

NIGERIAN JOURNAL OF FOOD, DRUG AND HEALTH LAW

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JIMMY O. CHIJOKE & OLUFEMI ABIFARIN Reproductive Rights in Nigeria: An Assessment	1-13
BENJIE OGWO ESQ Right to Health in Nigeria	14-31
FOLA AJAYI Medical Negligence in Nigeria	32-50
CHRISTIANA EJURA ATTAH The Political Economy of Drug Trafficking and Women in Nigeria	51-60
A.B. ABDULKADIR & A.O. SAMBO Human Rights and Environmental Protection: The Nigerian Constitution Examined	61-73
A.A. OWOADE A Comparative Analysis of Food Consumption and Regulation under Common and Shariah Laws	74-81
HAFSAT IYABO SA'ADU Iddah - A Receding Concept in Islamic Law	82-92
C. A. OMAKA & L. N. A. OMAKA (MRS.) The Health Implications of HIV/AIDS Stigmatisation and the role of Law Clinics for Promotion of Respect for the Rights of HIV/AIDS Patients	93-103
D.F. ATIDOGA & O. ATIDOGA (MRS.) The Legal Framework for the Defence of Human Rights of HIV/AIDS Victims in Nigeria	104-114
KABO SARINUS ETTOR Regulation of Alcohol in Nigeria	115-120
MAIDAULA, MOHAMMAD NASIR ESQ Corruption and Development: Legal Issues and Controversies	121-128
JIMMY O. CHIJOKE & OLUFEMI ABIFARIN A Critical Appraisal of Citizenship, Indigeneship, Residency and Settlers' Rights in Nigeria	129-144
AKINTOLA JOHN OLUWASEGUN ESQ. An Appraisal of the Convention on the Elimination of Discrimination against Women in Africa	145-152
EKPA SHEDRACK ESQ. Legal Measures for the Sustainable Conservation of Fishery Resources against Over-Exploitation	153-158
STEPHEN O. ALEGE Democracy and National Sustainability: Focus on Poverty Alleviation Programme of Obasanjo Administration	159-164
M.E. SANDA Comparative Efficacy of Two Levels of Stresroak® as an Immunomodulator on Birds Vaccinated With Newcastle Disease Vaccines	165-167
THOMAS IMOUDU GOMMENT & AKOH JACOB WILLIAMS Criminological Theories and Criminal Behaviour: Nigerian Experience	168-173
SHABA SAMPSON STATUTE REVIEW: A Critical Review of Traditional Medicine Regulation and Law of Kwara State Cap.T4 2007	174-177
JOEL ADELUSI ADEYEYE ESQ. CASE REVIEW: <i>Miss Felicia Osagiede Ojo v. Dr. Gharoro & 2 Ors</i> (2006) 3 NSCJ.	178-182

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JOURNAL OF FOOD, DRUG & HEALTH LAW

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A COMPARATIVE ANALYSIS OF FOOD CONSUMPTION AND REGULATION UNDER COMMON AND SHARIAH LAWS

BY
A.A. OWOADE*

I. INTRODUCTION

One major attribute of Law is its responsiveness to issues in the society as they affect human endeavors. It is settled scientifically that life is not possible without the three (3) essentials; food air and water; whereas, it is a primary function of Law to ensure the protection of lives. In fact, the Law is so fully aware of this principal responsibility that protection of life is a prominent and a first charge consideration under the Law. Under most Fundamental Human Rights provisions world over, protection of life is a commonly sung phrase. Hence, the Law deploys its tools of proactiveness readily and steadily to ensure that anything inhibiting or tending to inhibit same is adequately taken of. Conversely, the Law throws its weight behind anything promoting or tending to promote lives. The three essentials highlighted above are the facilities for survival, therefore the Law addresses them so amply towards ensuring that they are adequately monitored, so that their contribution to lives is positively felt. The common Law in this regard takes into consideration only the health of the individuals and the public at large as most provisions in relation to food consumption and regulation under common law are directed solely at the promotion of private and public health, and ultimately at the protection of lives. The principal laws regulating crimes generally in Nigeria (that is the Criminal Code¹ applicable in the South, and the Penal Code² applicable in the North) view this subject from the perspective of health. The Criminal Code does not stipulate the kinds of food substances (drinks and drugs inclusive) to be or not to be ingested, rather it prohibits the intake and administration of poisonous and noxious substances, classifying this under acts capable of endangering life, or causing bodily injury. As for the Penal Code, poisonous and noxious substances, fall under acts constituting public nuisance which is strictly prohibited under that law. As will be seen later in this paper, these two laws merely contain blanket provisions relating to poisonous and noxious substances, and do not set out what to be and what not to be ingested or administered. Therefore under the two statutes, any food or ingestive substance is not unlawful in so far it is free of poisonous and noxious substances, and in so far it is not adulterated.

The NAFDAC Act³ takes into account the health condition of individuals and the public at large. This is manifest in its "Safeguarding the health of the Nation" slogan. The Act therefore contains regulations with respect to the manufacture, sale, purchase, distribution and consumption of food products and drugs. The Act takes a step further ahead the Criminal Code and the Penal Code by elaborating its provisions to see to the health implications of foods and drugs manufactured, distributed, sold and consumed in Nigeria. It accords prominence to the chemical and nutritional considerations behind foods and drugs. Apart from these, there are still some other laws regulating ingestive substances in Nigeria. The NDLEA Act aims at curbing the

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¹ Cap.NI LFN 2004.

² Cap.C38 LFN 2004.

promotion , sale , manufacture, planting , transportation, distribution and consumption, etc, of hard drugs, such as narcotics and psychotropics. The principal aim of this law is to curb acts tending to disorganize humanity and society health wise.

Be that as it may under the common Law, the Shariah as a legal system is unique for its rival attribute of fixity and dynamism, its fixed sources notwithstanding, it is readily available to respond to the unlimited situations covering human endeavors in their strata; an exercise made possible by ijtiḥād-the vibrant tool of dynamism in the interpretation and application of Shariah Law. The Shariah aims at promoting five (5) major interests popularly referred to as the “5 protective intents” of Shariah embodied under “maqasid al-Shariah”. These are:

- (i) protection of life
- (ii) protection of religion
- (iii) protection of property
- (iv) protection of intellect
- (v) protection of procreation

It is sacrosanct under the Shariah that any application of Islamic Law offending any or all of the above (5) will go to a nullity. Further to this, all things incidental to the above enjoy the same status under the Shariah as them. Therefore , while the Shariah aims at protection of life, it takes into account all such things necessary to sustenance of life. This is also applicable in the case of the rest four(4). By reasonable application, ingestive substances such as foods, drinks and drugs are regulated by the Islamic Law within the realm of the “maqasid al-Shariah” purposely to protect the above (5). As applicable under the Common Law, Islamic Law provides facilities for the protection of lives and the health of the individuals and the public in general. However, the provisions of Shariah regarding same are not limited to the health aspect alone, but they also present some elements of religious consideration. This is what gives Shariah a giant leap ahead of the Common Law. The Shariah in its provisions regarding foods and drugs has three major considerations:

- (1) health consideration
- (2) social consideration
- (3) religious consideration

All these considerations will be examined in details in the appropriate segment under this paper.

II. FOOD CONSUMPTION AND REGULATION UNDER COMMON LAW: THE PROVISIONS OF THE CRIMINAL CODE, THE PENAL CODE, THE NDLEA ACT AND THE NAFDAC ACT CONSIDERED.

The Criminal Code

The provisions of the criminal code relating to food consumption prohibit the ingestion and administration of poisonous and noxious substances likely to result in the death or bodily injury of a person. These provisions are aimed at preventing death or bodily injury so as to protect the Right to life of persons. The Code under the heading: “Offences Against Public Health” stipulates the categories of food substances falling under this heading. Hence, under the Code, any food, drink or drug substance the ingestion of which has resulted or likely to result in a situation of bad health condition of an individual such as to cause, or to have caused bodily harm to such a person, thereby endangering, or tending to endanger his life, is regarded as poisonous, in which

respect the offender or any participating party in the act will be liable. Under the Criminal Code, the following constitute offences against public health:

- (i) Exposing for sale things unfit for food or drink.⁴
- (ii) Adulteration of food or drink intended for sale⁵
- (iii) Dealing in diseased meat⁶
- (iv) Fouling water meant for human consumption.⁷

Also under that code, there are provisions relating to offences endangering life or health, among which is "maliciously administering poison with intent to harm"⁸ or, "Causing Poison to be administered on a person". Moreover, under the code, by virtue of section 316 thereof, unlawful homicide resulting from administering poison on the victim is criminal and sanctionable. Further to this, under section 327, any person attempting to kill himself by way of poisoning will be criminally liable.⁹

It is discernible from the foregoing that the Criminal Code does not take into account whether a food or drug substance is beneficial to the body nutritionally, but whether its administration or consumption is harmful to the individual or the public at large. Therefore, under the Code, it is immaterial whether the food or drug in question is nutritive or beneficial to health, in so far its administration or consumption is not prejudicial to health and is not likely to cause bodily injury or endanger life or be of a threat to public health. It is also to be reckoned with that the Criminal Code does not expressly prohibit the manufacture, sale and distribution of foods, drinks and drugs including poisonous substances, such substance will only become a subject under the Code if it has been consumed or administered by or on a person, and such consumption or administration has been proved to have caused bodily harm to the victim, or to have endangered his life. The ultimate under the Criminal Code, it seems, is the protection of life and health of the people.

The Penal Code

The penal code paints the same picture as the Criminal Code but with a different colour. It embodies provisions relating to foods, drugs and drinks under its chapter xiii dealing with Public Nuisance. The Code declares an offence as constituting public nuisance if it falls within its sections 183 to 203. The aim is ultimately to protect public health and health of individuals. Hence, section 184 prohibits adulteration of food and drink intended for sale. Section 186 prohibits sale of adulterated food or drink. Section 187 sanctions sale of noxious food or drink. Section 188 prohibits adulteration of drugs, while 189 sanctions sale of adulterated drugs. By section 191, fouling water of public well or reservoir is an offence. Making the atmosphere noxious to health is an offence under section 192 of the Penal Code. These are the major provisions under the Code regulating foods, drinks and drugs.

As is the case with the Criminal Code, the Penal Code does not stipulate what food is or is not poisonous or noxious, but any such substance the intake, inhalation or administration of which has been shown to be prejudicial to public health will qualify to be a poisonous or noxious substance as the case may be.

⁴ Section 243(1)

⁵ Section 243(2).

⁶ Section 244.

⁷ Section 245.

⁸ Section 337.

⁹ Section 338.

Manifestly, under these two laws, a food, drink or drug substance is not unlawful by reason only that it is non-nutritive or does not improve the health in so far its intake has not been established to be prejudicial to health in which case it will be regarded as unlawful by reason of being poisonous or noxious.

The NDLEA Act

The NDLEA Act¹⁰ does not contain provisions dealing with foods and drinks per se, but principally its provisions are aimed at prohibiting the export, import, manufacturing, processing, planting, distribution, trafficking, transportation, sale, purchase, use, injection or ingestion of hard drugs (narcotics or psychotropics substance)¹¹ Under the NDLEA Act, dealing in food or drink or drug substance not falling within the meaning of hard drugs is not a crime. Moreover, dealing in poisonous or noxious substances is not an offence under the NDLEA Act, in so far the substances have not been established to be hard drugs. In other words, any substance served as food or drug whether or not nutritive, whether or not poisonous or noxious will not constitute an offence under the NDLEA Act in so far such substance has not been proved to be a hard drug or falling within the meaning of hard drugs. Conversely, a food or drug substance even if nutritive and even if not poisonous or noxious will constitute a subject under the NDLEA Act, if shown to be a hard drug or falling under the categories of hard drugs.

The NAFDAC Act

The NAFDAC Act contains regulations regarding foods, drinks and drugs-their import, export, manufacture, sale, distribution and consumption. The watchword of the enactment is "Health". While the Criminal Code and Penal Code limit their provisions to poisonous and noxious substances, and the NDLEA Act itself to the prohibition of hard drugs, the NAFDAC Act sees to the nutritive and nutritional values of substances served or to be served as foods and drugs. The Act also sees to whether those substances are those capable of improving and will actually improve the health of the people. By NAFDAC Regulations, any food or drug substance failing in the above regards is useless health wise and the import, export, manufacture, sale, distribution, etc of such substance is illegal under the NAFDAC Act. The Act empowers the Agency to forfeit, confiscate, seize, destroy and remove from circulation of food and drug items found to be poisonous, noxious, adulterated or failing in stipulated health standards. The Act, to achieve its aims, contains the following regulations:

- (1) **Foods¹² Products (Pre-packaged) Registration Regulations:** Under these regulations, all foods products must be registered with the NAFDAC. By section 3 of the Regulations, pre-packaged foods must bear certain information to wit: nutritional labeling, production and expiry dates, etc. By section 4, there must be a list of ingredients in the proportion in which the ingredients have been combined.
- (2) **Bottled Water (Labelling) Regulations** are also contained in the Act, stipulating the standards for the production, distribution and circulation of bottled water.

¹⁰ CAP N30 LFN 2004.

¹¹ See the preamble to the NDLEA ACT.

¹² Foods under the Act includes any article manufactured, sold, or advertised for food or drink and includes drinking water, chewing gum. See section 22 of the Regulation.

- (3) **Non-nutritive Sweeteners in Food Products (Prohibition) Regulations:** These roll out regulations as to the prohibition of non-nutritive sweeteners in foods/beverages. The Regulations also spell out the conditions (exceptions) for use of non-nutritive sweeteners in food products.
- (4) **Non-nutritive Sweeteners in Drug Products (Prohibition) Regulations** also regulate the use of non-nutritive sweeteners in drug products.
- (5) **Food Products Advert Regulations:** These guide advertorials and contain stipulations regarding exhibition of food products.
- (6) **Food Grade (Table or Cooking) Salt Regulations:** These stipulate that industrial salt should be marked to distinguish it from table salt.

All the above show that the NAFDAC ACT takes a giant step ahead of the Penal Code and the Criminal Code towards safeguarding public health. The Act also surpasses its counterparts health wise by taking into consideration the comprehensive health implications of foods and drugs substances in terms of nutritional and nutritive value and not limited to whether they are poisonous or noxious. To the NAFDAC ACT, non-nutritive substances may in effect put the health of an individual in a prejudicial state.

III. FOOD CONSUMPTION AND REGULATION UNDER THE SHARIAH

Islamic Law accommodates human endeavours in all their strata; spiritually, socially, politically, economically, etc. Shariah aims at social welfare at all times.

The provision of Shariah regarding foods and other ingestive substances (including drinks and drugs) is a function of some factors. This can be analysed under the following three considerations:

- (1) spiritual consideration
- (2) health consideration
- (3) social consideration

Spiritual Consideration

Islam takes care of both religious and secular. The shariah has its fundamental principles rotating on the altar of al-iman (faith). Spiritual consideration takes prominence over all others. Under the Shariah, whether a food substance (drinks inclusive) is nutritive or not is not the pre-occupation of Shariah, but whether it is declared lawful or otherwise by Allah. If the food substance under consideration is certified unlawful by Allah, then notwithstanding its nutritive value, strength or content, then the intake of same is forbidden. As a result, any food, drink or drug made of, or from, or served with even an iota of such substance is forbidden outright under the Shariah. The nutritive prospects of such a substance is then left for the academic exercise of biochemists or nutritionists. And unless in certain exceptional cases stipulated by Shariah, any such food substance so declared by the Shariah as "haram" remains so, and no true believer will question the authority of Allah on same.

It must be highlighted at this juncture that the spiritual rationale behind such a declaration may be to test the faith of the believers so as to know those who will submit unreservedly to Allah, for those are the ones to enjoy spiritual elevation by Allah's standards. Allah says:

“Do the mankind think they would be left alone to their mere pronouncement of faithfulness in Allah without being victimized. Indeed we victimized those (claiming to be faithful) before them, for Allah will surely distinguish those who are genuinely faithful from those liars.”¹³

The long story of Talut and his troop in the Quran is an attestation in this regard.¹⁴

At the same time, the spiritual reason may be to punish some people so as to bring them back to their senses, and the believers towards spiritual uprightness. For example, Allah in rebuking the attitude of the Jews towards His prophets (especially Moses and Jesus) reports in the Quran:

“And for the wrongdoing on the part of the Jews, We forbade for them all the honourable provisions hitherto allowed for them; and for their persistent refusal to follow the path of Allah”.¹⁵

It is obvious from the foregoing that some “even lawful” food items were forbidden for the Jews so as to punish them for their wrongdoing. Therefore, for certain spiritual reasons, Allah may forbid believers from consuming some food items even though they are lawful. For instance, it is undisputable that flesh of ruminants (cow, sheep and goat) is lawful for consumption in the light of Shariah even before the coming of Prophet Muhammed, Allah in the past had, in an attempt to punish some wrongdoers, forbidden some food for such wrongdoers such as manifest in the Quranic verses quoted above.

Still under spiritual consideration, the rationale behind Allah forbidding some kinds of food materials for the faithful may be to instill some spiritual sanity and sanctity in the believers so as to gear them up towards spiritual upliftment. Thus, under the shariah, the lawfulness of the food materials is not the only consideration but also the lawfulness of the means by which the materials have been sourced. This may be illustrated further; it is immaterial in the eyes of the shariah whether the food consumed by muslim is lawful if the food is secured through a prohibited means. This is because the food is not itself prohibited but the means. It is a matter of high spiritual magnitude for muslims to ensure that lawful food substances are pursued through lawful means so as to make them absolutely lawful in the spiritual realm. A long Hadith narrated by Al Nawawi reported Abu Hurayrah to have quoted the holy prophet to have said that:

Allah is clean and will not take what is unclean. And that Allah commanded the believers with what he commanded the messengers Allah says: Oh you messengers, eat from the clean and honourable provisions, and do good Allah also says: Oh who believe, eat from the clean provisions which we have supplied you. The prophet then recounted the story of a long journeying man, tired and rough as a result of the journey stretching unto the heaven (Allah) his two hands (apparently asking the favour of Allah), saying oh my Lord! meanwhile his means of feeding is haram, his means of drinking is haram and also his means of

¹³ Quran 29 verses 2 and 3. This position is further re-affirmed in Quran 6 verse 146.

¹⁴ See Quran chapter 2 where Allah restrained the troop from drinking the water of a river so as to assess them spiritually.

¹⁵ Quran 4 verse 160.

clothing is haram, his belly full of haram. How can his prayers be answered?

It is crystal clear from the above narration that the spiritual consideration behind foods and drinks consumption under the shariah is not limited to the lawfulness or permissiveness of such foods and drinks substances but also to the lawfulness of the means by which they have been secured. A lawful food or drink amounts to haram if the means of getting them is detestable to Allah. Thus, funds derived from haram businesses or dealings but used to procure lawful food and drink substances will clothe the so procured food and drink substances with haram garments thereby rendering them unlawful; but for only those who know!

Health Consideration

It is sacrosanct that one of the protective intents of shariah is protection of life. Protection of life however entails that the body should always be kept in good health condition aside other considerations. Therefore only those foods that will promote and not alter the health condition of the body should be consumed. It needs to be highlighted that shariah urges an individual to take consideration of his health condition so as not to do anything prejudicial to his health. Hence, notwithstanding that a food substance is lawful, it is not allowed for an individual if the ingestion of same will be hazardous to the health of the individual. By analogous extension of the rule in the Quranic verse which says: **And lay not your hands upon what is destructive**, hence, an individual is disallowed from consuming a food material consisting of or made of substances prejudicial to his health. It is a phenomenon of common sense that the rationale behind the prohibition of alcohol under the shariah is its side effects on the mental state of health of the consumer the same effects that could result from hard drugs addiction. The latter by its effects may result in permanent mental incapacitation of the addict. In fact, some contemporary jurists have termed drug addiction as "fasad" to bring it under the provision of Quran chapter 5 verse 33.

Social Consideration

The shariah takes into account the effects that the consumption of some foods drinks may have on the society. Any such food items likely to bring hazardous effect on the society will tend to be disapproved by the shariah. This can be branded public nuisance under the Shariah. e.g Alcohol. Some of the prohibited food items under the shariah include:

- (1) Wild birds e.g. eagle, falcon, vulture, hawk, e.t.c. The Malikis say that eating of wild but not harmful birds is allowed. Therefore eating of hawk, eagle e.t.c. is therefore allowed.
- (2) Wild beasts like lion, tiger, leopard, chameleon, elephant, monkey, domestic and wild cat, alligator, crocodile e.t.c¹⁶

Some of the prohibited drinks under the shariah include Alcohol and alcoholic substances and any such substance capable of causing drunkenness and drowsiness. Under the shariah, a drink is not lawful merely because a small quantity of it will not cause drunkenness if a large quantity of it will cause drunkenness.

¹⁶ The Malikis do not outrightly prohibit wild animals, but they disapprove of their consumption. However with regards to apes, there are two intra-school views; one prohibits while the other only disapproves of same. But the latter view is more tenable to the Malikis. See Abdur-Rahman Al-jazairiy, *Al-Fiqh ala al-Madhahib al-Arba'h* (Maktabah al-Haqiqah, Istanbul, 1996) vol. iii pg1

Generally forbidden also are all such things that can negatively affect the body or the intellect. They are emphatically coated with prohibition of the highest order. Thus, under the Shariah, narcotics, Indian hemp, cocaine and similar hard drugs are strictly prohibited.¹⁷ Generally under the shariah, Allah expressly prohibits the following food materials:

- (i) Al-maytah: carrion or flesh of carcass, save carcass of aquatic animals like fish, etc.
- (ii) Dam-blood¹⁸
- (iii) Lahm al-khinzir- swine flesh
- (iv) That dedicated unto any other than Allah.
- (v) Munkhaniqah-dead through beating
- (vi) Mawquudha-strangled to death
- (vii) Mutaraddiyah-dead through falling from a height
- (viii) Natihah-killed by the goring of horns
- (ix) Devoured of wild beasts saving that made lawful by the death stroke
- (x) That which hath been immolated unto idols
- (xi) And that sworn by the divining arrows.

Once a food material falls within the above category, it becomes unlawful for consumption as far as the shariah is concerned. Thus, an animal which could have been lawful e.g. cow, or sheep but which has died as a maytah or falls within iii-xi above is rendered unlawful by reason of the circumstance under each category. Any food or drug containing even an iota of the above is unlawful. The reason for the prohibition ranges from spiritual sanctity to health and social factors. All these items both solid and liquid are forbidden in their small and large quantities. By the same token under the Shariah, an originally lawful substance may wear the garment of haram if transformed into or mixed with unlawful substance. According to al-Jazairiy, "Any such thing causing disorder to the body or the intellect as a result of drunkenness or drowsiness is unlawful, even if taken from lawful items such as honey, cheese, or grains etc".¹⁹ Progressively, all the derivatives from these unlawful animals and drinks are equally forbidden for consumption, whether solid or liquid, under the Shariah.

IV. CONCLUSION

As highlighted above, under the common law, food consumption and regulation is informed by the health consideration of both the private and the public. The ultimate is to ensure that nothing served as food (drinks inclusive) turns out to be suicidal to health so as not to endanger or prejudice the life of an individual and the public at large. But under the shariah, the consideration behind food consumption and regulation is beyond (while not ruling out "health" as a very principal consideration) health. It traverses to other aspects of shariah embodied in the 5- protective interests of shariah viz: Religion, life, property, intellect and procreation. As expatiated in this write-up, food consumption and regulation under the shariah covers spiritual, health and social considerations. Thus, food regulation and consumption under the shariah has more ample and elaborate provisions than under the common law. Progressively, the provisions of shariah in respect of the topic under discussion touch some other aspects which its common law counter-part does not and will not seem to touch.

¹⁷ Ibid p.4.

¹⁸ Liver and spleen are exceptions to the above provision.

¹⁹ Al- Jazairiy p.6.