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Indigenous African Jurisprudential Thoughts on the Concept of Justice: A Reconstruction Through Yoruba Proverbs

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Abstract

The absence of writing in pre-colonial Africa has often befuddled indigenous African jurisprudential thoughts about law and related concepts. This article attempts a reconstruction of indigenous African jurisprudential thoughts on the concept of justice through a prescriptive exploration of Yoruba proverbs. This attempt reveals inter alia the reconciliatory and metaphysical nature and character of justice, as well as the goals of punishment and the character and nature of a desirable judicial system in African thoughts. While noting the artificiality of the categorizations adopted for the reconstruction, the author cautions that, although it may be necessary to compare the indigenous African conceptions of justice with similar postulations in western jurisprudence, the true value of the former lies in their proper understanding and appreciation within the indigenous African setting, as doing otherwise might lead to contradictions and absurdities.

Keywords

African jurisprudence, concept of justice, indigenous thoughts, Yoruba proverbs

INTRODUCTION

Pre-colonial Africa had a functioning legal system. This is now a well-accepted fact, despite its initial denial by earlier western scholars due to the wide social differences between western and African societies. Ancient African communities had legal systems that served the needs of the era and, despite the absence of writing, jurisprudential and philosophical thoughts about law, justice, morals, power and rights abounded. It is indeed contrary to reason to conceive an organized social community with no idea of law or justice.[1]

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1 JG Driberg "The African conception of law" (1934) *Journal of Comparative Legislation and International Law* 230; A Allot *Essays in African Law* (1960, Butterworth) at 13; JF

This article reconstructs the concept of justice in indigenous African jurisprudential perspectives, focusing in particular on the articulation of the concept through Yoruba[2] proverbs. To the Yoruba people, proverbs are vehicles of deep thought that become particularly handy whenever one is short of words: *[o]we l'esin oro, oro l'esin owe. Bi oro ba sonu, òwe ní a fi ń wá a* [proverbs are principal in discourses; whenever there is a dearth of what to say, a proverb speaks volumes]. This proverb captures the essence and primal place given to proverbs in the social, political, economic, legal and religious communal life of African societies. Due to the absence of writing in indigenous African societies, these proverbs are ageless and represent a product of the intellectual property of these societies from antiquity to the present times. They succinctly present the philosophical, juristic and theological thoughts of ancient peoples, intended to guide society on the path to virtue, peace and progress.

The African jurisprudential conception of justice is multi-dimensional. It is a legal issue as well as a social and moral one, clearly prescribing the attributes of justice, the metaphysical nature and character of justice, the goals of punishment, and the character and nature of a good judicial system.

ATTRIBUTES OF JUSTICE

A main attribute of justice in indigenous African jurisprudence is reconciliation: a restorative justice model that no doubt is given credence in modern times in the emphasis on the use of alternative dispute resolution methods by parties to a dispute. As noted by the Supreme Court of Nigeria in *Egesimba v Onuzurike*: "[c]ustomary arbitration by elders of the community is one of many African customary modes of settling disputes and once it satisfies the necessary requirements, the decision would have binding effect on the parties and this creates an estoppel. It is recognized under Nigerian jurisprudence".[3]

Apart from achieving the reconciliatory goal, justice in indigenous African jurisprudence must also be non-discriminatory, ensure a fair hearing for parties in a dispute, not be dependent on volumes of evidence, and advance the rights of individual members of the community.

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Hollerman *Issues in African Law* (1974, Mouton and Co) at 13; K M'Baye "The African conception of law" (1974) 2 *International Encyclopedia of Comparative Law* 138; LA Ayinla "African philosophy of law: A critique" (2002) 6 *Journal of International and Comparative Law* 147 at 150–52.

2 The Yoruba people are mostly found in western Nigeria and various other parts of Africa, with their language and culture having widespread influence in other places including Latin America, the West Indies and the USA. In Nigeria alone, over 40 million people currently speak the Yoruba language. See CIA "The World Factbook: Nigeria" (last updated 1 May 2017), available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last accessed 3 June 2017); RY Wee "Who are the Yoruba People?" (6 March 2017) *World Atlas*, available at: <http://www.worldatlas.com/articles/who-are-the-yoruba-people.html> (last accessed 3 June 2017).

3 (2002) 15 NWLR (pt 791) 466 at 512–13.

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Justice is reconciliatory

Maintenance of peaceful relations in society is a primary goal in African societies. This no doubt correlates with the communal lifestyle of these societies. An understanding of the African conception of justice necessarily flows from this goal, as epitomized in this proverb: [*k*]*'aja ka dore, ko le dabi ere apilese* [becoming friends after a fight cannot be the same as being friends all along].

Africans thus take an unfavourable view of the adversarial western legal system that has been imported into their societies, as it is believed that *a ki i ti kootu de ka sore* [parties do not become friends after having their case decided in an English court]. A primary goal of justice is therefore reconciliation between parties who have been at loggerheads due to an occurrence that disturbed the peaceful relations between them. It is not primarily a finding of who is guilty and who is in the right.

One proverb that succinctly captures the reconciliatory attribute of justice is: *[e]ebu alo ni ti Ahun, T'abo ni t'ana e* [while blame goes to Ahun in the morning, it goes to his father-in-law in the evening]. For clarity, this proverb has a story attached. Ahun[4] is a constant in mythological Yoruba stories used to teach morals. Ahun's father-in-law has for sometime noticed that someone has been stealing produce from his farm. He devised a strategy to catch the thief by hiding in the farm all night. Early in the morning before dawn, he noticed someone coming to harvest his yams. He waited until the thief has packed some tubers of yams, lifted the pack to his head and started going home. He then pounced on the thief and alas it was Ahun.

Disappointed, embittered and determined to teach Ahun an important lesson, he tied Ahun with the load of yam tubers to a tree on the pathway, closing his ears to Ahun's cries for mercy. As people started going to their farms in the morning, they saw that Ahun was the thief who had secretly been harvesting his-father in-law's produce. They therefore started abusing him, chastising him and subjecting him to all sorts of ridicule and molestation, congratulating his father-in-law for devising a means to catch the thief. Ahun patiently bore his punishment and continued to beseech all passersby to help him beg his father-in-law. By evening, when the people started returning from their farms, they still met Ahun tied to the tree looking half-dead. The tide of opinion changed as, one by one, the people started to speak ill of the father-in-law saying, "[h]aba,[5] this man must be a wicked man, if he can do this to his son-in-law, what will he do to a stranger? Does he want to kill him?"

Why did the people blame Ahun's father-in-law in the evening? First, it would be expected that the fact that Ahun is his daughter's husband should have been more important than the theft. In other words, although Ahun deserved to be caught and punished, this should not destroy the relationship between him and his father-in-law. In African jurisprudential thought, it is

4 Literally meaning "tortoise".

5 The word "haba" is an exclamatory expression of surprise or dismay.

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desirable that judges and those responsible for law enforcement should, while in pursuit of justice, not neglect the task of restoring both parties in a case to their former relationship of cordiality. The same duty equally behoves parties to a dispute, whether criminal or civil in nature. In fact, the artificial line drawn in other jurisdictions between civil or criminal wrongs is not indigenous to Africa. In the indigenous African community, a wrong is a wrong: the creation of imbalance in social and communal relations that needs the intervention and initiation of the communal dispute resolution process in an attempt to achieve a restorative balance in the social order.

In Aristotelian terms, this correlates with the notion of corrective justice. According to Aristotle, corrective justice comes into play when the equality among equals in society has been disturbed or upset (for instance, through the commission of a crime) and its purpose is to restore equality. As noted by Pomerleau, "corrective justice requires us, in some circumstances, to try to restore a fair balance in interpersonal relations where it has been lost. If a member of a community has been unfairly benefited or burdened with more or less than is deserved in the way of social distributions, then corrective justice can be required, as, for example, by a court of law".[6]

Indeed, perceiving justice as equal treatment for all seems to conform to the Islamic concept of justice as epitomized in the following Quranic verses: "[o] you who believe! Stand out firmly for justice, as witnesses to Allah, even if it be against yourselves, your parents, and your relatives, or whether it is against the rich or the poor".[7] and "God commands you to render trusts to whom they are due, and when you judge between people, judge with justice".[8]

Secondly, blame went to Ahun's father-in-law in the evening because, still reflecting the reconciliatory nature of justice, it is believed that "to err is human, to forgive is divine". This is quintessentially captured in another Yoruba proverb: *[o]mo ale ni i rinu, ti ki i bi. Omo ale ni a si i be, ti ki i gbo* [it's only a bastard that has cause to be angry but refuses to be angry; also, it's only a bastard that refuses to calm down and forgive after being appealed to].

The search for justice thus requires the magnanimity of mercy and forgiveness on the part of the victim of a wrong, especially where the guilt of the offender has been established or where the offender is manifestly remorseful and is pleading for mercy. This requires the victim to put himself in the shoes of the offender at the mercy of another person: how will he want to be treated? It is therefore expected that, no matter what Ahun had done, his father-in-law ought to have shown him mercy and released him after serving the imposed punishment for a period of time.

Thirdly, the reconciliatory nature of justice requires judgment in a matter to go both ways. In other words, even where the guilt of the offending party has

6 WP Pomerleau "Western theories of justice" *Internet Encyclopedia of Philosophy*, available at: <http://www.iep.utm.edu/justwest> (last accessed 22 May 2017).

7 Quran 4:135.

8 Id, 4:58.

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been clearly established, the adjudicator or adjudicatory panel will still identify any fault on the part of the victim of the wrong and he / she must accept this in good faith. This is done to assuage the feelings of the offender so as not to estrange him completely from the good fellowship of the other party and of the community, including the adjudicator or adjudicatory panel. After all, all parties involved in a dispute, including the adjudicator(s), are members of the community and peaceful relations must continue after the case has been disposed of.

The proverb of Ahun and his father-in-law and the associated story also depict the shifting values of justice in a matter. This means that a finding of who is in the right can change radically, depending on the circumstances. Parties to a dispute are therefore kept on their toes to watch their utterances and actions to ensure that the balance of guilt is not radically tilted towards them.

Justice is non-discriminatory

The non-discriminatory nature of justice in indigenous African jurisprudence is illustrated by different proverbs, but the following may be apt: *[i]bi o jubi. Bi a ti bi eru, ni a bi omo* [there is no superior birth; as a slave was born, so was one's child]; and *[o]na lo jin, eru naa ni baba* [it may be quite a distance, the slave too has a father].

The incidence of slavery was a fact of life in ancient African communities, with major contributory factors including conquests through inter-tribal wars, economic impoverishment and kidnapping. Yet, African juristic thoughts canvass a just and humane treatment for all, irrespective of birth, class, language, tribe or gender. Justice in this sense demands equality of treatment: an egalitarian society with particular provisions for the peculiar position of the weak and less privileged members of the community who would otherwise have no one else to defend or cater for them.

This aspect of justice also recognizes the fluidity in life experiences and positions. Whoever today occupies a privileged position of political (governmental) power and wealth thus needs to act with care and know that there is nothing innately in him or her that makes him or her superior to or better than others who are not so privileged. Furthermore, fortunes may change, placing him or her at the receiving end of society. It is noteworthy in this respect that an institutionalized class system was, with a few exceptions,[9] never a widespread practice in indigenous African communities.

This conception of justice seems wider and more demanding than the Aristotelian concept of distributive justice. In dealing with particular justice as distinct from universal justice, Aristotle differentiated between distributive justice and corrective justice.[10] According to Aristotle, distributive justice is

9 A noted exception in Nigeria was the Osu class system of eastern Nigeria.

10 See Aristotle *Nicomachean Ethics* (trans WD Ross, 1999, Batoche) at 75, available at: <https://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/aristotle/Ethics.pdf> (last accessed 3 June

based on the assumed principle that there has to be an equal distribution of distributable things among equals in any given society. As previously noted, corrective justice comes into play when this equality has been disturbed or upset. What are these distributable things? According to Aristotle, they are "honours or money or the other things that fall to be divided among those who have a share in the constitution".[11] These may otherwise be described as the benefits and burdens or the advantages and disadvantages of society.

A major problem with the Aristotelian principle is that his equal distribution among equals implies that, according to some given criterion or criteria of discrimination, unequal cases should be treated unequally. The question is, who decides the criterion of equality or inequality and, secondly, how just will such a criterion be. This position in fact betrays Aristotle's approval of slavery as a normal incidence of human society. Aristotle in fact did justify slavery as a natural institution. Slaves are thus less deserving and capable.[12] Secondly, according to him, men need leisure to cultivate virtue and slaves provide this by relieving them of tedium. Thirdly, he concluded that slaves for their part derive benefit through being guided by their superiors in virtue.[13] The Aristotelian sense of justice, if pursued to its logical conclusion, will thus very likely lead to institutionalized injustice, fostering atrocious social and economic policies, as was the case in the now abolished apartheid policy of South Africa, the racist programme of Nazi Germany and legalized racial discrimination (until the 1960s against blacks) in the United States.[14] Such unjust and highly discriminatory policies are no doubt greatly disruptive of societies, as the people so disadvantaged will sooner or later rise into peaceful or violent agitations to effect a more egalitarian social order. The present agitation in the Niger Delta region of Nigeria, though not arising from enslavement per se, is a case in point of the disruptive nature of continuous unjust treatment of a people group. It is noteworthy that past Nigerian leaders never saw anything wrong in permitting the devastating environmental degradation and socio-economic impoverishment of the region, since they were not personally affected.

Also important is the fact that, even within the same class of equals being treated equally, sheer injustice may still result if due consideration is not given to other factors such as power, talent and skills. The biblical norm, "if anyone is not willing to work, let him not eat",[15] may for instance be appropriate here as it would certainly be unjust to compel a hardworking person

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2017). Also see RWM Dias *Jurisprudence* (1985, Butterworths) at 65–86 and F Adaramola *Basic Jurisprudence* (2003, Nayce Publishing Co Ltd) at 226–27.

11 Aristotle, ibid.

12 Aristotle *Politics* (trans CDC Reeve, 1998, Hackett) at 1.

13 Dias *Jurisprudence*, above at note 10 at 75.

14 Adaramola *Basic Jurisprudence*, above at note 10 at 228.

15 *Holy Bible* (2003, English Standard Version) 2 Thessalonians 3.10.

to share equally with an indolent fellow. Since these factors are unequal in fact, any attempt to give them equal treatment in law may widen or create inequalities. For instance, if the power to contract were to be given to all citizens equally, great injustice may result in cases involving parties such as drunkards, infants, illiterates and the insane. Thus, special discriminating rules exist to protect them.[16] Such unequal treatment will be just, depending on the facts in each case.

The non-discriminatory rule is already given recognition worldwide. Section 42 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999[17] for instance provides:

> "(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person -
>
> (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
>
> (b) be accorded either expressly by or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.
>
> (2) No citizen shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."

Justice connotes a fair hearing

Fair hearing is a juristic concept which in modern times translates to a human right to which every party in an adjudicatory matter is entitled. On this, a Yoruba proverb posits: *[a]gbo ejo enikan da, agba osika* [to base judgment only on one party's evidence is gross wickedness].

This proverb captures the twin principles of natural justice as exemplified in the Latin maxims *audi alteram partem* [let the other side be heard] and *nemo judex in causa sua* [no-one should be a judge of his own case]. Justice in a matter thus involves giving room for both parties to present their cases clearly: to provide oral evidence; call witnesses in support of their case; examine the other

16 See for example Infant Relief Act 1874, sec 1 and Illiterates Protection Act, 1920.

17 As altered by Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010; Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010; and Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010. See CFRN 1999, sec 4(1) and (2) and also sec 4(6) and (7).

party's witnesses; and generally be abreast of the evidence against them. A denial of this opportunity is taken as gross wickedness, a travesty of justice and brutish misuse of power and authority. This is also attested to in one of the verses of the Ifa[18] literary corpus as follows: *[a]nikandajo, o o seun; Anikandajo, o o seeyan; Nigba ti o o gbo tenu onikeji, Emi l'o dajo se?*[19] [judgment based on one party's evidence is not good; judgment based on one party's evidence is inhuman; when you have not heard the other party, why are you judging?]. The inhumanness of such a judgment is obvious enough, as the party that brings a matter for determination will normally paint a "saintly" picture of him or herself and of his or her actions in a bid to win the sympathy and support of the adjudicator or adjudicating panel. Until the other party is given ample opportunity to present his or her case and controvert the complainant's evidence, the balance of probability of guilt previously tilted to the other party may never be properly determined in the pursuit of justice in the matter.

Also implicit in this proverb is recognition that the one giving the judgment is not a party to the dispute. Among the Yoruba people, disputes are normally brought unto the elders for resolution or adjudication. There is in fact a play on words in the phrase "*agba osika*", which could also translate as "wicked elder". The elder indicated here should ordinarily be disinterested in the subject-matter of the dispute brought before him, though in practice no legal rule stands to disqualify him if he has an interest. Only moral and social sanctions exist to discourage him from rendering decisions that would amount to gross wickedness in the eyes of the generality of members of the community.

The demands of a fair hearing in modern times involve, among other elements: a public trial (except in certain circumstances) by an impartial and independent count; trial within a reasonable time; the right to be represented by a counsel of one's choice; the presumption of innocence until proved guilty in a criminal trial; and non-retroactive criminal laws.[20]

Justice maintains individual rights

Oko ki i je ti baba ati ti omo, ki o ma nii aala [farmland belonging to both father and child must have clear boundaries]. Justice requires the maintenance and protection of an individual's rights, irrespective of their social status, economic power and relationships. For example, very few relationships come near the closeness, affinity and blood bond between a father and his child. It is also an unequal relationship, with the father standing tall and mighty (by tradition) with a divinely ascribed authority over the child. The child owes

18 Ifa is a popular deity among the Yorubas, imputed to possess unparallel wisdom and thus widely consulted for divination.

19 See W Abimbola *Awon Oju Odu Mereerindinlogun* [The 16 Divination Poems] (2006, University Press PLC) at 16 and 108.

20 See CFRN 1999 (as altered), sec 36.

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his or her life, well-being and possession to their father and must thus always respect and obey him. Yet, the Yorubas will not have the child cheated concerning a joint possession (such as farmland) and therefore advocate a delimitation of the portion belonging to the father and the one belonging to the child. In fact, in most cases, the farmland in question was originally owned by the father who is now giving the child a portion because he desires the child to become financially independent. Even in such a case, this concept of justice protects the rights and vested interests of the child (the weaker party) in the possession and by so doing also protects the interests of the father in his portion of the farmland and in making the child achieve the goal of the enterprise. The child will no doubt work hard to ensure the success of the joint venture.

Maintenance of individual rights is no doubt highly beneficial in every society, as a society that protects the interests and rights of everyone will in turn be rewarded with their loyalty and commitment to its well-being. Members of such a society will willingly go the extra mile to defend its territorial integrity, and advance it technologically, economically, culturally and politically. Such a society will also experience peace and cohesion among its people. The level of violence, conflicts and discontent in a society may therefore reflect the extent to which that society is just and equitable.

Justice depends not on the volume of evidence

A ki i tori awijare kito o tan lenu [in order to prove one's case, one must not embark on a journey of endless speech]. *Opo oro ko kun agbon, afefe ni i gbe e lo* [much speech does not fill a basket, it vanishes with the wind].

These proverbs reflect a fatalistic conception of justice that asserts that one may not necessarily obtain justice in a matter based on one's oratory powers or ability to offer much evidence. Knowing this, the claimant is not supposed to be overly excessive in his or her claim to be in the right. Rather, he or she should assert his or her claim calmly, as what is important is that the adjudicator or panel of adjudicators finds not only the evidence credible but also the claimant's demeanour credible and appropriate. The verbal cues of a claimant are thus not sufficient, as it is also incumbent on judges to observe non-verbal cues closely to know whether they largely match and complement, or are largely contradictory and divergent to, one another.

These proverbs also recognize the fact that, in some cases, justice may simply be beyond the reach of mortal man simply because there is no way the accused could prove their innocence. One such instance is in the case of a malicious lie asserted in this proverb: *[o] su ko nudi. Eniyan meloo ni eeyan yoo fe idi han?* [he does not clean up after defecating; to how many people will he expose his anus?].

In such instances, it is extremely difficult, if not impossible, to wash oneself clean of the evil allegation, noting in particular that, apart from the shame and embarrassment suffered by undue exposure of one's private parts, a careful examination of a person's anus will no doubt reveal faecal traces, notwithstanding the fact that they have indeed cleaned up. Thus, where the accused

goes to the ridiculous extent of asking people to examine their anus, this might lead them to confirm that the allegation is indeed true. This is more so as *[i]pako onipako laa ri, eni eleni ni i ri teni* [one can only see the back of another person's head; someone else sees one's own].[21] In such circumstances, African juristic thoughts encourage the person to commit his case into the hands of God, the perfect judge of all human activities.

METAPHYSICAL NATURE OF JUSTICE

The preceding thought naturally leads to consideration of the metaphysical (supernatural) nature of justice in indigenous African jurisprudence. First, as previously stated, is the recognition that only God, the perfect judge, can give a person justice in all matters of life. Africans are highly religious people with a pantheistic belief in different deities or gods through whom they worship God, the Supreme Being. To the African, the metaphysical world is a given reality. In fact, every social, political, economic and natural phenomenon or reality is taken to have metaphysical properties or undertones. God is the perfect judge because: *[o]tafa soke yido bori, bi oba aye o ri o, t'orun n wo o* [he who shot arrows into the sky, and quickly hid under a mortar, may not be known to the earthly king but the heavenly King knows him].

Thus, since God knows everything people do, he is able to render correct judgment and mete out appropriate punishment at all times, unlike the earthly judge who is limited in knowledge, wisdom and power. In other words, this depicts the divine properties of justice.

Second is the assertion that, whether someone likes it or not, whether now or in the future, justice will be done. According to the Yorubas: *[a]segbe kan ko si, asepamo lo wa* [there is no action (deed) without a consequence (reward); it may just be hidden (delayed) for a while].

It is believed that it is in the course of nature under the watch of the Supreme Being or the gods that whatever a person does is rewarded. The reward may of course be positive or negative. It will however be a just one. No matter how hard a person tries to hide his deed, one day it will come into the open, or at least his reward, a just recompense of what he did in secret, will come into the open to the knowledge of everyone. People are therefore philosophically counselled: *[e]ni n soore n se e fun ara re, eni n seka n se e fun ara re, a toore ati ika, okan ki i gbe, ojo atisun lo soro* [doing good is for one's benefit, doing evil is to one's detriment; both good and wicked deeds have rewards; live in view of the day of death].

This proverb also contains another aspect of the metaphysical nature of justice in African thoughts. This concerns issues surrounding one's death. The Yorubas believe that how a person dies is a reflection of whether he was a good or bad person. Dying by drowning, lightning, a terrible disease or any

21 That is, it is easy to come to a quick opinion about someone else because one does not know how one actually looks.

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other abnormal means is often associated with the kind of life the person had lived. It is therefore widely believed and taught that *olododo ki i ku sipo ika* [the righteous does not die like a wicked person]. Next is the issue of reward after death, with good people being positively rewarded in the next life while wicked people are otherwise rewarded. It is thus believed that, even if a wicked person somehow manages to escape his reward while living, he cannot avoid that associated with death.

The metaphysical nature of justice also leads to the assertion that every act of injustice will eventually be corrected: *[b]i iro ba lo logun odun, ojo kan lotito a ba a* [a lie that prospers (travels) for 20 years, is easily defeated (overtaken) by the truth in just one day]. This recognizes the fact that an act of injustice may be occasioned through the evil contrivances of wicked people or simply because the truth of the matter was unknown at the relevant time. This philosophical thought has at least three direct implications. First, it imposes a duty on society to ensure that an act of injustice occasioned on misleading and false premises is corrected as soon as the truth about the matter becomes revealed. Secondly, it puts the person or persons profiting from the lie on notice that the days of their so profiting are numbered, that, no matter how hard they try, the truth will be established one day. Thirdly, it gives credence to the constancy and power of the truth. Accordingly, truth is an invariable matter, that is unaffected by elemental factors of the human world, whether social, natural or supernatural. It is innately powerful and efficacious, requiring no extra efforts for acceptance and effect. These attributes are activated once it is revealed and known.

GOALS OF PUNISHMENT

The ends of punishment are very important in African juristic thoughts on justice. The nature, dimension and goals of any imposed punishment are considered to be determining factors in the search for justice in any society. First is the caution against imposing punishment on the innocent, as exemplified in the following lamentation: *[o]ri yeye ni mogun, t'aise lo po* [among the heads in Ogun shrine, are many that did no wrong]. In ancient Yoruba land, those guilty of heinous crimes are sometimes sentenced to death by beheading at the shrine of Ogun, the god of iron. The above lamentation simply bemoans the possible loss of lives at the shrine of Ogun without a just cause. This is particularly unfortunate due to the finality of death, by which even where facts later emerge that the deceased did not commit the offence for which he was beheaded, there would be no room for remedy. The poor soul is already dead and gone. Modern concerns about the propriety of capital punishment are also implicit in this lamentation. Human life after all is sacred and society must ensure its preservation, enhancement, enrichment and development.

The Yorubas therefore believed that only the guilty should be punished. After all, *ika to ba se ni oba n ge* [the king cuts only the finger that offended]. The demands of justice require that a person who has committed a wrong (whether civil or criminal), thereby creating an imbalance in social relations,

should be punished in order to restore the social balance. This view also seems to be saying that an offender should be punished because he or she deserves it. This seems to align with the retributive theory of punishment.[22]

The Yorubas also believe that *[i]ka to to simu, ni a fi n re imu* [a person uses the appropriate finger to pick his or her nose]. This means that punishment must be proportionate. Three factors basically affect the proportionality of punishment. First is the age of the offender, next is the nature and severity of the offence, and thirdly is the offender's condition. For instance the punishment meted out to a ten year old boy must be different from that given to a 30 year old man, with the former receiving a lesser punishment while the latter would receive a stiffer penalty. Depending on the circumstances, a very elderly person may also receive a lesser punishment due to the frailty brought upon him or her by old age.

The nature and severity of the offence naturally also determine the punishment imposed. Punishment for offences among the Yorubas ranges from payment of a fine as compensation to the wronged party, to returning stolen items (restitution), apology, caning, capital punishment (death by beheading, stoning or hanging), imprisonment (in dungeons or normal cells) and banishment from the community. A confirmed witch may for example be stoned to death (usually by mob action) or banished from the community by the king. Regarding punishment being determined by the offender's condition, a woman who is *abarameji* [pregnant] will normally not be executed, no matter her offence, except where her condition is not known. The underlying philosophical position here is that doing otherwise would result in the unintended killing of at least one innocent life in which society at large has an interest.

In fact, another reason why blame went to Ahun's father-in-law in the evening is because of what was thought to be the severity of the punishment. Tying a penitent thief on a tree from morning to night is considered not proportionate but excessive. At most, after imposing the punishment, Ahun's father-in-law should have demanded compensation from Ahun for previous thefts and, once the compensation was paid, the dispute between them would have been completely terminated.

Some other desired ends of punishment in the search for justice are encapsulated in the following proverb: *[t]i a ba fi owo otun ba omo wi,a a fi ti osi fa a mora* [when we rebuke a child with the right hand, we must use the left to embrace him or her]. This proverb depicts the reformatory or corrective goal of punishment in African juristic thoughts. The word *omo* [child] used here is not necessarily referring to one's own child, the fruit of one's body. In the African communal setting, a child refers to any child in the community and it is not out of place to refer to such a child as "my child". The upbringing

22 See HJ McCloskey "A non-utilitarian approach to punishment" (1965) 8/1–4 *Inquiry* 249, reprinted in G Ezorsky (ed) *Philosophical Perspectives on Punishment* (1972, State University of New York Press) at 132; H Morris "Persons and punishment" (1968) 52 *The Monist* 475; J Kleinig *Punishment and Desert* (1973, Martinus Nijhoff).

of children is in fact a communal responsibility. It is not left to the child's parents. Thus, since a good parent (out of love) will not totally cast off their child for whatever wrong they committed, the essential goal of punishment should be the moulding or remoulding of character: an aid in enabling the child offender to assimilate essential societal values including obedience, respect, hard work, love, integrity and honesty. It ought not to be a sadistic adventure. This viewpoint seems to agree with the rehabilitative theory of punishment.

Embracing the child offender also points to the reconciliatory goal of punishment in the pursuit of justice. Often a child under parental discipline soon becomes penitent and sorrowful, afraid of forever being out of favour with his or her parent. A good parent who has their child under one form of punishment or the other equally experiences mixed emotions of anxiety, sorrow, pain and disappointment. He or she experiences anxiety over the future of their child. Will this child ever become as I desire? Will this child think I hate him or her? Sorrow and disappointment fill his or her heart over the child's wrongful act and, because the child is experiencing some pain at the material time, a good parent also shares in the child's pain. The need for reconciliation between them is therefore mutual and the parent must sooner than later restore the normal parent-child relationship between them. It is on this philosophical platform that the African conception of the reconciliatory goal of punishment in society rests and it is easily conceivable that a society that so treats its child offenders will in return experience stability, cohesion and progress.

Punishment also serves something of a deterrent function in African jurisprudential thoughts. The Yorubas put it this way: *[b]i ile n gbe osika, bi ko gbe oloooto, bo pe titi, oore a ma a su ni i se* [where the wicked prospers, and the righteous suffers, people become weary of well-doing]. The essence of the thought expressed in this proverb lies in the need to punish wrongdoers so as to stop others from jumping on the bandwagon. In truth, any society that permits the prosperity of the wicked (the corrupt, the immoral, thieves, murderers, etc) will no doubt make life hellish and not worth living for the righteous (the morally upright who will not engage in corrupt practices, who obey the law, maintain personal integrity in dealings with others and generally follow due process). In attesting to this, Isaiah puts it this way: "justice is turned back, and righteousness stands afar off; for truth has stumbled in the public squares, and uprightness cannot enter. Truth is lacking, and he who departs from evil makes himself a prey".[23] The idea implied by this proverb is however more than that contained in the deterrent theory of punishment in western jurisprudence. The proverb actually canvasses a just society, where everyone is rewarded according to what he has done or failed to do. The wicked should receive a just punishment while the righteous receive a just reward, with the goal of discouraging wicked conduct and advancing righteous conduct in society.

23 *The Holy Bible* (2003, English Standard Version) Isaiah 59:14–15a.

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NATURE AND CHARACTER OF JUDGES

The judge must be an elder

Agba ki i waa ni oja, ki ori omo titun o wo [when an elder is in the market, a baby must be correctly carried by its mother]. *Agba ko si, ilu baje, baale ile ku, ile di ahoro* [evil befalls a town when there are no elders; a family house falls into ruins when the family head dies].

Elders in indigenous African communities occupy a special position as custodians of society's ancient customs and traditions, including the body of society's medical, technological and scientific knowledge. The reverence and honour given to elders is also partly motivated by the belief in their spiritual authority, a belief enhanced and sustained by the widespread practice of ancestral worship. The settlement of disputes thus naturally falls on the head of the elders, whether at the immediate family or family compound level or up to the level of the entire community, where the *baale* [village head] or *oba* [king] holds his court.

The oldest man usually holds the sacred duty of giving the final judgment at each level of society, with of course the exception of the *baale* and *oba* who may not necessarily be the oldest man due to the extant rules governing their ascendance to the throne. A *baale* or *oba*, whether young or old, is however supposed to possess the grave mind of an elder and also listen to the advice of his chiefs (executive council) before making his final decision known. The wisdom of this system is that, since the elder (the judge) is subject to no one else in his jurisdiction, he should be able to use his wealth of experience and wisdom to render a good judgment on any matter brought before him.

A jury system?

Ogbon ologbon ni ki i je, ki a pe agba ni were [the wisdom of others will not allow an elder to be termed "a fool"].

Among the Yorubas, when a matter is before an elder for adjudication, advice or for a decision to be taken, the elder will normally open the matter for discussion among the people present. He patiently listens to every submission and will often be the last person to speak. By the time he speaks, all those present will easily attest to the wisdom of the elder. This is however to be expected for, having listened to others' contributions, he is able to use their collective wisdom to render a sound final judgment, advice or decision. Even an *oba* in his palace will first consult members of his council before making his decision known.

This proverb thus encourages the elder (judge) actively to seek the advice of others so as not to occasion injustice through rendering a foolish judgment. It requires him not to think of himself as an epitome of wisdom and knowledge, as anyone who does so lives in a fool's paradise. This system of adjudication in a way recognizes a type of jury system and applies to all matters, the artificial distinction under English law between civil and criminal wrongs being inapplicable.

Judge's character matters

Bi ika ba ro ejo, ika ko ni yoo da a [the wicked may crookedly present their case, the judge will not be a person of their kind].

The essence of this proverb is that the character of the judge is essential in the quest for justice. As such, the judge is not expected to be a crook. He should stand morally tall and not be a deceitful or corrupt person. On corruption, another proverb cautions: *[b]i enu ba je dodo ni koro, enu ki i le so ododo ni gbangba*. This proverb also contains a play on words. It literally translates as: "if one eats *dodo* [fried plantain] in secret, one will not be able to say *ododo* [the truth] in the open". This thought finds support in the following biblical and Quranic injunctions: "you shall take no bribe, for a bribe blinds the discerning, and perverts the words of the righteous"[24] and "God commands you to render trusts to whom they are due, and when you judge between people, judge with justice".[25] This no doubt is a truism, and a judge upon whom the fate of all lies ought not pervert the cause of justice by ridiculing himself through corrupt practices.

Another implication of the penultimate proverb is that the judge must be sufficiently wise, knowledgeable and experienced to be able to recognize the devious means of a litigant attempting to thwart the course of justice. He should be able to discern the party in the right and the party in the wrong and accordingly do the right thing, no matter how convincing and sharp the devious evidence of the other party. The judge must give judgment deservingly and without bias, not minding whose ox is gored.

CONCLUSION

This article has attempted a reconstruction of indigenous African jurisprudential thoughts on the concept of justice, focusing in particular on articulating the concept through a prescriptive exploration of Yoruba proverbs. Four aspects of these were discussed: the attributes of justice; the metaphysical nature and character of justice; the goals of punishment; and the character and nature of a good judicial system.

A primary attribute of justice is reconciliation. This is a primary pursuit in the search for justice: a derivative of the communal lifestyle of indigenous African societies. Justice in the African conception is also non-discriminatory, ensures a fair hearing for parties in a dispute, advances the rights of individual members of the community, and does not depend on the volume of evidence. The fatalistic conception embedded in the fifth attribute led the discussion to consider the metaphysical nature and character of justice, in which the religious beliefs of African society came to the fore. In this regard it is believed that justice is divine, in that only God, the righteous judge, can render justice at all times and that, whatever individual members of the

24 *The Holy Bible* (1982, New King James Version) Exodus 23:8.
25 Quran 4:58.

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society may do, justice will eventually be done, whether in this present life or in the afterlife.

A basic goal of punishment identified here is the need to ensure that only the wicked (guilty) is punished, as it is highly unfortunate to see a person suffer unjustly. Punishment must also be proportionate depending on the age of the offender, the severity of the offence and the present condition of the offender. The ends of justice are also served when justice is reconciliatory, corrective, rehabilitative and reformatory.

On the character and nature of a good judicial system, indigenous African jurisprudence requires that a judge must be an "elder" or possess the grave mind and wisdom of one. A kind of jury system is also advocated, where the elder (judge), instead of personally arrogating all adjudicatory power and wisdom, actively consults and listens to the counsel of others before giving his judgment. It is considered morally repugnant for a judge to be corrupt and thereby pervert the cause of justice. The judge must in fact not only be sound in character but also sufficiently wise, knowledgeable and experienced to be able to recognize a litigant's devious means in attempting to thwart the course of justice.

Some things must of course be noted in this reconstruction. First, compartmentalizing the indigenous African conceptions of justice into four categories is artificial, as rigid lines may not at all times be drawn between the issues explored in each category. For example, the discussion under "goals of punishment" could as well appear under "attributes of justice". Secondly, though an attempt was made to compare the indigenous African conceptions of justice with similar theoretical postulations in western jurisprudence, the true value of the former lies in their proper understanding and appreciation within the indigenous African setting, as doing otherwise would lead to contradictions and absurdities. Next, it should be known that these conceptions are not meant to be purely theoretical but are actually part of the worldview of a people, reflecting their culture, lifestyles and religious beliefs, and the social, legal and political organization of their societies. They are theoretical postulations intended to give pragmatic solutions to the problems of achieving justice, peace and order in society, with the intention of firmly placing society on the path to progress and development.

Finally, it should of course be understood that, since pre-colonial Africa could not be said to be monolithic culturally, linguistically, politically and otherwise, it is indeed impossible to speak of a homogeneous indigenous African legal system or jurisprudence "even if the different (local) legal traditions have some similarities and common features".[26] Hence, while the different thoughts expounded here no doubt can be generalized as "African", they clearly more accurately reflect those of the Yoruba people, which of course makes them "African" indeed.

26 S Mancuso "African law in action" (2014) 58/1 *Journal of African Law* 1 at 2.

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