



**ESPOUSAL OF ADR TECHNIQUE IN THE PROCEDURE OF THE  
INDEPENDENT-SHARIAH-COURTS OF SOUTH-WESTERN  
NIGERIA: (A PROCEDURAL NECESSITY?)**

By

**Abdulazeez Maruf Olayemi Ph.D\***

**&**

**Hamzat Oladipupo Edu Ph.D\*\***

**Abstract**

*ADR procedure should be adopted in the independent-Shariah-court of West western Nigeria. The people of the south-western rejoin of Nigeria are predominantly Muslims. The people involved in contractual relationships such as syndicated farming, business relationships, and various types of partnerships which could be carried out through Islamic law principally. However, the governing laws in the region are either the customary law or the civil law. Although, their marriages al-Munakaat' are consummated on the basis of al-Malikiyah principles. Nevertheless, when there is a dispute, disagreements, or disengagement, the available forum they can result to, is the customary or the civil law fora which principles are at variance with that of the Shari'ah law court. Being Muslims, the people are out rightly disenchant and they clamored for the enactment of a law for the establishment of Shari'ah court in the in all south-western states, as enshrined in the Nigerian constitution, 1999, 'there shall be for any State that requires it a Shariah court of Appeal for that State',<sup>1</sup> and was adopted by the northern states. Although, there are said to be independent-Shari'ah-courts in the region. Nevertheless, the ruling and the award of the independent-Shariah-courts are not binding, and the jurisdiction of the courts is restricted to only family matters. Additionally, the ruling of the Shari'ah courts in the South-West is merely advisory. This paper advocates for the annexing of the ADR procedure to the procedure of the independent Shari'ah courts to resolve the*

\* Post-Doctoral Fellow, UM (Malaysia), PhD (Shariah Law and Common Law), International Islamic University Malaysia (IIUM), MCL (IIUM),

\*\* LLB (Imam Muh. Bin Suad Islamic University, Riyadh, Saudi Arabia, Mauritanian Campus, MCIABr, (UK), IBA, (UK), Lecturer, Faculty of Law, Lagos State University, Lagos, Nigeria.

<sup>1</sup> Section 275 of the Constitution of Federal Republic of Nigeria.



*non-binding and the procedural challenges, of the Independent-Shari'ah-court. The award of the ADR is binding.*

**Keywords: Ruling of Shariah court, Western Nigeria, ADR Procedure**

## **1.0 INTRODUCTION**

The inhabitants of the southwestern Nigeria are predominantly Muslims. Their marriages are consummated based on Islamic Law regulations and guidelines. They should not be subjected to the Civil Law rules or the customary court rules that used the traditional principles. However, the applicable Shari'ah codes in the northern Nigeria are not extended to cover the southwest Nigeria. The law is only applicable in Northern Nigeria. Therefore, the Muslim population in southwest Nigeria although consummated their marriage under Shari'ah principles, when it comes to divorce, dispute, or separation are subjected to the customary law or the civil law rules which are not consistent with the principle of Shari'ah law. That is since Shari'ah law rules are only applicable in the northern part of the country. It is not extended to the southern part of the country. Although, independent Shari'ah courts are set up in different cities of the southwest, like, that is Shari'ah Court of Lagos, Ibadan, Oshogbo, etc. However, the rules and awards of the independent Shari'ah courts are not binding.

Given this fact, this paper advocates for the use of the ADR method for the settlement of disputes and disagreements in the Shari'ah court of western Nigeria pending the time that binding effect will be given to the Shari'ah court. More so, the paper also proposes the widening of the jurisdictional scope of the Shari'ah courts beyond family matters and Muslim marriages. The reward of the Shari'ah courts is only persuasive and advisory. The doctrinal method is adopted for the collection of information for the discussion. It relies on the available documents. That includes the rules and regulations of Shari'ah courts in Nigeria, available cases, journal articles, textbooks, etc....

### **1.1 Application of Shariah Law in the South-Western Nigeria**

Although independent Shari'ah courts are established in South-Western Nigeria to cater for the needs of the Muslim population in the region, nevertheless, said the independent Shari'ah courts in the region (southwestern Nigeria) but the rulings and judgments of the court non-binding. They are merely advisory. The available cases of the courts show that the binding nature of the award of the court is subject to the desecration of the parties.



Although, Islamic Law, 'Shari'ah,' used to be classified as customary Law in Nigeria as a whole, however, *Alkamawa V Bello*<sup>2</sup> has since changed that. It is ruled in the case that the right of neighbor to [*Shuffu'a*] 'preemption' is only applicable in the northern part of Nigeria. It does not extend to the southern Nigeria. In addition, the question of the interpretation of Islamic law in Nigeria as '*personallaw*' came up before the Supreme Court of Nigeria in the case of *Yunusavs Adesobukan*,<sup>3</sup> where it is argued that one Yunusa Saibu lived and died as a Muslim. Thus, during his life time, the deceased was domiciled in Lagos State nonetheless, that he was originally from Kwara State. When the case was brought to the Nigerian Supreme Court. Although, the court agreed that the first son of *Yunusa Saibu* who challenged the 'Will' of his late father for the reason that the testator wrongly shared the estate by using a method which is not consistent with Shari'ah law Shar'ah Law. Nevertheless, on the question was brought to the Court as to whether the deceased was not subject to Islamic law for Shari'ah of his estate (as the customary law of northern Nigeria) or the Yoruba native law that is applicable in Lagos. The Supreme Court ruled that;

..., the deceased could be said to have shown enough intention of acquiring a new domicile in Lagos State.' Nevertheless, such a provision of Islamic law is null and void 'in the Southern Nigeria.' The Supreme Court further emphasized that 'there is no provision, [it's] knowledge, of any law which makes Muslim law, whether Maliki sect or any sect, enforceable [in southern Nigeria] whether on its own or as part of any customary law, in any of the courts of southern states.

Having given clear explanation for the need for enactment of law or judicial review that allow the applicability of Islamic law in the southern Nigeria, it hereby, proposed that since the reward of ADR is binding with the endorsement of the civil court, the current, ADR mechanism should be adopted in Shari'ah courts of the southern Nigeria. The writing emphasizes the mechanism of amicable dispute settlement and the alternative dispute resolution ADR, which – subject to the endorsement and sanction of the existing civil courts, are binding and executable. Therefore, the ADR mechanism is suggested for the Shari'ah courts as a solution to the non-binding nature of its ruling and the limit of the scope of its jurisdiction. Its jurisdiction is only limited to the Muslim family

---

<sup>2</sup> *Alkamawa V Bello* (1998) LPELR-SC. 293/1990.

<sup>3</sup> (1971) 1 All NLR 86.



matters. That is, pending the enactment of a law or judicial review to ensure the binding nature of the award of the Shari'ah courts in South-Western Nigeria and to widen the scope of its jurisdiction to financial matters, etc.

The methodology of ADR is a borrowed Shari'ah mechanism. It is an aspect of the procedure of Shari'ah Law. It is a mechanism and procedure of *al-Tahkim* (arbitration), *al-Sulh* (Mediation), and *al-Muhtasib* (Ombudsman) in the Shari'ah Law. Alternative Dispute Resolution (ADR) is generally understood as the method of settling and resolving disputes and disagreements amicably as opposed to the traditional method of court procedure.<sup>4</sup> In Nigeria, the awards of ADR are generally binding and enforceable. The Nigerian courts enforce the agreement and the resolution of parties that generally stayed pending the use of ADR for the resolution of disputes.<sup>5</sup>

Therefore, the term ADR is believed to be coined by the business environment to connote the process of resolving disputes outside the court trial. It is given preference because the actual court process leads to acrimony among parties. It involved high cost and high technicality, as well as bad publicity. Thus, ADR which is the method of resolving disputes amicably is given preference. It is the method that intends to resolve disputes out of the court or non-judicial process.<sup>6</sup>

In Shari'ah, civil cases disputes are encouraged to be settled through conciliation, mediation, arbitration, negotiation, or compromise. These are settled in the Qur'an and Hadith. The main concern is to achieve reconciliation. It is not to determine who is right or who is wrong. Since it is believed that disputes are inevitable in human interaction and transactions. That is, regardless of whether it is a domestic, international, civil, commercial, or economic dispute.<sup>7</sup> Nigeria is a common law jurisdiction with a civil procedural law.

Furthermore, Shariah Law (Islamic law) allows parties to settle property or similar private rights through arbitration '*al-Tahkim*'. The arbitrator's position is similar to that of a *Qadi* in so far as his power of giving an award is concerned and he must have the same qualifications as *al-Qadi*. Matters that are related to

---

<sup>4</sup> A.F, Adenekan esq., Michael, 'Alternative Dispute Resolution in Nigeria,' 7<sup>th</sup>, April, 2020., Chambers, Dieu El Mon Droit, <MichaelChambers.com>

<sup>5</sup> Litigation and Dispute Resolution Laws and Regulations, 2023., Contributors; Woye Famojuro, Temiloluwa Dosunmu, Michael Ajinde and Samuel F. Oluwepo, ICL.Com

<sup>6</sup> Mauro Cappelletti, "Alternative Dispute Resolution Process within the framework of the World-Wide Access-to-Justice Movement, The Modern Law Review, Vol, 56, No. 3 (1993), p. 282.

<sup>7</sup> Nigerian law guru.com,<10/10/2023>.



'al-hadd', mandatory punishment, retaliation, etc are not under the jurisdiction of arbitration. The award of an arbitrator after hearing evidence examining witnesses and administering oaths is equal to that of the courts. Therefore, the award may be filed in a conventional civil court of law. Once the court issues a decree based on the award of the ADR that it is binding and its enforcement is guaranteed. Consequently, even if only one of the parties signs the arbitration agreement, it is enforceable as a contract.<sup>8</sup> The Shari'ah judicial process is inclusive of many methods of dispute resolution. Some of the methods are discussed below.

## 2.0 AL-TAHKIM (ARBITRATION)

Islamic law allows parties to property or similar private rights to apply for arbitration 'al-Tahkim'. The arbitrator's position is similar to that of a Qadi in so far as his power of giving an award is concerned and so he must have the same qualifications as that of a Qadi. Matters that are related to 'hadd', mandatory punishment, retaliation, etc. are not covered in arbitration. The award is given by the arbitrator after hearing evidence examining witnesses and administering oaths just like courts. The award may be filed in a court of law and once the court issues a decree based on it, its enforcement is guaranteed. But even otherwise once parties to arbitration sign an agreement, it is enforceable as a contract.<sup>9</sup>

In dealing with matrimonial discords and disputes, Allah SWT recommends the appointment of an arbitrator. He SWT says, '*If ye fear a breach between them, then appoint two arbiters. One from his family, and the other one from hers; If they wish for peace, Allah will cause their reconciliation, for Allah hath full knowledge, and is acquainted with all things*'.<sup>10</sup> The procedure for making the award binding is to seek a court decree based on the award. Or to apply for a specific performance of the contract, if a contract has been signed by the parties.<sup>11</sup>

The *Majallah* treats arbitration as an attempt at reconciliation. Article 1850 of *Majallah* says '*if the two [disputing] parties who have appointed arbitrators, authorize them also to arrange by compromise, if they think fit, arrangement by way of compromise, made the arbitrator is good.*' Thus, one of the parties cannot refuse to accept it so far, they agreed on it *abinitio*. The book *He day of Ali Bin Abu Bakir bin Abdul Jalil al-Farghani al-Mirghnani*, in the year 592 AH,

---

<sup>8</sup> Sayed Khalid Rashid, p. 34.

<sup>9</sup> Sayed Khalid Rashid, p. 34.

<sup>10</sup> Qur'an, Surah Al-nisa (4) ayat 35.

<sup>11</sup> Sayed Khalid Rashid, p. 35.



contains clear rules regarding arbitration.<sup>12</sup> The known Arab conventions on Arbitration include (1) the Convention on Judicial Co-operation, 1952. The document was signed by the member states of the Arab League in Riyadh, on the 6<sup>th</sup> of April 1952. (2), another one is the Amman Convention on Commercial Arbitration of 1987, etc.

### 3.0 (AL-SULH) AMICABLE SETTLEMENT

Amicable settlement in Islamic Law covers all categories of dispute settlements. That is mediation, conciliation, negotiation, except for Arbitration. That is, '*al-Tahkim*'. According to the Qur'an; ..... Allah SWT says; '*the believers are but a single brotherhood, so make peace and reconciliation, between two contending brothers, and fear Allah. That ye may receive mercy.*'<sup>13</sup> He SWT equally says, '*if two parties among the believers fall into a quarrel, make ye peace (al-Sulh) among them or compromise between them with justice, and be fair*'.<sup>14</sup> He SWT further says, '*If a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterward become full of repentance for what ye have done.*'<sup>15</sup> the word, '*Sulh*' used by the holy Qur'an means mediation, conciliation as well as compromise.

More so, a peaceful settlement of the dispute was so dear to the Holy Prophet SAW to the extent that he was ready to disregard attacks on his honour for its sake. It was narrated by *Al-Bara Bin 'Azib* that, 'when Allah's Apostle [that is, the Holy Prophet, SAW] concluded a peace treaty with the people of *Hudaibiya*, '*Ali Bin Abi Talib* (RA) wrote the document and he mentioned in it that, '*Muhammad, Allah's Apostle.*' But the unbelievers said '*Do not write Allah's Apostle,*' for if we believe that he is Allah's apostle we will not fight with you. However, Allah's apostle [himself] asked Ali to rub it out, but Ali said. I will not be the person to rub it out.' However, Allah's Apostle SAW [himself] rubbed it out and made peace with them by that.<sup>16</sup> In addition, the *Ottoman Civil Code, Majallah Al-Ahkam* in Articles 1531 to 1571 defines al-Sulh as a contract of resolving a dispute by consent. Therefore, it is a concluded contract by offer and acceptance. However, Articles 1539 to 1544 deal with the competency of the person making Sulh or *ibra*.

### 4.0 OMBUSMAN (AL-MUHTASB) IN ISLAMIC LAW

Thus, since ADR is an alternative to dispute resolution that seeks to resolve civil disputes out of court, the office of the ombudsman should also be a component of

<sup>12</sup> Chapter 3 of the book.

<sup>13</sup> Suratu al-Ujrat (49) at Ayah 10.

<sup>14</sup> Ibid, Ayath 9.

<sup>15</sup> Ibid, Ayat 6.

<sup>16</sup> Shih Bukhari, at 536.



the Shari'ah court. *The equivalent of the Ombudsman is the office of al-Muhtasib in the Shariah Law. The duty of his office includes on-the-spot seeking of weight and measures, quality of commodities offered for sale, honesty in dealings and the observation of modesty, courtesy in salesmanship and general behaviour of the people. The institution is as old as Islam itself.*

The institution of *Ombudsman 'al-Muhtasib'* owes its origin to the verse of the Holy Qur'an which states that; *"let there arise among the band of you people. A group that will enjoy what is right, and forbid what is wrong, they are the ones to attain felicity."*<sup>17</sup> Likewise, the verse that says *"ye are the best of people, evolved for mankind, enjoying what is right, for bidding what is wrong, and believing in Allah,"*<sup>18</sup> and the verse that, *'the believers' men and women are protectors, of one another; they enjoin What is just, and forbid what is evil..."*<sup>19</sup> as well as the verse that says, *"O my son! Establish regular prayer, enjoin what is just, and forbid what is wrong, and bear with patient constancy. Whatever betide thee, for this, is firmness (of purpose) in the (conduct of) affairs"*<sup>20</sup>

Therefore, the holy Prophet Muhammad SAW personally makes sure that the public and individual conduct of the people conform to the moral and legal injunctions of Islam. He SAW appointed some *al-muhtasib* for this purpose. For example, the SAW appointed Sa'id bin Al-As *Bin Humayyah* as the *Muhtasib* of the city of *Makkah*, *Umar Bin Khatab* (RA) as the *Muhtasib* of *Madinah*, and *Abdullah Bin Utbah* Ibn Mas'ud were the national *Mutasib* of *Maddinah* during *Umar Bin Khata* time.

*The function of al-Muhtab* functions as the regulator of community affairs and behaviour, such as accuracy of weight and measures in the market, as well as honesty in business, such as the keeping of records, maintaining municipal affairs, keeping roads, and streets clean, ensuring that there is light at night, monitoring buildings and preventing it from clash with community's interests, are very important.<sup>21</sup>

## **5.0 ADR PROCEDURE IN SHARI'AH COURTS INCLUDE THE SOUTH-WEST**

### **5.1 Procedure**

Annexing ADR procedure in the rulings of the Shariah courts in south-western Nigeria is a necessity given the fact that, the award of the 'Independent Shari'ah

---

<sup>17</sup> Surah Ali Imran (3) Ayat 104.

<sup>18</sup> SurH Ali Imran (3), ayat 110.

<sup>19</sup> Surah At Tawbah ayat 71.

<sup>20</sup> Surah alLuqman, ayat 17.

<sup>21</sup> Mushtaq Ahmad, *Business Ethics in Islam*, pp 136 – 138. (Islamabad, 1995).



court' is not binding. That is despite that Shari'ah courts are provided for in the Nigerian constitution. The alternative court forum is suggested as the solution. That is pending the putting in place of the required law in the western Nigerian which states the importance and the effect of the bendiness of the award of the Shari'ah courts. However, the award and the judgment of the alternative dispute resolution in all its forms are binding. The fora include Arbitration, Mediation, Conciliation, Ombudsman etc. ADR will solve many problems of the Shari'ah court. This includes the delay in the procedure.

## 5.2 Delay in Courts and the ADR Solution

Delay of litigation on the parties and courts and the accompanying psychic trauma of the litigation process on the parties will be removed through the introduction of ADR in the Shari'ah courts. The introduction of ADR into Shari'ah courts will constitute an attempt to remove the delays that negatively affect how the public views the court system in general, regardless of whether it is a Shari'ah court or civil court. The delay has culminated in the loss of confidence in justice and court processes. It can be said that the enormous pressure on court dockets, and causes of action are created by statutory mandate, and made disputes more complex in civil cases. There is a longer queue to trial always. Nevertheless, society will prefer to settle their disputes without litigation. It is believed that there is no way to settle disputes through court adversarial methods<sup>2223</sup> and still be friends.

Therefore, the proposal for the introduction of the ADR system to the Shari'ah court in Nigeria is aimed at stamping out delays and corruption in the country's judicial system. The resolution will result in the reform of the civil justice. These are the alternative dispute resolution (ADR) centers that are handling mediations and arbitrations in South-Western Nigeria including Lagos, Ibadan, Oshogbo, and other states that operate independent Shari'ah courts in the southwest. It is anticipated that the introduced ADR methods will substitute and replace the volume of court litigation and the amount of time that is spent handling disputes which has no beneficial effect in the Shari'ah courts. In contrast, presently, a first instance case can take about six years to be heard and a further three years to be appealed.<sup>24</sup> Shari'ah court like the ADR is inquisitorial as opposed to the adversarial method of the conventional courts.

---

<sup>22</sup> Sayed Khalid Rashid, *Alternative Dispute Resolution in Malaysia*, Kulliyah of Laws, IIUM, Kuala Lumpur, 2006, p. 2

<sup>23</sup> Ibid.

<sup>24</sup> Brendan Malkin, (02/08/2004) *Nigeria brings in ADR as part of court reforms*, <http://www.thelawyer.com/cgi-bin/item.cgi?d=11&f=23&h=24&id=111380> (17/10/2008).



### **5.3 ADR in African Custom**

The ADR as an alternative to the formal litigation processes in the courts is not a new concept in Africa. Therefore, before the arrival of the colonial masters, various communities throughout the Yoruba land of the present South-Western Nigeria, Benin Republic, Togo, etc... have been practising a system that is similar to ADR in their dispute resolution. For instance, they established the native judicial centres which are known as Igbejo (dispute hearing and settlement centres) basically within each family. All sorts of disputes are settled and resolved in the forums. For instance, disputes of child custody arrangements, child maintenance, and support, separation agreements, housing disputes, farmland and tenure, etc. are decided amicably in the centres. However, with the arrival of the colonial power rules, people are of view settle their disagreements through colonial processes. Finally, the Shari'ah court like the ADR is inquisitorial as opposed to the adversarial method of the courts.

### **6.0 CONCLUSION**

Having observed that ADR has "the potential to provide greater satisfaction to disputing parties in Shari'ah Courts, with binding and its innovative methods of resolving disputes, as well as greater efficiency in achieving settlements" the ADR process is proposed for Shari'ah courts in the southwestern Nigeria. In contrast, it can be observed that federal courts have effectively compelled disputants to resolve ADR procedures before approaching the courts. In the same vein, the Shari'ah courts having the defect of being non-binding in their awards and narrow jurisdiction, should emulate civil courts and allow for the processes of arbitration, conciliation, mediation, and other ADR processes which will give bendiness authority to awards and expand the scope of its jurisdiction. The court-annexed ADR system should be part of the Shari'ah courts in south-west Nigeria.