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بِوَيْبَرِئْتِي إِسْلَامًا أَبَارًا بَعْثًا مِلِّيَّتِيَا

THE LEGAL FRAMEWORK FOR ALTERNATIVE
DISPUTE RESOLUTION IN COURTS WITH
SHARĪ‘AH JURISDICTION IN NIGERIA,
MALAYSIA AND SINGAPORE

BY

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ABSTRACT

Amicable resolution of disputes is a policy enshrined in the prime sources of Islamic law and this has been consistently practised in Muslim communities across the world since the advent of Islam. Therefore, the legal framework for ADR in Islamic law has a lot to offer in streamlining the modern practice of ADR. This study examines the legal framework for ADR in courts with Sharī'ah jurisdiction in Nigeria, Malaysia and Singapore. The major part of the study is dedicated to proposed reforms in the administration of justice system in the courts with Sharī'ah jurisdiction in Nigeria. Meanwhile, the Malaysian and Singaporean models of court-annexed ADR in the Sharī'ah court are closely studied with a view to proposing practical reforms for their Nigerian counterparts. The existing legal framework for ADR in courts with Sharī'ah jurisdiction in Nigeria is examined using qualitative legal research method. While 15 judges and other main stakeholders were interviewed, 145 Sharī'ah lawyers responded to the qualitative survey. The findings of this study reveal that the Sharī'ah Court of Appeal of two States in Nigeria (Kwara and Kogi States) have an informal dispute resolution mechanism, even though the existing legal framework setting up the court does not provide for court-annexed ADR. Over 95% of the respondents supported the proposed reforms in the administration of justice system. For the Malaysian and Singaporean aspects of the research, structured interviews were conducted. Pertaining to the practice of court-annexed ADR in the Sharī'ah courts in Malaysia, this study reveals that there is a need for more *Ṣulḥ* Officers in Malaysia to cater for the increasing number of cases. The Singapore Sharī'ah court should address the procedural challenges in its rules of evidence through the amendment of section 42 of the Administration of Muslim Law Act. Its decisions should not be subject to any modicum of supervision by the civil courts, as this will have some bearing on court-annexed mediation. In all, the findings of this research illustrate the adaptability of the practices in Malaysia and Singapore in the courts with Sharī'ah jurisdiction in Nigeria. The study is a significant contribution to the existing literature through the proposition of a Sharī'ah Court of Appeal (*Ṣulḥ*) Rules in Nigeria, which inculcates principles of amicable resolution of disputes into the formalised administration of justice system.

ملخص البحث

حين تقع الخلافات، فإن الحلول السلمية الودية بين الناس، تعد من الطرق والسياسات التي نصت عليها الشريعة في القرآن والسنة ومارسها المسلمون على مر العصور وفي جميع أنحاء العالم الإسلامي . ولذلك فالفقه الإسلامي لديه الكثير الذي يمكن أن يقدمه للعالم الحديث في تسوية المنازعات وتسهيل عملها , تبحث هذه الرسالة الإطار القانوني لتسوية المنازعات في المحاكم الشرعية في كلٍ من نيجيريا, وماليزيا, وسنغافورة.

ويركز جزءٌ كبير من هذه الرسالة على الإصلاحات المقترحة في نظام عمل المحكمة في محاكم نيجيريا الشرعية. وفي هذه الأطروحة حرصت على دراسة طرق حل النزاعات في المحاكم الشرعية في ماليزيا وسنغافورة ما يمكنني من اقتراح إصلاحات عميلة للمحكمة الشرعية في نيجيريا ، بعد مقابلات مع 15 قاضيا ومسؤولا، و 145 محاميا شرعيا ممن أجاب على الاستبيان، وتبين أن هناك محكمتي استئناف شرعيتين تطبقان تسوية النزاعات بالطرق السلمية في ولايتي كوارا و كوجي، على الرغم أنه ليس هناك نص قانوني يعطي الحق للمحكمة لتنشئ لديها مكتبا لحل المنازعات.

في الجانب الآخر أيد 95% ممن شملهم الاستطلاع الإصلاحات المقترحة على نظام عمل المحكمة الشرعية في كلٍ من ماليزيا وسنغافورة. كما قمت بإجراء مقابلات منتظمة تتعلق بطريقة عمل المحاكم الشرعية في ماليزيا التي تحتوي على مكتب لحل المنازعات وتبين من خلال الدراسة أن هناك حاجة لمزيد من ضباط الصلح في ماليزيا لتلبية احتياجات الأعداد المتزايدة من القضايا . أما بالنسبة لسنغافورة فينبغي على المحكمة الشرعية أن تعدل المادة 42 من القانون الإداري الخاص للمسلمين لتستطيع أن تواجه التحديات الإجرائية في نظام الأدلة. وينبغي

أن تكون قراراتها غير خاضعة لمراجعة المحاكم المدنية، وهذا سوف يكون له أثر أيضا في مكتب الإصلاح المرفق بالمحكمة.

وفي النهاية، توضح النتائج أنه هناك إمكانية للمحاكم الشرعية في نيجيريا ممن لديها مكتب حل للمنازعات على التكيف والاستفادة من عمل المحاكم في ماليزيا وسنغافورة. وتعد هذه الدراسة مساهمة مهمة في الكتابات الموجودة من خلال اقتراح قواعد موحدة لمحاكم الاستئناف الشرعية في نيجيريا , وهذا سوف يساعد على غرس مبادئ حل المنازعات بالطرق السلمية في نظام المحكمة الشرعية.

APPROVAL PAGE

The thesis of Umar Aimhanosi Oseni has been examined and is approved by the following:

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DECLARATION

I hereby declare that this thesis 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.

Umar Aimhanosi Oseni

Signature

Date

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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NIGERIA, MALAYSIA AND SINGAPORE**

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For

Prof. Zakariyau I. Oseni and Mrs. Reminetu Oseni [Dad and Mom],

Munirah and Abdurrahman [Wife and Son],

The whole Oseni Family.

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- Alhaji Saidu Maje v. Da’u Dillalin Shanu* Unreported, Appeal no. CA/K/142/S/2005
- Alhaji Sule Manto and Alhaja Fatimoh Agbeke v. Alhaji Saadu Akanbi* Appeal No. KWS/SCA/CV/M/IL/28/93
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- Ayisatu Anike v. Ishola Opo* Appeal No. KWS/SCA/AP/IL/39/93.
- Brother Isiaq Mustapha v Abdul Kabeer Atunrashe* (No ISP/IEM/0007DR/1424 AH)
- Cable & Wireless Plc v. IBM United Kingdom Ltd.* [2003] EWHC 316 (Comm)
- Chairman NPC v. Chairman Ikere L.G.A.* (2001) 90 LRCN 2803
- Chaytor v Zaleha Bte A Rahman* [2001] 2 SLR 236.
- Dunnett v. Railtrack Plc* [2002] EWCA Civ 303; [2002] 2 All ER 850,
- H. Ahmadu Usman v. Sidi Umaru* (1992) 7 NWLR (PT 254) 377
- Iyabo Bayo v Alh. Salami Ishola Eleku* Suit No. KWS/SCA/CVM/IL/18/2007
- Kenon v. Tekam* (2001) 90 LRCN 2821
- Madam Ayisat Afinni v. The President and Members of Grade “B” Customary Court, Isolo, Lagos State and Alhaji Jumat Owolabi* Suit No.: ID/852M/2007 (Unreported)
- Mamat bin Daud v. Government of Malaysia* [1988] 1 MLJ 119
- Mohamed bin Awang v. Asmah binti Ismail* Appeal Case No. 04 of 1976 (Unreported)
- Mohamed Yusoff Bin Mohd Haniff v Umi Kalsom Bte Abas (Attorney-General, Non-Party)* [2010] SGHC 114; [2010] 3 SLR 481
- Muhd Munir v Noor Hidah and Other Applications* [1991] 1 MLJ 276.
- Nerat bt. Musa v. Ahmad bin Kancil* (1965) 3 JH 101
- Norlia Bte Abd Aziz v. Md Yusof bin A Rahman* [2004] 5 MLJ 538
- Ogbuyinya v. Okudo (No. 2)* [1990] 4 NWLR (Pt. 146) 551
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- Oyewunmi v. Ogunesan* (1990) 3 NWLR (Pt. 137) 182
- R (On the Application of Cowl) v. Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 WLR 803,
- Rahmat Bin Slammat v. Rozika Binti Nabiwullah Syariah* Appeal Case No. 22 of 1993 (Unreported).
- Ramizah Haneem v. Yusuf Bin Hasbullah* [1993] 1 MLJA 115; [1993] 1 MLJA 115
- Re Estate of AbdulMumini Umar* SCA/KGS/OFF/171/FOL.II.
- Rossek & Ors v. ACB Ltd & Ors* [1993] 8 NWLR (Pt.312) 382
- Safiya Korau v Balai Korau* (1998)4 NWLR (PT.545) 212 at 222
- Saniah Bte Ali & Ors v Abdullah Bin Ali* [1990] 1 SLR 584.
- Shafeeg Bin Salim Talib and Another v Fatimah Bte Abud Bin Talib and Others* [2010] SGCA 11.
- Siti Hawa bte Mohamed v. Mohamed Radzuan* [1992] 1 MLJ cxcix.

LIST OF STATUTES

Administration of Muslim Law Act (AMLA) 1966 (Singapore)
Administration of the Religion of Islam (State of Selangor) Enactment No. 1 of 2003 (Malaysia)
Arbitration and Conciliation Act 2004 (Cap. A18 Laws of the Federation of Nigeria 2004) (Nigeria)
Constitution of the Federal Republic of Nigeria 1999
Federal Constitution of Malaysia 1957
Islamic Family Law (Federal Territories) Act 1984
Shari‘ah Court Civil Procedure (Federal Territories) Act 1998
Shari‘ah Court Civil Procedure (*Ṣulḥ*) (Federal Territories) Rules 2004
Shari‘ah Court of Appeal Law No. 16, 1960 (Nigeria)
Wafaqi Mohtasib (Ombudsman) Order, 1983 (Pakistan)

LIST OF ABBREVIATIONS

A.H.	Anno Hegirae, the Islamic calendar
AAA	American Arbitration Association
AALCO	Asian-African Legal Consultative Organization
AAOIFI	Accounting and Auditing Organization for Islamic Financial Institutions
ACA	Arbitration and Conciliation Act
ADR	Alternative Dispute Resolution
All ER	All England Law Report
AMDC	Abuja Multi-Door Courthouse
AMLA	Administration of Muslim Law Act
ASEAN	Association of Southeast Asian Nations
BC	Before the birth of Christ
C.E.	Common era, Christian era
Cf	compare
CLJ	Current Law Journal online database
CPR	Civil Procedure Rules
ECJ	European Court of Justice
ENE	Early Neutral Evaluation
etc.	And so forth
FDR	Family Dispute Resolution
IFLA	Islamic Family Law (Federal Territories) Act
JCA	Justice of the Court of Appeal
JKSM	Jabatan Kehakiman Syariah Malaysia (Department of Sharī'ah Judiciary of Malaysia)
JSC	Justice of the Supreme Court
KLRC	Kuala Lumpur Regional Centre for Arbitration
LFN	Laws of the Federation of Nigeria

LMDC	Lagos Multi-Door Courthouse
M.R.	Master of Rolls
MUIS	Majlis Ugama Islam Singapura (Islamic Religious Council of Singapore)
MULAN	Muslim Lawyers' Association of Nigeria
n.	footnote
NJC	National Judicial Council
NJI	National Judicial Institute
PTC	Pre-trial Conference
Rep.	Report
ROMM	Registry of Muslim Marriages
S.A.W.	<i>salallahu 'alaihi wa salam</i> , may peace and blessings of Allah be upon him.
SCJA	Supreme Court of Judicature Act
SCSN	Supreme Council for Sharī'ah in Nigeria
SIAC	Singapore International Arbitration Centre
SWT	<i>subhānanau wa ta'ālā</i> , glory be to Allah, the Most Exalted.
UNCITRAL	United Nations Commission on International Trade Law
v.	versus, against

CHAPTER ONE

INTRODUCTION

1.0 PREAMBLE

Last century witnessed dramatic changes in the administration of justice system in the world, particularly in the West. The waves of transformation were also experienced in developing countries, which culminated into the introduction of alternative dispute resolution (ADR)¹ mechanisms to streamline the process of administration of justice in the courts. Even though amicable resolution of disputes has been the norm in the primordial communities of Africa and Asia, there was a gradual drift towards the institutionalisation of ADR practices in the West in the latter part of the 20th century. The dominant effect of such reforms was also felt in a number of African and Asian developing countries. Meanwhile, Islamic law considers a number of effective dispute resolution mechanisms as part of the case management role of a judge.²

¹ In Islamic law, the acronym “ADR” for Alternative Dispute Resolution is not found in the books of Islamic jurisprudence. However, this study adopts the acronym because the underlying philosophy of ADR is what Islamic law has portrayed through *ṣulḥ* and *taḥkīm* in particular. Even from the conventional usage of the term “ADR”, there has been controversy on the most appropriate term to be used. While some prefer to call it “Dispute Resolution” others call it “Expedited Dispute Resolution (EDR)”. In fact, ADR may also be called “Appropriate Dispute Resolution”. For a general overview of the controversy on the appropriate term, see Sir Laurence Street, “The Language of Alternative Dispute Resolution”, *Australian Law Journal*, 66 (1992), 194. Also, see generally, Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*. 2nd ed. (Australia: LexisNexis Butterworths, 2002), at 76-81.

² Muslims in the West have repeatedly called for the introduction of Sharī‘ah ADR processes within their local communities for their members. Many have taken giant steps to introduce Muslim Arbitration Panels in London and Canada. While the Muslim Arbitration Tribunal was established in London, the Islamic Institute for Civil Justice (IICJ) established Sharī‘ah Arbitration in Canada. These initiatives are not free from legal and regulatory challenges. For instance, the Sharī‘ah Arbitration introduced by the IICJ in Ontario was defeated by legislative amendments to the enforceability of awards emanating from such arbitral institutions. The amendments to the Arbitration Act render all arbitral proceedings that are not based on the Ontario law unenforceable in a court of law. See Ori Aronson, “Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization”, 51 *Va. J. Int’l L.* (Winter 2011), 231, 240- 242; Michael C. Grossman, “Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process”, 107 *Colum. L. Rev.* (2007), 169; Dieter Grimm, “Religion and Constitutional Adjudication: Conflicts Between General Laws and Religious Norms”, 30 *Cardozo L. Rev.* (2009), 2369, 2377, 2381; Donald Brown, “A Destruction of Muslim Identity: Ontario’s Decision to Stop Shari’a-Based Arbitration”, 32 *N.C.J. Int’l L. & Com.*

This chapter examines a number of preliminary issues in the research ranging from the background to the research, research questions, literature review, research methodology, scope and limitation, and significance of the research. These issues are of paramount importance in setting the stage for subsequent discussion regarding the central theme of the study. The literature review aspect gives a general review of existing literature on the central theme of the study and the need to add to the continuum of literature. It is important to observe at the onset that this study relates to three commonwealth jurisdictions –Nigeria, Malaysia and Singapore.³

This chapter begins with a general background to the research which examines salient issues to be addressed. This background serves as a preliminary summary of the whole research which may otherwise be referred to as an extended abstract. Without doubt, there is a marked increase in the use of ADR processes across the world.⁴ A new direction is being introduced in this research from a different

Reg.(2007), 495; Jehan Aslam, “Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship”, 38 *N.Y.U.J. Int'l L. & Pol.* (2006), 841; Trevor C. W. Farrow, “Re-Framing the Sharia Arbitration Debate”, 15 *Const, Forum Constitutionnel*, (2006), 79; Caryn Litt Wolfe, “Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts”, 75 *Fordham L. Rev.* (2006), 427, 441. Despite the non-recognition of the arbitral awards of the Sharī‘ah arbitration, one soothing aspect of the whole issue is the willingness of many Muslims to accept the decision of the panel. Similar challenges have been experienced in Nigeria despite the fact that it has a large Muslim population.

³ Nigerian got her independence on 1st October 1960 while Malaysia got her independence on 31st August 1957, both from the British colonialists. On its part, Singapore got self-government in 1959 from the British control and later merged with Malaysia and other neighbouring territories in the Federation of Malaya on 31st August 1963. Singapore finally left the Malaysian Federation to become an independent nation on 9th August 1965. See Jim Baker, *Crossroads - A Popular History of Malaysia and Singapore*, 2nd Ed., Singapore: Marshall Cavendish, 2008.

⁴ For instance, in the United States of America, a new legal regime was introduced in 1998 with the enactment of the Alternative Dispute Resolution Act (1998). This Act introduced mandatory court-annexed ADR as preliminary step to court adjudication. In the United Kingdom, the Civil Procedure Rules were amended in 2000 which brought about the introduction of court referrals to appropriate ADR mechanisms. This is considered as part of the case management role of the judge. See Arthur Marriot, “Mandatory ADR and Access to Justice”, (2005) 71(4) *Arbitration*, 307, 331. In Malaysia, Practice Direction No. 5 of 2010 on Mediation has been introduced which became effective 16 August 2010. This allows for appropriate court referrals or court-mandated mediation of cases. See the Preface to the book, Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed, *Mediation in Malaysia: The Law and Practice*, Malaysia: LexisNexis, 2010, at xiii – xv. Furthermore, the Singapore experience has been very pleasing for most disputing parties. Tremendous progress has been recorded in the past five to ten years in Singapore. There is astounding growth in the use of ADR processes in

worldview. Hence, preliminary issues are given in this chapter to set the ball rolling for burning issues in the dispute resolution models in the courts with Sharī‘ah⁵ jurisdiction in Nigeria, Malaysia and Singapore. These models are critically juxtaposed with the Islamic law models of dispute resolution. It goes without saying that, most precedents on ADR processes in Islamic law are contained in Islamic legal history which is a relevant part of this research.⁶

1.1 BACKGROUND TO THE RESEARCH

The current trend in most developing countries across the world is a paradigm shift from the colonially inherited litigious method of dispute resolution to the amicable means of settlement.⁷ This trend generally had a great impact on countries across the world towards the end of the 20th century. The conventional means of dispute resolution have been practised by most traditional communities in Africa and Asia from time immemorial.⁸ The age-long traditional dispute resolution mechanisms in

Singapore. According to Chris Crowe in his consideration of the performance of the Singapore International Arbitration Centre, “[w]hile Asia may not necessarily have the biggest cases, the pace of growth is outstripping Europe and North America, evidenced by SIAC’s huge 60 per cent growth in its number of cases in 2009”. See Chris Crowe, “Asia’s arbitration explosion”, *International Bar News*, (August 2010), at 38. Also see, Lim Lan Yuan and Liew Thiam Leng, *Court Mediation in Singapore*. Singapore: FT Law and Tax Asia Pacific, 1997, at 53; P. G. Lim, “The Growth and use of mediation throughout the world: Recent Developments in Mediation/Conciliation among Common Law and Non-Common Law Jurisdictions in Asia”, [1998] 4 *MLJ* cx; Lim Lan Yuan, “Mediation, Its Effective Implementation as an Alternative Dispute Mechanism –Singapore Experience”, a paper presented at the *National Seminar on Alternative Dispute Resolution* on 4 and 5 February, 2002 at Federal Government Administration Centre, Putrajaya, Malaysia.

⁵ This is the correct transliteration of the word accepted universally. The word “Sharī‘ah” will be used throughout this thesis to represent the Nigerian version “Sharia” and the Malaysian and Singapore versions “Syariah”. All legislations, rules and names of court in this thesis will follow the standard usage.

⁶ As will be demonstrated in Chapter Two of this thesis, the Islamic history is replete with standard precedents on amicable resolution of disputes which are worth emulating in the conventional practice of ADR.

⁷ The legalization of the community has caused a lot of threats to most entrepreneurs, corporate bodies and even families in developed countries. See generally, Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Law Suit*, (Dutton, New York: Truman Tally Books, 1991).

⁸ Apart from the ADR processes in Islamic law widely practised in Asian Muslim communities since the advent of Islam, there are traceable origins of mediation in the Chinese traditions since Chou