

## COMPARATIVE ANALYSIS OF THE ISLAMIC LAW AND COMMON LAW IN NIGERIA: CASE STUDY OF ADULTERY AND THEFT

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### ABSTRACT

The colonial rulers pursued a policy, which aimed at curtailing the application of Islamic law. The legal and judicial system they enshrined and the institution they established were governed by rules, which were structured to achieve the said objectives. The legislature of the country as well as the courts ensured that English Law was promoted at the expense of Islamic and Customary laws. Despite the achievement of Independence in 1960, the trends have not being changed. This paper highlights the objectives of Shari'ah and also attempts a comparative analysis of the Islamic legal system and the English Law within the Nigerian context especially as its relate to the punishment of adultery and theft and it implication. The paper proffers some useful suggestions for the purpose of peaceful co-existence and national understanding and co-operation.

**KEYWORDS:** Shari'ah, Adultery, Fornication, Stealing, Theft, Legal System

### INTRODUCTION

Among the most far-reaching consequences of Nigeria's colonial era or experience was the imposition, by the colonialists of English common Law which has superseded our time honored judicial processes and principles, particularly regarding the Shari'ah legal system to which the majority of Nigerian Muslims adhered to. The contempt and totality with which the English law holds or regards the Shari'ah meant that, Islamic legal practice is still restricted or rather relegated to civil matters and other personal issues like marriage, divorce, inheritance etc. While on the other hand, English law claim superiority or monopoly over almost all forms of laws like constitutional, commercial, and criminal. Nonetheless, despite the fact that, majority of Nigerian Muslims particularly in the Northern part were Muslims, common law rather than Islamic law serve as the main judicial code and procedure; as a result of which at present law in Nigeria is substantially divorced from its natural socio-cultural and religious context; which of course Muslims considered this trends as injustice and grossly inappropriate (Rashid, 1988).

Islam is not only a religion, but also a total way of life that embraces both secular and religious matters. This fundamental principle is what set it in a collision course with western practice where religion and secular matters are separate. Due to the strong western domination and influence which the west exerts in the world today as a result of its material, economic and high technological eminence, its misconception about Islam have translated into a global condemnation of any system that is Islamically oriented (Kurawa, 2000). Nowhere is this condemnation more plausible than in the pathological and incessant fear many people have on the implementation of Islamic legal system otherwise

known as Shari'ah.

Shari'ah or Islamic law according to Ambali (1998) is grossly misconceived and misunderstood where some people look at it as representing a bundle of barbaric and primitive values and practices, while to others, it stand for a legal system whose punishment are inhumane, amputation, mutilation savage stoning to death and archaic corporal punishment. And yet to some people, Shari'ah stand for the explosives in the hands of the Muslim fundamentalists in the developing countries while still others regards it as a so-called law of backward-looking civilization of "Mohammadans".

To the Muslims, justice can never be truly conceptualized nor well practiced unless it is rooted in the belief in Allah (SWT) and the implementation of his rules and regulations. In fact meaningful justice begins in giving the honor and recognition of creation and sustenance of the universe to whom they are due. It will amount to isolated justice for somebody to single himself out of the whole system and designed for himself what he calls justice. The angle from which Islam looks at justice is global and comprehensive. Allah (SWT) has created everything with a purpose and in perfect balance and harmony. He has also guided every creation so that it can fulfill the purpose of it creation.

Justice for man according to Ambali (1988) lies in obeying Allah (SWT) by doing what He has laid down. He further observed that:

It is only Allah (SWT) who can establish the intricate network of interrelationships and roles, mutual right and obligations and consequent rewards and punishments on the basis of absolute standards of justice. It is beyond the reach of man to determine these standards because he himself is subject to the law. In addition, he has limited capacity to comprehend fully the intricate network and interrelationships of the creation with which he interacts. Man on his own, cannot determine what is 'good' or 'evil'. He requires divine guidance. It is this guidance that is known as Shari'ah. It guides man on what he owes Allah (SWT), what He owes himself, the right of other people over him and what he should and should not do with the powers and resources, which Allah (SWT) has placed at his service and put, under his control.

### **The Objectives of Islamic Legal System**

Basically, to the Muslims, no law is ever more justifiable than Shari'ah because its application is not even limited to human beings alone but to all other creatures of Allah. This explains why the creatures co-exist in a well-designed arrangement of nature without conflicting with one another (Mahmud, 1988).

One important aspect of Shari'ah, beside it comprehensiveness, is its provision for and emphasis on justice. In connection to this, the Qur'an says:

O ye who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you makes you swerve to wrong and depart from justice. Be just: that is next to piety; and fear of Allah. For Allah is well acquainted with all that ye do (Q. Chp. 5 V 9).

More so, the Prophet (SAW) is quoted to have said; "*On the Day of Judgment, Allah will give shelter to seven people among whom is a leader who is just*" (Sahih al-Bukhari, 1988).

Another objective of Shari'ah is to shape the lifestyle of human beings either individually or collectively so that they live on earth usefully and peacefully. Thus, Shari'ah provides for Muslims set of rules and regulation that helps them regulate their life and affairs (Adegbite, 2000). While on the other hand, it regulates the relationship between an individual

and his creator and between an individual and his government, his fellow citizens and other creatures.

In essence, therefore, Islamic law has the advantage of perfection over man-made laws. By this is meant that, it entails all that society may require in ways of judicial decisions and concepts necessary to meet the need of human society in the present, and in the near and distance future.

### **Comparison between Islamic Law and Common Law**

The word Islamic law (Shari'ah) like *Jihād* has been made a threatening word especially to the ignorant and bias-minded people. Most often, it is regarded as a system without mercy and one that provide only cruel punishment like amputation, stoning and whipping and in some cases, it is look upon as primitive, barbaric, troublesome and fanatical. More so Shari'ah is also misunderstood, misinterpreted and misconceived to mean a system of law that is archaic, retrogressive and uncivilized. Such imagination, have distorted and misconceived the meaning of Shari'ah forgetting that Islam, Shari'ah and Muslim cannot be divorced from one another. While Shari'ah is a divine law, Islam is the submission to the divine will and a Muslim is one who submits to the divine will as contained in the divine law. To therefore deny Muslims to regulate their lives by divine law is tantamount to denying them the right to accept divine will that is enshrined in the divine law. As such, Muslims in Nigeria certainly needs Shari'ah (Galadanci, 2002).

### **The Case of Adultery and Fornication**

The punishment for adultery and fornication is prescribed only when the culprit confesses the crime or if four witnesses adored for their righteousness and integrity were present at the accomplishment of the sexual act; and in a manner, which could exclude the possibility of any slightest doubt. By implication, it will not be sufficient if the accused were seen naked or stuck together. Moreover, the testimony of only one, two or three persons has no value before the law and will not be sufficient at all, unless if the act is performed in the presence of four trusted and reliable witnesses who have never been indicted. If that has been confirmed, then the Islamic position is that public order has been seriously offended and violated (Dawalibi, 1972).

Furthermore whether legitimate or not, it is always improper for sexual act to take place in public. That was the rational behind putting the most severe punishment against the offenders of public order and morality. It is also a fact that, if such an act occurred in the street of any capital or civilized country, passerby would have taken upon themselves to inflict the most dreadful punishment to the offenders even before the case would be taken to court; and that such people would be treated like beast and their lives would deserve no more respect.

The purpose of prescribing such a severe punishment for adultery at the very beginning of Islamic message is to instill morality in the community where confusion was prevalent with regard to paternity, so that procreative instinct would be regulated and be exercise only within the limit of legitimacy. Therefore, from the beginning of Islamic message and throughout the life of the prophet, no single case of adultery was established by evidence of four eyewitnesses (Dawalibi, 1972). More than fourteen hundred years since that severe penalty was prescribed, but hardly can we establish fourteen cases of stoning or whipping of an adulterer or adulteress. As such, the punishment has remained cruel in principle, but extremely rare in practice.

## The Case of Stealing or Theft

On the other hand, the case of stealing or theft has been declared unlawful and the offenders are to be inflicted with harsh and severe punishment. In the year 10 A.H equivalent to 632 A.D, the Prophet (SAW) in his farewell pilgrimage declared that “your lives and properties are sacred to one another...” These however signify that Islam has conferred the right and security of ownership of property. In this connection, the Qur’ān says:

And do not eat up your property among yourselves in vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people’s property (Q. Chp 2 V 188).

“Stealing or theft is an illegal means of acquiring another’s property” (Doi 1984). Islam teaches that theft, with the exception of doubtful cases, as one prompted by starvation is punished by amputation of the hand. Stealing, as practice in other places particularly in the west is most of the time perpetrated by force, the end product of which entails the murder of the victim. One begins to wonder in such an incident whether it is better to have pity on the hand of a thief rather than on the life of the assaulted person (Dawalibi, 1972).

It is glaring here in Nigeria that because of the fear of thieves and armed robbers, the feeling of insecurity has taken over the control of our psychology, the effect of which no state or private monies could be easily and securely transferred from one bank to another without the protection of a strong police force and a necessary number of armored cars.

The constitutional provision of the English common law imposed on the Nigerian Muslims by the colonialists provides imprisonment or fine as punishment for theft, which gives the offender the room to resume back his deeds after his discharge from prison or after payment of stipulated fine. For the avoidance of such therefore, corporal punishment is supposed to be inflicted to serve as deterrent to others which is the more realistic position taken by the Shari’ah in punishing a thief by amputating one of his hands.

It is clear that the punishment for committing theft in the period of the earlier prophets of Allah is even more severe than what is obtained in the Shari’ah. During the period of Prophet Isa (A.S) i.e. Jesus Christ (peace and blessing of God be upon him) anyone who was found guilty of committing theft and it was proved, was crucified; as the Holy Bible says: “Then there were two thieves crucified with him, one on the right hand and the other on the left.” (Mathew 27:38).

Islam wants to build a healthy community in order to establish peace and security in human society, stealing is considered a grave crime and that was why Islam stipulates grave penalty to the offender, which is amputation of hand, which at the same time is more sympathetic and merciful than the jungle justice being administered in some States of the Federation by putting a tyre on the neck of a thief and then roast him alive.

In summary, it must be understood that, under Shari’ah legal system nobody is above the law; because the Shari’ah does not favor any person whether king or slave rich or poor black or white. Once a crime is proved against anybody beyond reasonable doubt, punishment will be applied to him regardless of his status in society.

## RECOMMENDATIONS

Having said much, the writers wish to proffer the following recommendations to avoid further misconception, misperception and misrepresentation of Shari’ah legal system in Nigeria.

- Muslim scholars should put more effort in educating people both Muslims and non-Muslims on the benefits of Shari'ah and its application to the Muslims as part of their fundamental right of freedom of worship and religion.
- Mutual understanding and respect for the religious beliefs and sensitivity of one another is what a multi-religious setting of the country demands of all of us.
- Muslims should as believers who are concerned about the image of their judicial and legal institution and not as bureaucrats, develop interest in recognizing the institution to make it conform as closely as possible to the Islamic norms and ideals.
- Matters relating to religion specifically should be removed from the deliberative processes when the need arise for any constitutional debate; because it is the object of passionate appeal and manipulation by the politicians.

## CONCLUSIONS

In conclusion, it should be understood that the position accorded to the Shari'ah is completely unjustifiable because the Shari'ah will die out and the whole Muslims Society will eventually de-Islamise which consequently will result to the Europeanization of the country

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