at my disposal, I will leave it till another opportunity."¹⁴⁶

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¹⁴⁶ Quoted in Adam Jones, "German Sources for West African History, 1599-1669" (Wiesbaden: Steiner, 1983), 43. Cited in Benson Osadolor and Leo Otoide, "The Benin Kingdom in British Imperial Historiography," *History in Africa* 35 (2008): 405.

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