

EXAMINATION OF OATH OF EXONERATION (YAMIN AL-TUHMA) AND ITS COMPLIANCE WITH PRESUMPTION OF INNOCENCE

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ABSTRACT:

Burden of proving criminal and civil case is always lies on the defendant and the plaintiff as the case may be. This is according to both Islamic and conventional laws. This is based on the legal maxim that 'He who assert must prove'. This is also related to the established principle of 'Presumption of Innocence'. According to Islamic law and constitutional provision, the accused person is presumed to be innocence until the contrary is prove. However under Maliki law which is the applicable law to Shari'a Courts in Nigeria, an accused whose offence can not be proved or there is no prima facie evidence against him, should subscribe to an oath (Yamin al-Tuhma) before the striking out or dismissal of his case. This is tantamount to his constitutional right of presumption of innocence and the Islamic law principle that "المتهم بريء حتى تثبت إدابته" Accused person is presumed innocence until the contrary is prove. This paper examined the Maliki law and the practice of Shari'ah Courts judges to see whether they are in conflict with the above principle of Islamic law and section 36 (5) of the 1999 constitution as regard to the presumption of innocence. It is the finding of the paper that the oath of exoneration (yamin al-Tuhmah) according to the Maliki rules is not in conflict with the general principle of Islamic law and the 1999 constitution as amended. However, practice of some Sharia Court judges in applying the law or administering the oath might be in conflict.

Keywords: Oath of Exoneration, Presumption of innocence, conflict.

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1.0 Burden of Proof and the Presumption of Innocence:

Since it is established that a defendant is presumed to be free from liability until the plaintiff proves the contrary, it is important to know who is the defendant and who is the plaintiff and who of the two must bear the onus of proof. There are at least in every judicial dispute two litigant parties, the plaintiff and the defendant. The first claims what is contrary to the custom or apparent fact; the second holds to the apparent fact and denies the claim.² Since proof is an important judicial requirement, it is essential to know upon whom the onus of proof lies. There is no doubt that the burden of proof is upon the plaintiff. This is explained by so many Shari'a principles and legal maxims and the fact that what is apparent is presumed to be the original position; anyone who claims to the contrary must prove it. Article 77 of the *Majallah*³ and the Shar'ah legal Maxim says: (البينة لإثبات خلاف الظاهر و اليمين لإبقاء الأصل) ⁴ "The object of evidence is to prove what is contrary to the apparent fact, while the object of the oath is to ensure the continuance of the original state". The other sharia legal maxim says (البينة على المدعي و اليمين على من أنكر) "The burden of proof is on him who alleges and the oath is on him who denies."⁵ This is based upon a tradition of the Prophet (PBUH) to the same effect.⁶ It says that, evidence is required from the plaintiff because he is the weaker side among the two and has the burden of proving his claim; and the defendant, who is usually the stronger of the two parties, takes the oath, as the presumption of being in the right first lies in his favour. In other words, if someone claims something from another, he must prove it, because a defendant is presumed to be free from liability. Thus the *Majallah* and Sharia Legal Maxim says, الأصل براءة الذمة "Freedom from liability is a fundamental principle".⁷ This is one of the principles upon which *Shaf'i school* jurists based their theory of *istishab* or the presumption of continuity and upon which they built similar principles, such as: الأصل بقاء ما كان على ما كان "It is a fundamental principle that a thing shall remain as it was originally".⁸ Another Sharia legal Maxim/ Article 10 of the *Majella*, says: ما ثبت بزمان يحكم ببقائه ما لم يقم دليلا على خلافه "Judgment shall be given in respect to any matter which has been proved at any particular period unless the contrary is proved"⁹

² Abu Al-Hassan al-Tasuliy, al-*Bahjah Fi Sharhal-Tuhfah*, (3rd edn Dar al-Kotob al-ilmiyya, 2017) Vol. 1. 36

³ This is quoted with a variant reading in *Khadimi's Majami*. See uz elhisari, *Manafi*, 314.

⁴ Zuhailiy Muhammad Mustapha, *Al-Qwa'id al-fiqhiyya wa Tadbikatuha Fil Mazahibul*, (1st edn Darul Fikr 2006) vol 1. p. 510

⁵ Mustapha Ahmad Al-Zarqa, *Sharh al-qawa'id Alfiqhiyya*, (Dar al-qalam, 1989) 369 - 370

⁶ Imam Suyuti , *Jami Saghir*, Nos. 3225 and 3226 on the authority of Tirmidhi and Baihaqi.

⁷ Zuhailiy Muhammad Mustapha, (n 3). vol 1. P. 32

⁸ Ibid also see article 5 of the *Majella*

⁹ Ibid p. 111-138

The principle of freedom from liability necessitates the rejection of a claim which cannot be proved, and requires a return to the original state. The *Majallah* says,¹⁰ "Things which have been in existence from time immemorial shall be left as they were" (Article 6). But this is qualified by another article, which reads: "Injury cannot exist from time immemorial" (Article 7). Furthermore, attributes are of two kinds: original and intervening (transitory). The original are those that existed with an object initially, for example, presuming that a person who has reached adult or legal age is of sound mind because the attribute of sanity is fundamental with the majority and co-exists together initially. The intervening (transitory) attribute does not exist initially with the object described. It can be exemplified by madness or drunkenness. These qualities are not presumed to exist originally and a person who claims their existence must prove his contention.

The principle to be deduced from the aforementioned is that original attributes are presumed to exist, whereas intervening (transitory) ones are presumed not to exist. The *Majallah* says,¹¹ "Non-existence is a fundamental presumption attached to intervening (transitory) attributes. Example: In case of a partnership (of capital and labour), if a dispute arises as to whether or not profit has been made, the statement of the person supplying the labour is heard and the owner of the capital must prove that profit has been made" (Article 9). Lastly, it is necessary to indicate that the *Majallah* has an exception to the principle that the burden of proof lies on the claimant. Article 1774 reads: "A trustee (person to whom a thing has been entrusted for safekeeping) making a statement upon oath is worthy of credit".

Thus, if a person who has entrusted his property to another for safe-keeping brings an action against that person, who in turn alleges that he has returned the thing entrusted to him, the trustee shall be believed if he swears that he has discharged his obligation. This provision is contrary to the general rule because the person to whom the thing was entrusted is making a claim contrary to the apparent fact and by analogy should be asked to prove his claim that he had returned the trust. Majority of Muslim jurists have accepted this exception. Only the Maliki's did not, except where the thing entrusted was deposited with the trustee without accompanying evidence of deposit in the first place. However, if the thing entrusted was

¹⁰Ibid P. 26

¹¹ Ibn-Najm, '*Tahkeekul Ashbahu wan Naza'ir*' Vol. 1. P. 78. (3rd edn Available at maktabah Shamela) <<http://www.shamela.ws>> 25.

deposited with accompanying evidence and the trustees subsequently alleged its return, it is a duty to prove that he had.¹² This says that evidence is required from the plaintiff because he is the weaker of the two parties under the burden of proving his claim and the defendant, who is usually the stronger of the two parties, takes the oath as the presumption of being on the right. Faith lies in his favour. The Author of the *Risalah* mentions the famous Hadith of the Prophet (SAW), “البينة على المدعي واليمين على من أنكر”. However, once the party asserting has perfected the proof of his case in accordance with the Islamic law procedure there is no further discretion left to the Judge than to enter judgment for that party. If the defendant and his witnesses gave evidence, such testimony will not be relevant.¹³ According to the Maliki jurists, the precept is limited to two perspectives: *khultah* in contracts (*Mu‘amalat*) and dying declarations (*tadmiyah*) in criminal matters. These do not require evidence (*bayyinah*). It only requires strong circumstantial evidence (*allauth*). It is stated in the *Hashiyah* that some may misconstrue this expression to mean that this type of dying declaration is alone sufficient to lift the obligation to produce evidence, but in reality, it is dependent upon the availability of the testimony to the dying declaration.

The Nigerian Constitution provides that:

*Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty*¹⁴

However, Fundamentally this and other fundamental rights under the 1999 Constitution, are not absolute, but subject to other provisions of the same constitution. For instance section 45 (1) (b) of the 1999 Constitution as amended provides that;

*Nothing in section 37, 38, 39, 40, and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (b) for the purpose of protecting the rights and freedom of other persons.*¹⁵

¹² Muhammad Ahmad Ibn Rushd, *Bidayatu al-Mujtahid wa nihayatu al-muktasid*, (1st edn Maktabatu ibn Taymiyya 1415AH) II, p.57

¹³ *Mintar v. Kori* [1989] 1 NWLR 719

¹⁴ Section 36 (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

¹⁵ Section 45(1) (a) of the 1999 Constitution of Federal Republic of Nigeria (as amended)

Based on the above constitutional provision, the law may not be in contradiction to the provision of the constitution, even if it may seem to affect any of the fundamental rights to a citizen, provided that the law satisfies the following three conditions contained in the above provision, to wit:

1. It is validly enacted by legislators.
2. It is reasonably justifiable in a democratic society.
3. The purpose is to protect the rights and freedom of other persons.

Also, the provision of the constitution permits temporary tempering with the right of a person, who is reasonably suspected of having committed an offence. It provides that:

*Every person shall be entitled to his personal liberty and no person shall be deprive of such liberty save For the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence.*¹⁶

This is the position of the Supreme Court in *Ekwenugo V. FRN*¹⁷ where the court held that:

a person can be deprived of his right to personal liberty upon being reasonably suspected of committing a criminal offence

The above provision of the constitution and holding of the Supreme Court clearly allow the temporary deprivation of fundamental rights to personal liberty against any person responsibly suspected to have committed an offence. And the right deprived can be not only the right to liberty but also other rights like the right to dignity being a sister right of the same rank. The alleged offence could also be against one's property or his human body.

¹⁶ Section 35 (1) (a) of the Constitution of Federal Republic of Nigeria as amended

¹⁷ (2001) 6 NWLR pt 708 171 at 328-329

2.0 The Oath of Exoneration (*Yaminul Tuhma*)¹⁸

This oath is sometimes referred to as the oath of criminal accusation, even though it covers all such oaths administered to either parties to a case to clear any suspicion to a hidden fact. But our concern here is that of criminal accusation. It is apply against a person suspected to have committed an offence and there is no evidence to prove the charge against him. In that case, he will be required to subscribe to it in order to defend himself against the charge, whereupon he would be discharged.¹⁹ It is similar to *Yamin al-inkar* in a civil case but here the oath is not reversed since the claim is not a confirmatory one, that is to say, the complainant only suspects the defendant. *Yamin al-Tuhmah* administered against a defendant to serve as a defence for an allegation or suspicious claim is the view of the Maliki and the Zaiydiyya School.²⁰ The origin of *Yaminul-Tuhma*, according to the Maliki School, is the principle of *Istihsan*, as reported from Ibn Rushd and others.²¹ Ibn Rushd was asked about *Yamin al-Tuhmah* and he said it is about a claim which is not confirmed or an unproved claim against a defendant. Jurists have debated on its administration at the first place. They also debated if it is administered based on the first view, whether it will be reverted to the other party or not. Ibn Rushd continued to say:

*the obvious from the analogy (qiyas), an oath should not be administered unless the claim is certain, for the prophetic hadith which says 'Plaintiff is to give evidence while oath is on he who denies', however it is allowed based on Istihsan. And a clear position is that, it will not be reverted to the complainant if the defendant refuses to take it. This is because complainant should not be forced to swear on what he don't know. What I choose here is the administration of Yamin al-Tuhmah when the suspicion is strong, and it will fail when the suspicion is weak and should not be reverted if it is administered*²²

¹⁸ Some refer to it as 'Oath of defense' while Kano state ACJL refers to it as 'oath of denial'. See sec. 198 & 155 of Jigawa State Shari'ah Criminal Procedure Code Law. Section 358 (3) Kano State Administration of Justice Law 2019. Also O.11 R. 13 of Shari'a Courts (civil procedure) Rules 2000.

¹⁹ Abdullahi Ibrahim, *Selected Principles of Islamic Law through cases*, (Malthouse Press Limited, Lagos, 2018) p. 34; See also Adunni vs Atanda, KWS/SCA/CV/3/84/ Judgment delivered on 10/08/84 by the Shari'a Court of Appeal Ilorin;

²⁰ Muhammad bn Ahmad bn Muhammad al-Fa'si, *Sharhu mayyarah*, (Markaz al-Turath lil-Barmajiyat, 2013) Vol 1 p. 245

²¹ Ibid Vol 1 p. 245

²² Ibid Vol. 1 p.248

Therefore, if a person accuses or makes a claim against another person for stealing his property and he do not prove same, the accused/defendant should be asked to take an oath before he can be exonerated or discharged. If he refuses to take the oath and reverts it to the complainant, who accepts to swear, the defendant / suspect must pay for the stolen item for his refusal to take the oath and for the oath of the complainant. But this could not prove amputation. But where a claim of theft is against a person of good character, the accuser must be disciplined.²³ The oath of the complainant referred to above is only required where the claim is a confirmatory claim (*da'awa tahkeek*), while in an accusation or suspicious claim (*da'awal ittiham*), mere refusal by the defendant to take the oath of exoneration will warrant him to pay the value of the stolen item and no reversal of the oath to the complainant, even though according to the teaching of *mudawwanah* the oath of exoneration is reverses. But it is not the popular view (*mash'hur*) of Maliki school.²⁴ However, the reversal of the oath, which is disallowed, is for a defendant to ask the plaintiff "Take the oath (instead) that I stole your property, but it is allowed for a defendant to ask a plaintiff to take an oath that the alleged wrong act (i.e the theft) is really committed or that he is sincerely accusing him not just for sake of defaming the defendant. He can also ask him, "if you take an oath that your particular item is stolen or that you are sincerely accusing me of stealing it, I will pay for the same". This is a different oath not a reversal of the first oath and the plaintiff should take it.²⁵

Where the claim of theft, for instance, is against a person of good character, the complainant should be disciplined.²⁶ This is because the defendant is not within the definition of a suspect (*muttahaam*) Kharshi in his book, *Sharh Mukhtasar*, says;

و المراد بالمتهم من بظن به التساهل في الوديعة أو أكل أموال الناس لا من اتهمته بذلك²⁷

That's the meaning of suspect (*Muttahaam*) here is known to be negligent with a trust or who eats people's property unjustifiably not the one just accused to have committed the same.

He continued to say:

أن من ادعى الغصب على رجل صالح فإنه يؤدب و المراد به من لا يشار إليه بالغصب لا الصالح العرفي²⁸

²³ Kharshi, *Sharhu Mukhtasar* Khalil, (Daru al-fikr printing Press?) Vol. 7 p. 102

²⁴ Ibid

²⁵ Abu al-Hassan Al-Tasuliy, *Al-Bahjatu Fi sharhit Tuhfah*, (3rd edn Darul Fikr publisher, 1996) Vol. 1 p. 250 - 251

²⁶ Kharshi, (n 6) Vol. 7 p. 102

²⁷ Ibid Vol. 6 p. 117

²⁸ Ibid Vol. 6 p. 130

That is, he who accuses a person of good character of theft/robbery, he should be disciplined. This refers to a person who this crime of robbery do not deserve his personality and not even a traditional good person. According to some jurists, the oath (*yamin al-tuhma*) can also be administered in a case of theft or robbery where the character of the suspect is unknown (who can either be of good or bad character)²⁹ Ahmad Shihabudden is of the view that in cases of theft and robbery, mere suspicion, warrants the oath and *khultah* is not required. It is always presumed because of the nature of these offences.³⁰ However, ibn Arafah rejected this view and said that this is not the popular view of the Maliki School and the practice of the Judges is to prove *khultah* even in these cases.³¹

It is reported from Abdoosiy that the accusation (*al-Tuhmah*) is of two types: an accusation in which the claim is defamatory in nature, such as an accusation of theft. This does not apply to someone who is not worthy of it and is known and witnessed to be a good person associating with good peoples and avoiding the people of evil. Secondly, an accusation other than that. In this case, the oath applies to all people, whether righteous or immoral, according to the view of those who support its application (the oath of accusation). This is a well-known position and of the judicial application and the practice of today (in the Malikiy School).³² The strength of accusation is known and determined after considering the kind of accusation against the defendant, his personal behavior and good or bad record, his companies and whether he is a *mubarraz* (prominent in justice) or an ordinary just person.³³ The above criteria show the strength of the accusation or otherwise and we can understand from it that a *Mubarraz* (prominent in justice) should not be subjected to the oath of exoneration (*Yamin al-Tuhma*) whether a claim against him is defamatory in nature (*fih ma'arratun*) or not, but it should be administered against any ordinary person (other than a *mubarraz*) if the claim is not defamatory in nature. This is according to the report from Imam Malik in his book *Al-Mabsud* and it is the view of al-Lakhmi, Gawriy and ibn Marzuk.³⁴ Al-Tasuliy (the author of *Bahja*) says, a better position to him in this time, the administration of the oath of exoneration (*yamin al-tuhma*) is without exception where strong suspicion is proved,

²⁹ *ibid*

³⁰ Ahmad bn qanim Shihabuddeen, *Fawakihi Al-Dawaniy Ala Risilati ibn Abi Zaid Al-Kairawan*, (Daru al-fikr 1995) vol. 2 p. 220

³¹ *Ibid* p. 221

³² Kharshi, (n 6) Vol 6 p. 249

³³ *ibid*

³⁴ *ibid*

but the jurists are not in agreement as to the strength of suspicion. However, a strength in a defamatory claim is where it is against a person of bad character or bad record, while a strength in a non-defamatory claim is where it is against a good person other than a *Mubarraz* (prominent in justice).³⁵

On the issue of *Khultah* (intermingling) it was argued that, the statement “فواليمين على من أنكر” in the prophetic hadith carries the apparent import that it is immaterial that there was a dealing (*khultah*) but this has been clarified by the words “ولا يمين حتى تثبت الخلطة أو الظنة”, meaning there is no oath until intermingling or suspicion is proved.³⁶

The above principle of law has received a judicial blessing in the case of *Umaru v. Muhammad & ors* where it was held that :

However, it is mandatory that oath shall only become due when a transaction "HULDHA" Is established or when there is a strong suspicion of a transaction or accusation. See SODA Vs KWINGA (1992)8 NWLR (Pt. 261)632. Before any person is called upon to take an oath under Islamic Law, the Court is bound to explain to him the implication of his refusal to take such oath. See SAYA-SAYA Vs SAYA-SAYA (SUPRA). One important feature of Islamic Law of procedure is that a dispute can be resolved on the basis of denial "NUKUL" of either of the parties i.e. the plaintiff or the defendant, to subscribe to an oath when confronted³⁷.

Khultah is established by the confession of the defendant or by the evidence of two reliable witnesses or by the testimony of one witness and the oath of the plaintiff,³⁸ even though the author of the *Mukhtasar* states that *khultah* can be proven by the testimony of one woman.³⁹ *Zinna* occurs only in the case of the theft and the usurper. That is to say, *khultah* occurs in the *Mu'amalat* and *Zinnah* occurs in matters related to the *ahl al-ghasabat*.⁴⁰ The author of the *Risalah* then states that: *كذلك قضى حكام أهل المدينة*. Meaning, this has been the judicial

³⁵ *ibid*

³⁶ Abdullah Abi Zaind al-Kairawani, ‘*Al- Risalah fi Fiqh al-Imamu Malik* (Darul Kutub al-ilmiyyah, 1971) p. 96

³⁷ *Umaru v. Muhammad & ors* (2020) LPELR-51139(CA) (Pp. 19-22 paras. D-D) K

³⁸ Salih Abdu al-Samii al-Abiy al-Azhariy, *Thamaruddani Sharhu Risalatun ibn Abi Zaid alkairawani* (?) p. 508

³⁹ Khalil bin Ishak al-Maliki, ‘*Muktasar Khalil*’ (*Sharikatu al- Kudus*, 2006) 263

⁴⁰ *Sahih Abdu al-Sami*’ (n 41) 508

practice of Madinan's judges, and he followed this up with the famous statement of Umar bin Abdil-Aziz: "تحدث للناس أقضية بقدر ما أحدثوا من الفجور" meaning that novel practices in the law of procedure can be introduced to cater for the evil machinations of people.⁴¹ An example of *khultah* is where the plaintiff claims that the defendant owes him money – the purchase price of an article sold to the defendant and it is shown that the defendant was in the habit of collecting goods on credit from the plaintiff.⁴²

It is clear from the above that, a mere claim without proof of intermingling cannot warrant administering oath, according to Imam Malik, contrary to the view of Abu-Hanifa and Shafi'i.⁴³ The Maliki School reasons that a mere claim has no legal binding unless where necessity warrants and to impose the oath on a defendant is causing him unnecessary harm. This is not allowed unless a necessity warrants it, such as where certain things proved (by custom) to be happening without intermingling.⁴⁴ Likewise, according to Suhnun, suspicion (*al-tuhmah*) has the same legal effect with intermingling (*khuldah*). Hence, even in the absence of *khuldah* if the defendant is of suspicious character (*muttaham*), he should subscribe to this oath, but according to the popular view of the Maliki school, the oath should not be administered.⁴⁵

The Council of Ulama of the Ministry of Endorsement and Islamic Affairs of Qatar was asked on 05/04/2015 if in an allegation of theft it is permissible to administer an oath to those around the place of the Stolen Property's owner? And they responded as follows:

The origin (al'asl) in any Muslim is to be trusted, and to be presumed that his affairs is safe and perfect, but if there is any suspicion which became strong by circumstantial evidence, oath of exoneration can be administered ... it is also reported in (Mara'fatul Mafatih) from al-Dibby: the origin of administering this oath, is suspicion (Tuhmah) not confirmation or prove (of the alleged act) and that it should not be administered to whom who is not subject to suspicion. It support that, the owner of the right can drag a suspect to court and asks for his oath even if he has no any evidence as far as there is a strong

⁴¹ Abdaullah Abi Zaid al-Kairawani, (nt 40) 96

⁴² Bello, M.U., *Islamic Law of Evidence: Practice And Procedure*, being the content of a paper presented at the Annual Refresher Course for Judges and Kadis (organized by the National Judicial Institute held at the Andrews Otutu Obaseki Auditorium on the 23rd of March, 2022)

⁴³ Abul-walid Sulaiman bn Khalaf al-Kurdibi, *Al-Muntakha Sharh al-Muwadda*, (1st edn Sa'adah printing Press, 1332AH), Vol. 5, 224

⁴⁴ *ibid*

⁴⁵ *Ibid* p. 225

*suspicion and justification for administering the oath. Considering the consequences of this request (to swear) as it may lead to disgrace and degrade (of person) before the public, it is better (for the oath) to be asked outside court where there is suspicion.*⁴⁶

With due respect to the last part of the above view, it's my humble view that the oath of exoneration can only be decisive and terminate a dispute if it taken before a court. It will not serve the purpose if taken outside the court, as suggested by the Council. It should also be noted that, mere staying around the vicinity where theft took place cannot result yamin al-tuhma.

Briefly, there are three views as to the administration of *yamin al-tuhma* (the oath of exoneration) to wit:

1. *Yamin al-Tuhma* should not be administered at all. This view is reported from Ibrahim in his book *Al-Durar* under the heading of *al-wakala*. He also says this is a well-known position (*mashhur*) in the Maliki School. This view is also provided in *Tabsira* and it is in line with what the author of *Tuhfatul Hukkam* who says that تحقق الدعوى مع البيان meaning that, the claim must be confirmed and be clearly explained.
2. The supporters of this second view classify the accusation into two. They said that if the claim is defamatory in nature, such as an accusation of theft, the oath should only be administered against someone who is likely to commit the said offence or wrong. But in a non-defamatory claim, the oath applies to all people, whether righteous or immoral person except a *Mubarraz fii adala* (prominent in justice). This is the view al-Lakhmi, Gawriy and ibn Marzuk.
3. The oath of exoneration should not be administered until a claimant proves that a defendant is of suspicious character and likely to commit the alleged offence or wrong act. This is the view of Ibn Rushd, Abul-Hassan and ibn Farhun. It is also reported in *Mudawwanah*.⁴⁷

Based on the above, it is my humble conclusion that the oath of exoneration administers only against a defendant where there is reasonable suspicion, especially against a person of questionable

⁴⁶ Council of Ulama Ministry of Islamic Affairs Qtar, Fatwa No. **48561**. Available at <<https://www.islamweb.net/ar/fatwa/294976/>> access on 26 February 2024

⁴⁷ Wahbatuz zuhaliy A. D., (n 19) Vol. 8 p. 249 -250

character or whom the circumstances warrant his suspicion, but in a mere baseless allegation especially against a person of good character, who is unlikely to commit the alleged offence or wrong act, the oath should not be administered, the claim may not even be entertained in the first place. This is because, one of the conditions of an acceptable claim is to be reasonable and possible according to custom. However, where circumstances warrant the administration of *yamin al-tuhma*, the issue of affecting the dignity of a defendant should not arise, since it is not bad to force a person with questionable character, record of a similar offence or who is surrounded by some circumstances justifying the allegation to take *Yamin al-Tuhma*. In other words any circumstance in which a person can be rightly arrested, he can also be forced to take *Yamin al-Tuhma* to exonerate himself from the alleged offence.

Based on the above constitutional provision of sections 35 (1) (a) and 45 (1) (b) of the 1999 Constitution (as amended), the oath of exoneration (*yamin al-tuhmah*) according to Islamic Law of Maliki, is not in contradiction of the provision of the constitution since it satisfies the conditions to wit:

1. It is a Law enacted by the state. Section 29 (3) of Shari'a Court Law Kano state provides that. 'Islamic Law and Muslim Law shall be deemed to be a statutory law in all the existing laws in the state.'⁴⁸
2. It is reasonably justifiable in a democratic society.
3. The purpose of the Law is to protect the rights of other person, that is protection of their property.

Secondly, mere administering an oath to a person suspected to have committed an offence or breach the right of an individual may not warrant violation of fundamental right and presumption of innocence. And where there is prima facie or circumstantial evidential that a person has committed an offence, such person can be legally invited or arrested by law enforcement agent talk less of being asked to take the oath of exoneration (*Yamin-al-Tuhmah*).

Thirdly, according to Islamic jurisprudence this oath is not an independent proof or sufficient proof but rather it is meant to confirm, strength or complement a fact or presumption of law. This is in line with the Shari'ah Legal Maxim which says; '*The aim of evidence is to prove what is contrary to the apparent fact (original presumption), while the aim/objective of the oath is to*

⁴⁸ Section 29(3) Kano State Shari'a Court Law 2000

ensure the continuance of the original state”⁴⁹

Conclusion

It is clear from above discussion that, *Yamin al-Tuhma* (the oath of exoneration) is only administer after proof of suspicion (*Zinna/Tuhma*) or intermingling (*khultah*), So, it should not be administered by mere allegation or claim and despite the prove of suspicion (*Zinna*) or intermingling (*khultah*), the law still presumes the accused or defendant to be innocent and mere giving oath is not to reverse the presumption, but to confirm it.

⁴⁹ Al-Zarqa, M.I, *Sharh al-qawa'id Alfihiyya*, (Dar al-qalam, 1989) p.179