



A BRIEF COMPARISON BETWEEN THE NIGERIAN
EVIDENCE ACT 2011 WITH ISLAMIC PRINCIPLES OF
EVIDENCE: SPECIAL REFERENCE TO THE ISSUE OF
COMPETENCY AND COMPELLABILITY OF
WITNESSES

BY

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A dissertation submitted in fulfilment of the requirement for
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ABSTRACT

This dissertation is a comparative study of the competency and compellability of witnesses under Islamic law and the Nigerian Evidence Act 2011 (as amended). The law relating to witness is very important in determining the rights and liabilities of individuals in the court or tribunal. It is through competent witnesses the aim of the law will be achieved which is the attainment of justice for all. The study has adopted the doctrinal method, using comparative approach. The Nigerian law of evidence as govern by the Evidence Act 2011 (as amended) which the researcher used as primary material in analysing the requirements for the general competence and compellability of witness and other categories of persons that were protect by the law, though competent but not compellable to give testimony/ evidence. However, some other materials were also used like Nigeria 1999 Constitution which has complement the provision of the Act. While on the part of Islamic law, various requirements of witnesses from the Qurān, hadith and Ijmā were also discuss, this is in order to give a clear picture of what is required of a witness. Different juristic opinions were considered on the compellability of witness and the duty imposed by Allah on witness when he is call to testify in the court or anywhere. Thus, the study has made various recommendations particularly to the law making body to further amend some of the provisions of the Evidence Act by in inserting some Islamic law principles on the competence of the witness in order to ensure that guilty person did not escape punishment and innocent person is set free. This will strengthen the entire judicial system in Nigeria and make it a role model to many countries of the world.

خلاصة البحث

هذه الأطروحة هي دراسة في الكفاءة وإجبار الشهود في قانون الإثبات النيجيري لسنة 2011م (وتعديلاته) مقارنة بالشريعة الإسلامية. فالقانون الذي يتعلق بالشهود مهم جداً في تحديد حقوق والتزامات للأفراد في محكمة أو هيئة قضائية. ومن خلال الشهود يهدف القانون للوصول إلى تحقيق العدالة للجميع. وقد اعتمدت الدراسة المنهج الفقهي، وكذلك استخدمت المنهج المقارن. فالنظام القانوني النيجيري للإثبات الذي يحكمه قانون الإثبات 2011م (وتعديلاته) استخدمه الباحثة كمصدر أساسي في تحليل متطلبات عامة في إجبار الشهود وحمايتهم، وكذلك وفئات أخرى من الأشخاص الذين تم حمايتهم من قبل القانون، وعلى الرغم من كفاءته ولكن لا يجوز إجباره على الإدلاء بالشهادة. كذلك فقد تم استخدام بعض المصادر الأخرى مثل الدستور النيجيري لسنة 1999م الذي هو مُكَمَّل لأحكام القانون. وبينما الجانب الشرعي تم مناقشة متطلبات مختلف للشهود من القرآن، والسنة، والإجماع، وهذا من أجل إعطاء صورة واضحة عن ما هو مطلوب من الشهود. واعتبرت الآراء الفقهية المختلفة على إجبار الشهود أنها واجب فرض الله على الشاهد عندما يتم استدعائهم للشهادة في محكمة أو في أي مكان. وكذلك قدمت الدراسة توصيات مختلفة لا سيما للقانون مما يُجسّد في تعديل بعض أحكام قانون الإثبات لإدخال بعض مبادئ الشريعة الإسلامية في مسألة اختصاص الشاهد، من أجل التأكد من أن الشخص المذنب لم يفلت من العقاب، والبريء يُطلق سراحه. وسيؤدي ذلك إلى تعزيز النظام القضائي برمته في نيجيريا وجعلها نموذجاً يقتدي به كثير من دول العالم

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Alhaji Haruna Garba

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*To my old Mother, my Wife, my Family members and Friends who have contributed in
one way or the other for the success of my Research.*

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Malaysian Evidence Act 1950
Nigerian Evidence Act 2011(as amended) CAP E 14 Laws of Federation of Nigeria
2004
Selangor Syariah criminal procedure code Enactment 1991
Syariah Criminal procedure (Federal Territories) Act 1997

LIST OF ABBREVIATIONS

ed./eds.	Editor / Editors
Etc.	(<i>et cetera</i>) and so forth
FRN	Federal Republic of Nigeria
JCA	Justice Court of Appeal
NNLR	Northern Nigeria Law Report
NWLR	Nigerian Weekly Law Report
EA	Evidence Act
P./PP.	Page / Pages
PBUH	Peace Be Upon Him
Pt.	Part
RA	<i>Radhiyal Allahu Anhu (m)</i> (May Allah be pleased with him / them)
SAW	<i>Sallal Allahu Alayhi wa-sallam</i> (Blessings and Peace of Allah be upon Him)
SCNJ	Supreme Court of Nigeria Judgement
SCNLR	Supreme Court of Nigeria Law Report
V	Versus
Vol. /Vols.	Volume/Volumes

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The rules of evidence control the matters brought for adjudication before the court. Their aim is to facilitate the introduction of all facts logically and statutorily relevant with a view of ascertaining the truth or otherwise of any claim of a party in a suit.

Therefore, the Nigerian law of evidence seeks to guide the judges on the principles of assertions to deduce the truth or otherwise of the facts in disputes for the purposes of determining the claims, rights, duties and defences of the parties in a court.

The above mentioned principle, which guide the Nigerian law of evidence, is almost the same or similar to that of Islamic law. To ensure justice in any judicial proceeding or system, Islamic Jurists have developed a fair and clear law of evidence for proof of the facts in issue or relevant fact in order to arrive at a just conclusion of a case before a court of law. It has been observed that, the object of the law of evidence (in Islamic law) is to put down principles to prove the facts relevant for the determination of the case. There are at least two litigants in every dispute: the plaintiff and the defendant. The plaintiff claims what is contrary to the apparent fact and the defendant denies the existence of any claim. Therefore, the burden of proof lies on the plaintiff because what is apparent is presumed to be the original state. This principle is what is referred to as “*Istīṣhāb*” in Islamic jurisprudence¹.

The above explanation gives an insight to what Islamic law of evidence intends to regulate and guide. There is no doubt that Islamic law covers more than what is quoted above, especially in regards to what the Prophet Muhammad (SAW) call the

¹Anwarullah, *Principal of Evidence in Islam*, (Kuala-Lumpur: As-Noordeen, 2010).

'*Bayyinah*' The Prophet used the word for anything which showed or manifested the facts disputed in the court of law.

The primary means of proof under the Nigerian law of evidence, as contained in the Evidence Act, includes confession, oral testimony, real evidence and documentary evidence². These are the most important and prominent means of proof under the Nigerian law of evidence. However, according to Hon.(Dr.) Justice Ibrahim Tanko Muhammed JCA (as he then was)³, the primary means of proof in Islamic law differ from the one found in the common law system i.e. the Nigerian law of evidence. Those provided by Islamic law are principally as follows; admission/confession (*al Iqrāar*); evidence/testimony or oral evidence (*al Bayyinah or shahādah*); Oath (*al Yamiin*) and refusal or return of oath (*Nukūul*).

It is evident from the above categorisations of means of proof under the Nigerian law of evidence and Islamic law of evidence that the two legal systems share some similarities and differences. For example, both have accepted oral testimony and confession or admission as means of proof. However, they differ as to whom should be considered as a witness, the requirements of a competent witness and the number of witnesses that is required to establish a particular case.

Nigeria is a country with a mixed legal systems, this include Islamic legal system and English legal system (Common law). Because Islamic law is practice particularly in northern Nigeria many years before the arrival of Europeans. After their arrival they allowed the Muslim to apply their personal laws only and reserved the application of Islamic criminal law and imposed the application of English laws. These is the background why there is mixed legal system in Nigeria and prompt the

² Nwadialo. F, Modern Nigerian Law of Evidence, (Lagos, Unilag Press, 1999), 3-6.

³ Muhammad, I. T. "Comparative Analysis of Burden of Proof Under Islamic and Common Law" a Paper presented at the 4th Annual Judges Conference Organized by Centre for Islamic Legal Studies, CILS, A.B.U. Zaria, Nigeria (2002): 2.

researcher to comparatively analyzed both the two legal systems as applicable to various courts in Nigeria.

1.2 STATEMENT OF THE PROBLEM

Both the Nigerian law of evidence and Islamic law of evidence have laid down rules for any aggrieved person who intends to seek redress in the court of law for any of his rights or remedies for the violation of such rights, these may include the rights of individuals, the rights which involve the right of Allah (SWT) or the right of a an individual against the state functionary. For the person to succeed in his claim, he must prove his claim to the satisfaction of the judge before any judgment can be given in his favor. If he fails to provide proof for his case, the matter will be dismissed and the judgment may not be given in favor of the plaintiff.

There are so many ways of proving a claim/case under the Nigerian Evidence Act and Islamic law. As ke it was mentioned above, but the best method of proof is by oral testimony of witnesses who have witness the act in case of a committing crime or transaction in case of contractual agreement.

a-The question that arises is who is a witness? And what are the requirements of a competent witness?

b- At what point or case can a competent witness be compelled to testify? If a witness is compelled to testify will the court admit such a testimony?

c- Are there people that are protected or immune by law even though competent but excluded from giving testimony?

The above questions have generated a lot of problems among the members of the bar, the bench, academician and law students which pose the needfor in-depth research in to constructive legal reforms or reviews of the Nigerian law of evidence.

Additionally, as well as making new *ijtihad* (independent reasoning) by the Islamic jurists with regard to Islamic law of evidence and procedure.

1.3 OBJECTIVES OF THE RESEARCH

In view of the above mentioned background and statement of problems of the research, the objectives of this thesis will be summarised to include:

1 - Comparative examination and analysis the legal issues and frameworks for the competency and compellability of witnesses under the Nigerian law of evidence and Islamic law of evidence with particular reference to Nigerian experience;

2- Comparatively provide legal materials on evidence and procedure in both Islamic law and the Nigerian Evidence Act. This will be useful reference to the Judges, lawyers, lecturers and the general public;

3- Identification of some of the legal problems, challenges and inadequacies of both the Nigerian law of evidence and the Islamic law of evidence on the requirements of a competent witness and the compellability of a witness to testify.

4- Propose viable and relevant suggestions and recommendations on how such problems, challenges and inadequacies of the two legal systems may be solved. These will include legal reforms, reviews and new independent reasoning in the case of Islamic law.

1.4 SIGNIFICANCE OF THE RESEARCH

The importance of this research cannot be over emphasized. These is because the best method of proving a matter before any court, apart from confession or admission, is by oral testimony of competent witnesses whether the matter is tried in *Sharia* courts or Common law courts. Hence, there is a need to have material that will be of benefit

to judges, legal practitioners, prosecutors, police, anti-financial crime agencies such as Economic and Financial Crime Commission (EFCC) Independent Corrupt Practices Commission (ICPC) and the general public. It will serve as a basis for further research in the area of both Islamic and the Nigerian laws of evidence.

1.5 SCOPE AND LIMITATION

The research is intended to be a comparative study between the Nigerian law of evidence, as provided under the Evidence Act, and Islamic law which include the Qurān and Sunnah as the primary sources, and *Qiyās*, *ijmā* and *Ijtihād* as secondary sources. In addition, relevant statutes and judicial pronouncements from Malaysia will also be used to explain and guide the discussion for clarity, good understanding and achieving the overall objective of the research.

The Nigerian Law of Evidence for the purpose of this research will be limited to the provisions of the Evidence Act, It will not include the Customary law of evidence which is also a source of law of evidence in Nigeria. In this research, Islamic law of Evidence is seen as a special reference based on the divine legal system and will be given due consideration for comparison.

1.6 RESEARCH METHODOLOGY

The methodology that will be used in this research will be mainly doctrinal, which is also known as library based research. It will include the use of Statutes, Judicial authorities, the Quran, hadith of the prophet and juristic interpretations and opinions on matters relating to evidence. However, other techniques of research will be implored where necessary to facilitate the completion of the work and achieve the objective of the research. Other methods adopted include the collection of information

from text books, journals, manuscripts and online material which will be duly acknowledged.

1.7 LITERATURE REVIEW

Generally, there is enormous literature in the field of evidence, particularly with regard to of witnesses, which were the contribution of early scholars and modern writers who are experts in the Nigerian law of Evidence as well as Islamic laws of evidence. However, emphasis will be made on the writings of contemporary scholars: It will be more relevant to the study because in the past there is nothing like codified Evidence Act as been presently used in many Muslims countries that were colonialised by European nations like England and France etc. Even though one may quickly point out that there is no much literature, on this area of interest of the researcher, believes that there should be a comparative study between the Nigerian law of evidence as regulated by the Evidence Act and the Islamic law of evidence as regulated by Sharia.

Consequently, the review here will be approached from the perspective of two legal systems i.e. the Nigerian law of evidence and Islamic law of evidence. Hopefully, it will develop a new and unique research area in Nigerian law Evidence. Thus, this literature review is comprised of two sections. First it will examine literature about the Nigerian law of evidence on the competence and compellability of witnesses. Second, it will review literature under the Islamic law of evidence.

1.8.1 Review of Literature under the Nigerian Law of Evidence on the Competency and Compellability of Witnesses

There are several contributions made by both Nigerian and foreign scholars on this aspect of law of evidence.

T. Akinola Aguda (1989)⁴ in his authoritative text book “*The Law of Evidence*” has made a far reaching discussion on the competence and compellability of witnesses under the Nigerian law of evidence. In chapter nineteen, he analyses the provisions of the Act with regard to witnesses and their rights to give testimony and whether they can be compelled to testify. He also examines the different types of people stated in the Act by citing judicial interpretations on the issue of competence, compellability as well privileges accorded to some individuals.

But, Aguda’s explanation is limited to the provision of the Act and he does not refer other texts which serve as secondary sources of the Nigerian law of evidence. Also, the author has cited some cases (Judicial authorities) which are consider obsolete because a lot amendments have been made on evidence and procedure.

Fidelis Nwadialo (1999)⁵ in his book “*Modern Nigerian law of Evidence*” Highlight the requirements of a witness under the act as well as persons who are barred from giving testimony. He also tries to distinguish the general competence of a witness as well as the specific requirements of an expert witness who may be called on special circumstances either by the Court or parties to the suit.

However, Nwadialo does not thoroughly discuss all the persons that are regarded by the law to be competent or incompetent and those that can be compelled to testify as highlighted in the Act. Hence, this research will discuss both the issue of competency and compellability of witnesses under the Act by giving a more extensive on judicial authorities.

Another scholar, Afe Babalola,⁶ in his book “*Law and Practice of Evidence in Nigeria*” discussed the requirement of the law pertaining to witnesses privileges under

⁴ Aguda, *The law of Evidence*, (Ibadan, Nigeria, Spectrum Book Limited, 1999), 299.

⁵ Nwadialo, 465.

⁶ Afe Babalola, *Law & Practice of Evidence in Nigeria*, (Ibadan, University press, 2009), 165 and 379.

Nigerian law such as Section 308 of the Nigerian Constitution which accords immunity to the President and his deputy, Governor and his deputy particularly in chapter nine, sixteen and seventeen of his book he started by giving the historical origin on how the common law in England was develop and the subsequent changes and development that occur for many years, he reveal that it is of historical interest that rule of on competence of witnesses was in 18 century negatively stated in England. The exclusion of potential witnesses was the order of the day where parties, their spouses, people with financial interest at the outcome of the proceedings and people with past criminal conviction were prevented from testifying in court proceedings. But by the 19th century, a universal rule was introduced to allow witnesses to testify. He also tries to justify the non-compellability of certain categories of witnesses who have been accorded the privilege on the basis of public interest. This is due to the likelihood of danger to national interest if they were disclosed. Similarly, he tries to balance the privilege not to be used as a process of withholding evidence which will cause a serious injustice to the party in a proceeding that may lead to miscarriage of justice. He also suggests that some certain relationship have to be given legal recognition by amending the law to include them, such as professional relationships between doctors and patients, priests and penitents.

Sir Phipson⁷ in his book "*Phipson on Evidence*" broadly discusses the competence and compellability of witnesses. He starts by giving historical account of the topic, going back to 14th Century. He explains that there were who were people prevented from testifying and those who were exempted by the law even though they were competent. This was a frequent occurrence in common law even though it is the mother law of all common wealth Countries. The book does not give a clear picture of

⁷ Sir Phipson, *Phipson on Evidence*, (London, Sweet & Maxwell, 2005), 212.

the Nigerian Law of Evidence as contain in the evidence Act. However this research intends to look at the Nigerian context with regard to witness competence as well as compellability but not the position of common law because different enactments and amendments were made from the old evidence Act inherited from Britain colonial powers.

Similarly, Rupert⁸ Cross in chapter six and twelve of his book “*Cross on Evidence*” has highlights the requirement in which a witness will competent particularly in common law. He gives historical instances of reformation in the field of law of Evidence in England that has brought us to our present position. The author mentions instances in England where testimonies of non- Christian were not accepted. This means that for witnesses to be seen as competent, they must be of the Christian faith⁹. The writer further argues that the professional privilege between a lawyer and his client should not be limited to proceedings alone, but should be extended to correspondence between them while the client is in prison custody. The Court has acknowledged that such a communication is also covered by this privilege.

John Sopinka and Sidney N. Lederman.¹⁰ “*The law of Evidence in Civil Cases*” They treat the issue of witnesses in a general sense after narrowing their discussion with specific reference to competence and compellability. They also give a historical account of the issue. Their approach is different from other scholars because they cite so many examples from different jurisdictions apart from the English law of Evidence i.e. Common law such as Canadian law of evidence, India, United State and China particularly with regard oath or affirmation of witness. Even though the learned authors has gave more emphasis on civil proceedings in Court, nevertheless they have

⁸ Sir Rupertbet Cross, *Cross on Evidence*, (London, Butterworths, 1990), 186.

⁹ *Ibid*, 188.

¹⁰ J. Sopinka and S.N. Lederman, *Law of evidence in Civil Cases*, (Toronto, Butter Worths, 447.

not substantially dealt with issue of witnesses in criminal matters. They also submitted that even if the person is a child he or she should not be excluded from testifying but the Court should instead attached less weight to that testimony. Also a child should be deemed a competent witness to testify about an event that happened when he or she is minor.¹¹

B.E. Ewulum.¹²(SAJMS) The author has itemized some the person that law consider competent but not compellable. Yet, he is not thorough in discussing other categories of people who are not compellable witnesses like revenue officers from disclosing the sources of their information. Ewulum limits his discussion to the president, vice president, governor and deputy governor but ignores other individuals that are covered by the privilege. It is this gap that is not covered and this research intends to contribute to the field of knowledge.

1.8.2 Review of Literature under Islamic Law of Evidence on the Competence and Compellability of Witnesses

It is important to state that most of the Islamic Law literatures are writing in Arabic which is the language of the Quran and the Prophet tradition. Nevertheless there are few number of books that are writing in or translated in to English which the researcher will reviewed to fill the gaps in the existing research. This will benefit the judges and the general public because most of the proceedings in Nigerian courts are conducted in English and not Arabic.

Salih al-Fawzan¹³ in his book “*A Summary of Islamic Jurisprudence*” has discusses the issue of competent witnesses based on Quran and Sunnah. This includes the requirements of compellability of witness and the persons who are generally

¹¹ Ibid, 450.

¹² B.E. Ewulum. South Asian Journal of Multidisciplinary Studies(SAJMS) Vol.2. Issue 1.

¹³ Salih Al-Fauzan, A Summary of Islamic Jurisprudence, (Riyadh, Al-Maiman Publishing House, 2005), 727.

competent but are barred from giving testimony in proceedings due to some reason. This may include interest in the outcome of the suit or blood relationship etc. He also highlights instances where witnesses will be compelled, even though he considers giving testimony by a witness as a general responsibility. But it will suffice if someone or individuals has given their testimony which means they have exonerated other members from liability. He cited Quran 2: verse 282 “Let not the witness refused when they are called upon...”

However, the author does not clearly discuss the circumstances in which a witness can be compelled to give evidence. He limits his explanation to the competence of witnesses to testify in proceedings.

Professor Anwarullah¹⁴ has made a tremendous contribution in Islamic law of evidence particularly in chapter one of his book “*Principles of Evidence in Islam*” he thoroughly explains the conditions that must be met before a person can qualify as a competent witness. He also mentions some of the exceptions in which a witness who does not satisfy the above condition will be allowed to give testimony, such as non-Muslim giving testimony to the will written by a Muslim while on a journey. However, this is the condition that he fears that his death is near. He also raises the issue of some international conventions and treaties which were ratified by some Muslim countries like the Geneva Convention and the Charter of Human Rights which seek to exclude any discrimination based on religious belief. But, the author has not touched much on the issue of compellability of witnesses i.e. whether a witness can be compelled to give testimony irrespective of whether it is a civil or criminal matter. Similarly, he does not mention the rulings (*Ijtihad*) of Islamic scholars on whether the present immunity clause accorded to some leaders are in line with the principles of

¹⁴ Anwarullah, 1.