

**INTER RELATIONS BETWEEN COMMON  
LAW AND SHARIA LAW**

**PRESENTED BY**  
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**INTRODUCTION**

In Nigeria, we have a very large number of ethnic layouts. The interesting thing is that with more or less unconscious efforts, a smooth melting and to some extent fusion of cultures has taken place. This development has necessitated very crucial happenings particularly with regard to the judicial system.

It goes without saying that when peoples of various cultures and beliefs come together to live as a community, there are bound to be arrangements of give and take for the community to have harmonious relationships.

There is no doubt social activities will come into play, inter marriages will take place and families will emerge. To regulate these relationships, they must put in place a Legal/ Judicial system to moderate the harmonious relationships between the communities.

This has been the position in Nigeria even before Independence in 1960. As a matter of fact the various communities in Nigeria had been doing their thing long before Independence.

I think it will be correct to say that at Independence in 1960 a lot of water had run under the bridge, in the sense that very virile and functional judicial systems were in place. In the North of the country, Sharia law system was well established with Judges, Court staff and Court houses functioned very well. The system allowed Emirs to be at the top. The Emirs in the various Provinces appoint the Judges and senior Court staff. They also control the Police Force and the Prisons.

Institutions for the training of Judges and senior Court staff were put in place, one can recall with nostalgia, one of the most famous institutions, The School for Arabic studies in Kano. My Alma Mata.

In the South, there are readily available many Customary Courts presided over by Elders chosen by the communities. These two systems had worked very well over the years somewhere in between, however another system came on board, and that is the common law system.

These three systems developed and each one chartering its own course. They became like three streams flowing smoothly by each other's side and finally got a position of recognition in our Constitution, particularly the 1979 and the 1999 of the Nigerian Constitution.

Having said this much by way of introduction, I will now consider the topic which is comparative insight into the common law system and the Sharia law system.

We all know what common law means.

It is with regard to the Sharia law, that I need to say few things to clarify certain concept or is it misconception Sharia can mean one of two things, depending upon how you look at it.

One concept is that, for a Moslem, Sharia law is generally regarded as a way of life; which means it covers the whole spectrum of a Moslem's life from cradle to grave.

The other concept is that Sharia law is such volume of legal norms that governs the life of a Moslem in his dealing with other people, be they Moslems or non-Moslem, as well as the State.

My discussion will be centred on the second concept, since the topic is comparative insight into the common law system and the Sharia law system.

I will however mention one distinctive feature of the Sharia law. "It is the law that has molded the people, and not the people the law."

In discussing this topic, I would like to consider some important features of the administration of Justice in any society, but particularly in Nigeria. The first issue I will discuss is the concept of fair hearing.

**1. THE CONCEPT OF FAIR HEARING/FAIR TRIAL AND THE RULE OF LAW UNDER COMMON LAW AND THE SHARIA LAW.**

Fair hearing is one in which authority is fairly exercised that is consistent with the fundamental Principles of Justice embraced within the conception of due process of law. Simply put, fair hearing is the opportunity afforded to a party to proceedings to present his grievance with no obstruction from the authority. That is the right to present his evidence, to cross examine witnesses called, be appraised of the evidence against him, so that at the conclusion of hearing, he may be in a position to know all the evidence on which the matter is to be decided. This equally applies to an accused person in a criminal case.

As far back as 1873. Mr. Justice Blackburn made the following observations.

“To the rule about a fair trial there is the further rule about bringing to bear on a party. None shall, by misrepresentation or otherwise, bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint, or to give up his defense, or to a settlement on terms which he would not otherwise have been prepared to entertain.”

A hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard, present his case or call witnesses.

The principle of fair hearing is normally equated to fair trial or to natural Justice. I think it is an acceptable assumption, because the true test of a fair hearing in a case has always been the impression created in the mind of a reasonable person who was present at the trial, whether Justice has been done in the case.

To achieve the principle of fair hearing in this context, there are at least two inherent rules.

1. “That the Judge before whose Court the complaint or grudge is brought must hear the two parties to the dispute. This accords with the common law doctrine of **AUDI AL TERAM PERTEM.**
2. That there should be no evidence of bias, so that one should not be a Judge in one’s own cause. This accords with the common law doctrine of **NEMO JUDEX IN CAUSA SUA.”**

If for any reason, these principles are not adhered to, it is for the appellate Court to declare that there has not been a fair hearing and such proceedings must EX DEBITO JUSTICIAE be declared a nullity and be struck out. This principle clearly approved by the case law had its root in the common law.

Let us now consider the other side of the coin, that is the position of Islamic law, popularly known and called the Sharia.

The Sharia Legal system equally recognises the principles of fair hearing. I think it is important to point out that, the foundation of Sharia law can correctly be said to be a religious law, so much as the foundation of the common law of England is.

It is perhaps pertinent to mention that the common law of England derives its origin from the Ecclesiastical law, which in general sense means the law relating to any matter concerning the Church of England administered and enforced in any Court. It also can mean the law administered by Ecclesiastical Courts. The Ecclesiastical law of England derives its immediate origin largely from the Canon law of Papal Rome and the Civil law of Imperial Rome.

I think it is appropriate at this stage to cite a passage from the Holy Quran, which states:-

“And now have we set thee (O Muhammad) on a clear road of Our Commandment, so follow it, and follow not the whims of those who know not” Al Qur’an 55:18.

In another passage, Allah The Most High states;-

“It is obligatory on the Judge to maintain absolute equality (impartiality) between the contending parties with regard to the way they stand-up or sit-down; their proximity or distance (from the Judge), how he listens to them and how they raise their voices. This is irrespective of whether the parties are Muslims or otherwise.”

So much for the source. Let me now consider what the Sharia law in general terms provides regarding the operation of the principles of fair hearing.

I shall now refer to the provision in one of the most authoritative book of **JAWAHIRU AH. IKLIL (Commentary in MUKHTASAR) Vol. 2 page 225**. It provides.

“The Judge should preserve the most absolute equality between the contending parties, whether they are Muslims or otherwise.”

The following comments followed on the above passage.

It is also settled in Sharia law the order in which the parties will state their case. The plaintiff shall state his claim first, after that the defendant will be afforded equal opportunity to either admit or deny the claim. In the case of criminal charge, the accused or Defendant can confess or plead not guilty. On no account shall a Judge prepare his decision without first hearing to finality all the parties.

See another passage in the same book quoted above, Vol.2 at pages 199 -200, which states:-

“The Judge shall not deliver any Judgment against any of the contending parties until he hears to completion the claim of the plaintiff. If the plaintiff has finished stating his claim, then the Judge will ask the defendant to state the true position of the claim against him. If he admits the claim as stated by the plaintiff that is the end

of it. But if he denies then the plaintiff has to lead evidence to establish his claim.”

Let me finally on this issue quote from an authoritative instructions given by **CALIPH UMAR BIN AL-KHATTAB - (R.L.A.) THE SECOND CALIPHA. TO ABU MUSA AL-ASH'ARI** on the occasion of the appointment of the latter as a Judge to AL-KUFA. This instruction clearly laid down the rules of pleadings and evidence in a trial. It states as follow:-

“Now the office of the Judge is a definite religious duty and a generally followed practice. You should understand the nature of the depositions made before you as it is useless to consider an invalid plea. Consider all the people equal before you in your Court and in your attention so that the noble will not expect to be partial and the humble will not despair of Justice from you. The claimant must produce evidence and you should extract an oath from the defendant. Compromise is permissible among parties but not to the extent of legalizing the prohibited or permitting the forbidden. If a person brings a claim which he may not be able to prove, set a time limit for him. If he brings proof within the time limit, you should allow his claim otherwise, you should give Judgment against him. This is the best way to forestall or clear up any possible doubt. All Muslims are competent witnesses against each other except such as have been disqualified (by law) e.g. those guilty of giving false evidence or where there exists party-witness relationship (which may confer benefits on the witness such as son-father relationship etc). you should avoid fatigue, weariness and annoyance at litigants.”

To put it in a summary form, the following fundamentals must be observed in any trial.

1. “The Plaintiff must be afforded an opportunity to state his claim.

2. The defendant must be afforded equal opportunity to either admit or deny the claim against him.
3. The Judge should preserve absolute impartiality between the parties.
4. If the plaintiff calls a witness, the Judge will ask the witness what he knows about the dispute between the parties.
5. If the witness does not know anything he can straight away be discharged.
6. If the witness gives evidence in support of the plaintiff's claim, the defendant shall be allowed to cross-examine him.
7. The defendant has the right to challenge the competence of the witness to give evidence on such grounds as bias or prejudice or blood tie (Tajreeh).
8. When the evidence of a witness is so challenged, the Judge shall allow the witness to defend himself against the challenge.
9. If defendant successfully discredits the evidence given by a witness, the evidence shall be discarded.
10. Parties in an Islamic law suit, are not competent witnesses in their respective cases (as against the common law) hence their statements in Court cannot be regarded as evidence but something akin to statement of claim or defense as the case may be.
11. Every claim must be stated in clear, unambiguous and categorical terms. In landed properties, locations and boundaries or any special feature must be mentioned.
12. In all questions relating to property (mal) judicial proof is complete by the evidence of.

- (a) Two males of unimpeachable character (Adlani).
  - (b) One male and two females.
  - (c) One male and plaintiff's oath.
  - (d) Two female and plaintiff's oath
13. It is not mandatory for a witness to subscribe to an oath or be subjected to an affirmation before he can testify. It is purely within the discretion of the Judge.
14. It is not mandatory that when a visit to locus in quo is conducted by a Court that evidence must be taken there and then. The usual practice is that after the inspection, hearing is resumed in Court when witnesses who were at the inspection of the locus shall be called upon to testify.

Let me close the discussion on this subject by citing two short passages from the Holy Qur'an. Thus:-

“And if ye Judge between mankind that ye Judge justly” 4:58.

“And let not hatred of any people seduce you that you deal not justly. Deal justly, that is nearer to your duty.”

I shall now move to another topic which deals with the principle of burden of proof.

## **2. BURDEN OF PROOF UNDER COMMON LAW AND ISLAMIC/SHARIA LAW.**

It is accepted both in common law and Sharia law that evidence remains the surest means by which facts are proved before a Court of law.

In general terms, evidence is the means from which an inference may logically be drawn as to the existence of a fact; that which makes evident or plain. See **HENRY CAMPBELL BLACK LAW DICTIONARY**.

The term evidence includes all the means by which any alleged matter or fact, the truth of which is submitted to investigation, is established or disproved, through the medium of witnesses, record, documents, concrete objects and the like.

The same position is obtainable in Sharia law called **SHAHADAH/BAYYINAH**.

**IBN QAYYIM** states as follows:-

“Evidence is a name of that which explains or clarifies a claim/right. Any one who limits it to the evidence of two, or four witnesses or even a witness, does not accord the name its rightfully title.”

Simply put, the law of evidence is that body of law regulating the burden of proof, admissibility, relevance and the weight as well as sufficiency of what should be admitted into the record of proceeding.

Generally the bottom line is what is known as standard of proof and/or Burden of Proof. It is important to note that the standard of proof varies between Civil and criminal proceedings. Balance of probabilities or preponderance in Civil case, while proof beyond reasonable doubt is required in criminal case. This generally is the position under common law.

What then is the position under the Sharia law.

The Sharia law recognizes and lays a lot of premium on the doctrine of burden of proof or standard of proof. It can even be said that the conditions or requirements under Sharia law are stricter than the ones under the common law.

I will start with a saying of the **HOLY PROPHET (PBUH), that:-**

“If people were to be granted their requests, some will claim the blood and properties of others. But establishment (of a claim) (burden of proving the claim) is on the claimant (Plaintiff) and oath is on the denier (defendant).”

See also AL-FASI, which states:-

“Establishment of the claim is on the Plaintiff. Evidence is required in all situations. The defendant is required to subscribe to the oath where the Plaintiff fails to substantiate his claim.”

See also another passage from the same author:-

“That the Plaintiff is required to establish his claim irrespective of whether he is chaste or unchaste; God fearing or otherwise. It applies generally to every claimer (plaintiff).”

I think it is fair to say that the standard of proof in Sharia law in both criminal and Civil proceedings depends entirely on the subject matter brought to Court for adjudication.

Thus, the primary means of proof in Sharia law differ in some ways from the ones found in common law.

Those provided by Sharia law are;-

1. Al-Iqrar (admission/confession),
2. Al-bayyinah (evidence)
3. Al- yameen (Oath) and
4. Nukuul (refusal to take the Oath).

I shall discuss briefly each of the four methods. It should be noted that methods (3) and (4) are not applicable in common law case.

**Al-Iqrar;** (confession as in criminal matters) or admission, in civil matters) is an acknowledgement by a competent person against himself which binds him. It is a sort of evidence against oneself in favour of another. It is the strongest proof for the establishment of the plaintiff's claim. It is stronger than evidence or Oath.

It is stated in TUHFA that :-

“Where an adult in a state of health, makes an admission in favour of another, such an admission suffices. This is best standard of proof.”

**AL-bayyinah** (evidence)

This involves the calling of witnesses to establish the claim against the defendant. The standard of proof differs from one subject matter to another. For instance, on financial transactions the standard set by the Holy Qur'an is as provided by Chapter 2 verse 282 thus:-

“And let two (male) witnesses testify from your own men. where they are not available, then let one man and two females (testify) from those you choose for witnesses.”

Another verse 2 in Chapter 65 provides:-

“And take for witnesses two persons from among you endowed with Justice and establish the evidence.”

In the saying of the Holy Prophet (PBUH) simply stated that “your two witnesses or his Oath.” Also “Every claim is established by (the evidence of two irreproachable male (witnesses)).

This basic principle is applicable to the following related transactions:-

1. All commercial transactions (buyu')
2. Landed matters (aradhi)
3. Loan (ariya)

4. Gift (Hiba)
5. Pledge (Rahan)
6. Hire (ijara)
7. Commission/wages (Ju'lu)
8. Deposit (wadiyah)
9. Trust (amanah)
10. Rent (Kira')
11. Marriage (Nikah)
12. Divorce (Talaq)

Majority of the Muslem Jurists accept that, except in the case of the crime of Zina, all other claims/charges can be proved by two irreproachable witnesses. In order to prove the crime of ZINA four male witnesses must be produced, and two to support the culprit's confession.

Sharia law has also given special consideration to female witnesses particularly in events which do not usually occur in the sight of men, such as the existence of virginity, menstruation, suckling, defects in woman and in parts of the body usually covered. The proof of these and the like is normally done by the evidence of four women.

Generally the minimum requirement for the establishment of a Civil claim is any of the following:-

- a. Unequivocal admission by the defendant.
- b. Two males of irreproachable character
- c. Evidence of one male and two female
- d. Evidence of two female witnesses plus the plaintiff's oath.

**Al-Yameen** or Oath is another yardstick set by Sharia law to ascertain a claim. Generally it connotes a solemn pronouncement or delcration in the

name of ALLAH or HIS ATTRIBUTES to affirm the truth of one's statement.

A tradition of the Holy Prophet stated thus:-

“establishment of the claim is on the Plaintiff and Oath is on the defendant.”

This means that where the plaintiff fails to discharge the onus of proof placed on him by law, oath will be administered on the defendant to entitle him to what the plaintiff was claiming from him. If the defendant refuses, to take the Oath, the plaintiff will be required to take the oath, and if he does so, the claim against the defendant will stand proved.

This is one clear area where Sharia law of evidence differs from the common law. The common law does not recognize the administration of an oath on a defendant, where the plaintiff fails to discharge the burden of proof. Under the Sharia law, it is on very rare occasions that the defendant is called upon to call witnesses where there is failure by the plaintiff to establish his claim. Instead the defendant is asked to subscribe to the oath of entitlement.

Imam Ibn Farhun in *Tabsiratu Al-Hukkami* page 232 stated thus:-

“As for the oath of denial (in course of a trial) is that in which a man (plaintiff) claims from another (defendant) a right and he has no evidence to prove it against (the defendant). The defendant denies and the oath is now on him to deny what the plaintiff is claiming.

See also another passage where he stated thus:-

“As in the case of the reversionary oath, it is where the defendant is required to take the exculpatory oath but he refused. It then reverts to the Plaintiff and if he swears he shall be entitled to the claim..... where he refuses to

swear then he shall not be entitled to anything.”

I shall now consider briefly the Sharia law on proof of ZINA that is the offence of adultery or fornication.

The penalty of course is very severe. It is summary execution by stoning in case of ZINA, while fornication carries a punishment of 100 stripes of the cane.

In view of the severity of the punishment, the requirement for its proof is also made very weighty. The burden of proof is on the accuser. The standard of proof is fixed by the Holy Qur'an. Surat Al-Nisai.

“If any of your women are guilty of lewdness take the evidence of four reliable witnesses from among you against them.”

All the Schools of jurisprudence are in agreement that there must be four male witnesses to prove the offence. If the number of witnesses is less than four, then the witnesses will be guilty of “QAZAF” (defamation) and their punishment is 80 stripes each.

See verse 4 of Surat Al-Nur, which provides thus:-

“And those who accuses honourable women, but bring not four witnesses scourge them with eighty stripes. In addition to this punishment, the people will forever be looked down upon and their evidence will never be accepted again.”

If there is slightest doubt, the offence shall be regarded not proved, and the burden not discharged and the accused must be discharged and acquitted.

The Holy Prophet said:-

“Prevent punishment in case of doubt. Release the accused whenever possible, for it is better that the ruler err in forgiving than err in punishment.”

I think it is important before I conclude this paper to touch upon one important area under the Sharia law, and that is the area of inheritance or succession.

### **SUCCESSION:**

Under the Sharia law, it is called **MIRATH, FARA'IDH**, which means the process of transfer of ownership of the estate of a deceased Muslim to his surviving heirs in accordance with the principles laid down by Sharia law.

The Holy Qur'an in Chapter 4 verse 7 states:-

“There is a share for men and a share for women from what is left by parents and those nearest related, whether the property be small or large, a legal share.”

The formula for the sharing is also set out in the Holy Qur'an. See Chapter 4 verse 11 which provides then.

“Allah commands you as regards your children's inheritance: to the male a portion equal to that of two females: If only daughters, two or more, their share is two thirds of the Inheritance; if only one, her share is half. For parents, a sixth share of the inheritance to each if the deceased left children, if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters), the mother has a sixth (the distribution in all cases is) after the payment of legacies he may have bequeathed or debts.

You know not which of them (whether your parents or your children) are nearest to you in benefit.

It is an order from Allah. And Allah is ever All-knowing, All Wise.”

(underlining supplied by me for emphasis).

(iii) The next verse in the same chapter stipulates:-

“In that which your wives leave, your share is

half, if they leave no child, but if they leave a child you get a fourth of that which they leave after payment of legacies they may have

bequeathed or debts. In that which you leave, their (your wives) shares is a fourth if you leave no child; but if you leave a child, they get eight of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (she) may have bequeathed or debts: so that no loss is caused to anyone. **This is a commandment from Allah** and Allah is All-knowing. Most Forbearing.”

(iv) In the last verse of Chapter IV Allah say:-

“They ask you for a legal verdict. Says: “Allah directs about those who leave no descendants or ascendants as heirs. If it is a man who dies, leaving a sister, but no child she shall have half of the inheritance. If the deceased is a female who left no child, her brother takes her inheritance. If there are two sister they shall have two-thirds of the inheritance, if there are two brothers and sisters, the male will have twice of the female. Thus does Allah make clear to you His Laws lest you go astray and Allah is knower of All things.”  
(underlining for emphasis).

## **PHILOSOPHY BEHIND THE LEGISLATIONS**

The philosophy behind the legislations for mandatory distribution of estate of a deceased Muslim centres on the following points:-

- (i) Equality of heirs as they relate to the deceased (in the sense that no one is omitted from the estate of the deceased once he/she is legally qualified to inherit the deceased).
- (ii) The sacrosanct of direct divine distribution of the estate removes conflict from the family unit or minimizes it provided those assigned to distribute follow the right steps as laid down by Sharia.
- (iii) It lays a foundation for a stable Islamic welfare system among the family nucleus and the entire Ummah.”

### **CLASSIFICATION:**

Sharia law of succession is divided into two.

- (1) Testate succession and
- (2) Intestate succession

Testate succession deals with wills/bequests and so on.

A Muslim is entitled by Sharia to make a bequest of some portion of his property while he is still alive. He is not however allowed to give away more than one third of the estate.

Intestate succession deals with the sciences of distribution of the estate of the deceased to his heirs.

### **ESSENTIAL REQUIREMENTS FOR INHERITANCE**

There are three of them.

- 1. Death of the praepositus.

Heirs of a deceased person can benefit as heirs

only after the confirmation of the death of the deceased.

2. Survival of an heir after the death of the deceased.
3. Proper knowledge of the relationship between the Deceased and the heir.

### **GROUND FOR INHERITANCE;**

There are three grounds:

1. “Blood relationship. This group consists of parents, children, brothers, uncles etc.
2. Marital relationship where there is a valid and Subsisting marriage at the time of death of the deceased, each of the spouses is entitled to inherit the other.
4. **Slavery:** Where a Master emancipates his slave and the slave dies without an heir to his property, the Master inherits the property.”

### **DISQUALIFICATION OF AN HEIR:**

Some of the grounds are:-

1. **Murder /Homicide:**  
Where an heir kills any of his relations from Whose estate the heir is entitled to inherit, Sharia Law will not allow him to partake in that inheritance.
2. **Difference of Religion:**  
All the four Sunni Schools are unanimous that a Muslim shall not inherit the estate of a non-Muslim, likewise a non-Muslim shall not inherit the estate of a Muslim.

I have graphically set out these essential details to show clearly that the concept of Shania law in this regards is totally different from the concept of the common law.

I thank you for listening.

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Hon. President,  
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