



MUHTASIB (OMBUDSMAN) AND FATWA OF MUFTI IN NIGERIA: AN ANALYSIS OF THE IDEAL APPROACH

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Abstract

Islamic Alternative Dispute Resolution (ADR) processes are more of being at the rudimentary stage or practiced unsystematically. It is alarming that processes like *Muhtasib* (Ombudsman) and *Fatwa of Mufti* (Expert Determination or Legal or Ruling of an Islamic Scholar) are haphazardly practiced in Nigeria. One will ordinarily expect that in a country like Nigeria with large population of Muslims, the adoption and application of these two processes should be well standardized as obtained in other jurisdictions of the world with relatively the same population with Nigeria. Thus, problem associated with these two processes in Nigeria is brought to the fore and the progress made in Malaysia with respect to *Fatwa of Mufti* (Legal Ruling) is shown. Likely solution is proffered based on the structured approach obtainable in a jurisdiction like Malaysia as a way to strengthen the application of Islamic ADR processes in Nigeria.

Keywords: alternative dispute resolution, *Muhtasib*, Ombudsman, *Fatwa of Muftis*, expert determination, legal ruling

1. Introduction

The relevance, applicability, and acceptability of Alternative Dispute Resolution (ADR) globally as a veritable dispute resolution mechanism is valid and not a mere assumption. The acceptance may not be divorced from congruent and consensual nature of its practice and procedure. The same could be said of Islamic ADR practices but more importantly, Islamic ADR practices are specifically based on Qur'ān and *Sunnah* of Prophet Muhammad (SAW). Although, there are myriad of these processes that encompass among others, like *Sulh* (mediation), *Tahkim* (arbitration), *Sulh* and *Tahkim* (med-arb), *Muhtasib* (Ombudsman), and *Fatwa of Mufti* (Expert Determination or Legal Ruling) meaning: Mediation, Arbitration, Med-Arb, Ombudsman and Legal Ruling or Expert Determination of a Jurist-Consult respectively. While some of the Islamic ADR processes are either at the initial stage or practiced haphazardly, it is evident that processes like *Muhtasib* (Ombudsman) and *Fatwa of Mufti* (Expert Determination) are unsystematically practiced in Nigeria. Thus, an attempt is made to show the problem with these two processes in Nigeria and the appreciable progress made in Malaysia with respect to *Fatwa of Mufti* (Expert Determination). As the way forward, solution is offered based on the structured





approach in this jurisdiction as a way to establish the application of Islamic ADR mechanism in Nigeria.

1.1. An Overview of Islamic ADR Processes

There are multiple Islamic ADR processes; *sulh* (mediation), *tahkim* (arbitration), combination of *Sulh* and *Tahkim* (Med-Arb), *Muhtasib* (Ombudsman) and *Fatwa* of *Mufti* (Expert Determination) among others which have been extensively discussed elsewhere. Thus, *Sulh* (Negotiation, Mediation and Compromise of action) is provided for the Qur'an and as well supported by the *Sunnah* of Prophet Muhammad (SAW). Its relevance in Islamic law is most significant.¹ The basis its application is seen in the Qur'an² and Allah (SWT) prescribed *Sulh* as being the best.³ The application of *sulh* by Prophet Muhammad (SAW) when concluding the treaty of *Hudaibiya* is unique in nature⁴ in that it exemplified the need to ensure harmonious resolution of dispute in Islam. In effect all forms of negotiation; settlement, mediation/conciliation or even compromise of action is permissible between Muslims in Islam except one legitimizes what is unlawful as lawful.⁵

¹Nicholas Khoury, "Commercial Mediation in Africa and Islamic Law," <http://businessconflictmanagement.com/blog/2009> (accessed October 14, 2011); See Nasimah Hussain and Ramizah Wan Muhammad, "*Sulh* In Islamic Criminal Law: Its Application In Muslim Countries," <<http://www.apmec.unisa.edu.au/apmf/2008/papers/33-Nasimah%20Hussin%20&%20Ramizah%20Wan%20Muhammad.pdf>> (accessed February 17, 2011) at 2.

²Qur'an, al-Hujurat 49:10; See 'Abdullah Yusuf 'Ali, *The Meaning of the Holy Qur'an, Qur'anic Text (Arabic), with Revised English Translation, Commentary and Index*, 11th ed. (U.S.A: Amana Publications, 1427 AH / 2006 AC), 1341; al-Hujurat 49: 9; See Yusuf 'Ali, *The Meaning of the Holy Qur'an*, 1341. Qur'an, al-Nisa 04: 114. See Yusuf 'Ali, *The Meaning of the Holy Qur'an*, 222-223.

³Qur'an, al-Nisa: 128. See Yusuf 'Ali, *The Meaning of the Holy Qur'an*, 226-227 (...And such settlement is best); See also Ramizah Wan Muhammad, "The Theory and Practice of *Sulh* (Mediation) in the Malaysian *Shari-ah* Courts," *International Islamic University Malaysia Law Journal* 16, (2008): 35; see Ibrahim Barkindo, "The Role of Traditional Rulers in Dispute Resolution: An Islamic Law Perspective," at 5, <<http://www.scribd.com/doc/24011864/The-Role-of-Traditional-Rulers-in-ADR-An-Islamic-Law-Perspective>> (accessed August 9, 2011).

⁴Muhammad al-Bukhari, *Sahih al-Bukhari, Translation of the Meaning of Sahih al-Bukhari Arabic-English*, Eng. Trans. by Muhammad Muhsin Khan, vol. 3, 5th ed. (New Delhi: Kitab Bhavan, 1984), 536. Narrated by Al-Bara bin Azib: when Allah (SWT)'s Messenger (SAW) concluded a peace treaty with the people of Hudaibiya, Ali bin Abi Talib wrote the document and he mentioned in it, 'Muhammad, Allah (SWT)'s Messenger.' The pagans said, "Do not write: "Muhammad (SAW) Allah (SWT)'s Messenger," for if you were an apostle we would not fight with you." Allah (SWT)'s Messenger (SAW) asked Ali to rub it out, but Ali said, "I will not be the person to rub it out." Allah (SWT)'s Messenger (SAW) rubbed it out and made peace with them.

⁵This is unequivocally stated in the letter of Umar bin Khattab RA to Abu Musa Al-Ash'ari RA on his appointment as a *Qadi* that: "All types of compromise and conciliation among Muslims are



However, this occasion may call for the application of another legal process like arbitration (*Tahkim*) in resolving a dispute where its use is allowed by law to attain justice. Thus, *Tahkim* (arbitration) as a process involves an agreement by parties to appoint someone to play the role of an arbiter (*Hakam, Judge*) to settle of their dispute according to *shari'ah* (Islamic Law).⁶ Although the use of *tahkim* (arbitration) is well-rooted in Arabia before Islam,⁷ the birth of Islam further strengthened and structured its application, and it's the basis in the following provisions.⁸ The arbitration between Caliphs of Islam further epitomizes its application as an acceptable dispute resolution mechanism in Islam.⁹ It is settled that an arbitrator must possess certain qualities¹⁰ and as such the use of arbitration is limited to a class of matters.¹¹

permissible, except those which make *haram* anything which is *halal* and *halal* as *haram*." See Mahmood Ahmad Ghazi, *Adab al-Qadi* (Urdu), (Islamabad, 2nd edn., 1993), 164 cited in Syed Khalid Rashid, "Alternative Dispute Resolution: The Emerging New Trend of Informal Justice," Tenth Inaugural Lecture delivered October 8, 2002 at IIUM (International Islamic University Malaysia), 23; Fyzee, A. A. A, *A Modern Approach to Islam* (Bombay: Asia Publishing, 1963), 42.

⁶Abd al-Karim Zidan, *Nizam al-Qadi fi al-Shari'ah al-Islamiyyah* (The Jurisprudence System in Islam) (Baghdad: Matbaah al-'Ani, 1984), 291; See Nora Abdul Hak, "*Hakam/Tahkim* (Arbitration) in Resolving Family Disputes: The Practice in the *Shari'ah* Courts of Malaysia and Singapore," in *Asian Journal of International Law*, 1, Issue 1 (June 2006): 47; See also Wahbah Al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh* (Islamic Jurisprudence and It's Arguments) vol. 6, 3rd ed. (Damascus: Dār al-Fikr, 1989), 756; Mahdi Zahraa and Nora A. Hak, "*Tahkim* (Arbitration) in Islamic Law within the Context of Family Disputes," *Arab Law Quarterly*, (2001):3.

⁷Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, 2nd ed. (The Hague: Kluwer Law International, 1999), 11; see Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia* (Malaysia: Kulliyah of Laws IIUM, 2006), 34; see also Zahraa and Hak, "*Tahkim* (Arbitration) in Islamic Law within the Context of Family Disputes," 4-5.

⁸*Qur'ān*, al-Nisa 04: 35, 58 among other verses. See Yusuf 'Ali, *The Meaning of the Holy Qur'ān*, 196 and 203 respectively. It is stated in *Qur'ān*, al-Nisa 04: 35 "If ye fear a breach between them twain, appoint (two) arbiters one from his family and the other from hers; if they wish for peace Allah (*SWT*) will cause their reconciliation for Allah (*SWT*) hath full knowledge and acquainted with all things."

⁹The arbitration was between Caliph Ali RA and Mu'awiyah RA in resolving the dispute between the two Muslim leaders over the right of succession. Rashid, *Alternative Dispute Resolution in Malaysia*, 36. Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, 2nd ed., (The Hague: Kluwer Law International, 1999), 15.

¹⁰An infidel, a slanderer, a slave or an infant are exempted. Charles Hamilton, *The Hedaya Commentary on the Islamic Laws*, vol. 1, Part 1 and 2, Eng. Translation 1st ed. (Pakistan: Darul-Ishaat, 2005), 752.

¹¹It is allowed in transactional matters of private rights (*huquq al-Naas*) and not allowed in matters that deal with the 'Right of Allah (*SWT*)' or public order. In the same vein, Article 260 of the Tunisia Arbitration Law stated that: No arbitration is possible in: 1. Matter concerning public order; 2. dispute relating to nationality; 3. dispute relating to personal status, with exception of the monetary disputes which arise there from; 4. Matters where no conciliation is possible; 5. Disputes which must be communicated to public prosecutor, unless another law provides otherwise. Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (The Hague: Kluwer Law International, 1990), 39, 1136; Zahraa



Moreover, as the application of Med-Arb (mediation and arbitration) is practicable under the contemporary and/or traditional application of ADR, it is also feasible under Islamic ADR. Thus, application of *sulh* and *tahkim* is provided for in Islam and it is valid.¹² It is pertinent to note that mediation should first be explored after which arbitration may be used in case a compromise is not achieved.

The above statements give an overview of some of the recognized Islamic ADR mechanism while the focus of this discourse is hereinafter discussed with a view to identify the visible problem and criticism against the practice of the said two Islamic ADR processes of *Muhtasib* (Ombudsman) and *Fatwa of Mufti* (Expert Determination) particularly with respect to Nigeria.

1.2. *Muhtasib* (Ombudsman)

It is settled that the system of check and balance operates to check excesses and the lack of it may result in the abuse of power and / or office. Thus, conventionally Ombudsman is seen as an inevitable instrument in this regard. This office is ordinarily in charge of receiving complaints from the public against any public authorities or departments of a country and to investigate it, so as to check and correct the abuses of public administration. Ombudsman is credited to have its origin in the Scandinavian countries; particularly the practice is deep-rooted in Sweden.¹³ However, the concern here is with regard to Ombudsman or *Muhtasib* in Islamic law. The use of this dispute resolution mechanism was entrenched ever since the time of the Prophet Muhammad (SAW), and as a result an integral part of Islamic law. The practice may be synonymous with the contemporary use of Ombudsman, but

and Hak, “*Tahkim* (Arbitration) in Islamic Law within the Context of Family Disputes,” 28; Rashid, *Alternative Dispute Resolution in Malaysia*, 40.

¹²*Qur’ān*, al Nisa 04: 35. See Yusuf ‘Ali, *The Meaning of the Holy Qur’ān*, 196. This is also supported by the provision of the *Maj Allah (SWT) Al-Ahkam al-Adliyyah* where it states that: “If the two parties who have appointed arbitrators, authorize them also to arrange by compromise...an arrangement, by way of compromise made by the arbitrators is good”. Article 1850 of the *Maj Allah (SWT) el-Ahkam-i-Adliyah*, C. R. Tyser et al, *The Mejelle, An English Translation of Maj Allah (SWT) el-Ahkam-i-Adliya and A Complete Code on Islamic Civil Law*, Eng. Translation (Lahore: Law Publishing Co., 1980 reprint of 1901 edn.), 254-255; See for a detail discussion on Islamic ADR processes, Ayinla L.A., “A Critique of the Contemporary Relevance of Islamic ADR Processes in Nigeria,” Paper presented at the *International Conference on Islam in Africa: Intellectual Trends, Historical Sources and Research Methods*. Held on 19-21 July, 2011 at International Institute of Islamic Thought and Civilization, Malaysia.

¹³See for the meaning and details Stephen B. Goldberg, Frank E. A Sander, Nancy H. Rogers, *Dispute Resolution, Negotiation, Mediation and Other process*^{3rd} ed. (New York: Aspen publishers, 1999); Henry Brown and Arthur Marriott, *ADR Principles and Practices* (London: Sweet and Maxwell, 1999), 380, Roel Fernhout, “Access to Justice and the Ombudsman, National Ombudsman, the Netherlands,” in *Democratizing Access to justice in Transitional Countries*, proceedings of workshop “Comparing Access to Justice in Asian and European Transitional Countries,” Bertrand Ford, Bogor ed., Indonesia, 27-28 June 2005 (Singapore: Asia-Europe Foundation; 2006), 76.



the purpose and function of *Muhtasib* in Islam are broader than that of an Ombudsman *simpliciter*.¹⁴ It is argued by Hussein that:

Al-Muhtasib is literally a judge (*Qadi*) who takes decisions on the spot, in any place at any time, as long as he protects the interests of the public. His responsibilities are almost open-ended in order to implement the foregoing principle: commanding the good and forbidding the evil of wrongdoing. *Al-Muhtasib* and/ or his deputies as full judge (s) must enjoy high qualifications of being wise, mature, pious, well-poised, sane, free, just, empathic, and learned scholar (*faqih*). He has the ability to ascertain right from wrong, and the capability to distinguish the permissible (*halal*) from the non-permissible (*haram*).¹⁵

Whether the requirement as deducible from the foregoing quotation is achievable in the practice in Nigeria is doubtful as shall be seen in the discourse. Besides, the functions of an Ombudsman further extends to encompass keeping a watchful eye on weights and measures, quality of commodities sold in the market, honesty in trade and commerce, observance of modesty in public places, observance of religious rites among other things.¹⁶ It therefore, presupposes that *Hisbah* (official board) ensures public inspection of nearly everything including moral issues. It is a fact a judge acts only when a case is filed in his court, but *Muhtasib* is empowered to act *suomotu* (when necessary). This underlies the specified requirement which according to Ibn-e-Taymiah, *Muhtasib* must be kind and patient and ensure proper conduct of people in public activities.¹⁷ The role is sanctioned by Allah (*SWT*) thus, the observance of the duty is premised on the dictate of Allah (*SWT*) as contained in the Qur'an that: "Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity."¹⁸ In furtherance of this provision, several people have been appointed to hold the office of *Muhtasib* in Islamic history. The following analysis gives account of persons that served in this position:

Sa`ad ibn Al-Aas Ibn Umayyah (*RA*) was appointed *muhtasib* of Makkah and Umar bin al-Khattab that of Medinah (*RA*) by the Prophet (*SAW*) himself.¹⁹ A separate department of *hisbah*, with full time *muhtasib* assisted by qualified staff (known as

¹⁴Rashid, "Alternative Dispute Resolution: The Emerging New Trend of Informal Justice," 28.

¹⁵*Hisbah* Institution, <http://islamic-world.net/economic/hisbah_institution/hisbah.html> (accessed March 11, 2011)

¹⁶Rashid, "Alternative Dispute Resolution: The Emerging New Trend of Informal Justice," 28.

¹⁷Hussein A. Amery, "Nigeria: Islam and Water Management," *Daily Trust*, October 14, 2008. See also <<http://allafrica.com/stories/200810140179.html>> (accessed March 13, 2011)

¹⁸Yusuf 'Ali, *The Meaning of the Holy Qur'an* 154; *Qur'an*, al 'Imran: 104; See also Rashid, "Alternative Dispute Resolution: The Emerging New Trend of Informal Justice," 28 for other similar verses in al-'Imran 03: 104, 114; al-Taubah 09: 71; Luqman 31:17.

¹⁹Mushtaq Ahmad, *Business Ethics in Islam* (Islamabad: Islamic Research Institute, 1995) 136-138; see Rashid, "Alternative Dispute Resolution: The Emerging New Trend of Informal Justice," 28.



Arif and *Amins*) was introduced by the Abbasid Caliph Abu Ja`afar al-Mansur in 157 A.H. The institution of *Hisbah* moved along with Muslims in Western provinces of Spain and North Africa. Similarly the office of *muhtasib* was an important department during the rule of Fatimids, Ayyubids, and Ottomans...The institution of *hisbah* remained in vogue during the entire Muslim period of history, though it has been termed differently in various regions. For example, in the eastern provinces of Baghdad caliphate the officer in charge was *muhtasib*, in North Africa he was *Sahibal-Suq*, in Turkey, *Muhtasib Aghasi*, and in India (during the Muslim period) *Kotwal*.²⁰

In other places such as in Cairo, the duties of *muhtasib* during the reign of Sultan Barquq included the regulation of weights, financial dealings, prices, public morals, and the cleanliness of public places, as well as supervision of schools, teachers, and students, and attention to public baths, general public safety, and the flow of traffic.²¹ *Muhtasib* stands to secure the common welfare in the society as a whole, even if it requires taking a position against the government. The task of *Muhtasib* is comprehensive and covered virtually all aspects of the day-to-day life of people and surroundings.²²

Muhtasib (Ombudsman) is now introduced in a modified form particularly in a country like Pakistan, to handle matters of administrative excesses of the federal government departments and agencies. It protects the ordinary citizen against administrative wrongs notwithstanding its lack of jurisdiction over malpractices of business firms against a citizen.²³ It is pertinent to state that the activities of the National Agency for Food and Drug Administration and Control (NAFDAC) established by decree no. 15 of 1993 as amended²⁴ is similar to what is expected of an ombudsman under Islamic law in a country. However, the legal reform in Northern Nigeria particularly in Zamfara State by (the then Governor Ahmed Sani Yerima) in the year 2000 and other 11 States further strengthened the practice of *shari`ah* (Islamic Law) in Nigeria. In 2003, the Governor of Kano State inaugurated three

²⁰Muhammad Akram Khan, "Al-Hisba and the Islamic Economy," in *Ibn Taymiya, Public Duties in Islam*, Eng. Trans. Muhtar Holland (Leicester: Islamic Foundation, 1982) 136-138; see Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia*, 50.

²¹Anne F. Braodbridge, "Academic Rivalry and the patronage System in Fifteenth-Century Egypt," *Mamluk Studies Review*, vol. 3, (1999) cited in Wikipedia, the free Encyclopaedia, *Muhtasib*, <<http://en.wikipedia.org/wiki/Muhtasib>> (accessed March 11, 2011).

²²*Hisbah* Institution, <http://islamic-world.net/economic/hisbah_institution/hisbah.html> (accessed March 11, 2011).

²³Muhammad Akram Khan, *An Introduction to Islamic Economics* (Islamabad, 1994) 83-84. See also Hussein Amery, "Nigeria: Islam and Water Management," 17.

²⁴It is an agency under the Ministry of Health which is responsible for the regulating and controlling the manufacture, importation, exportation, advertisement, distribution, sale and use of food, drug, cosmetics, medical devices, chemicals and packaged water. The establishment of this agency due in part to the fact that in 1989 about 150 died of paracetamol syrup containing diethylene glycol, due to adulterated and counterfeit drugs. See en.wikipedia.org/wiki/NAFDAC (accessed September 9, 2011)



Shari'ah bodies, one of which was the *Hisbah* (Official Board).²⁵ In June 2005 a 50 member *Shura* (Advisory Council) with distinguished religious scholars as members was set up to give advice to the government on religious matters and community affairs. Its aim was that the government should work with community leaders to restore morals into the society.²⁶ This informed the establishment of *hisbah* (board) that is more visible in Kano and Zamfara States.²⁷ In Kano, for example, sequel to the inauguration of *hisbah* the ban on the consumption of and dealing in alcohol was enforced. As a result, at Dambatta Local Government Area of Kano State alone, a total of 34,000 bottles of alcohol was intercepted and destroyed.²⁸ It must be stated that the establishment of *Hisbah* in some of the Nigerian States generated concern and a heated debate. Thus, the then Federal Minister of Information (Mr. Frank Nweke) accused the State of trying to turn *Hisbah* into a parallel police force. The claim was refuted by the State Government. As the Police come under Federal government which was not tolerant towards *Hisbah*, it was banned by the police and the leader and his deputy who supported *hisbah* were arrested.²⁹ The issue metamorphosed into a court action³⁰ and the two accused persons were later released on the order of the

²⁵Created pursuant to Kano State *Hisbah* Board Law No. 4 of 2003 and Kano State *Hisbah* (Amendment) Law No. 6 of 2005

²⁶John N. Paden, *Faith and Politics in Nigeria: Nigeria as a Pivotal State in the Muslim World*, (USA: United States Institute of Peace Press, 2008), 59-61, <<http://bookshop.blackwell.co.uk/jsp/preview2.jsp?isbn=9781601270290>> (accessed May 26, 2011) or <http://books.google.com/books?id=OgEbAOseuq8C&pg=PA61&lpg=PA61&dq=hisbah+in+nigeria&source=bl&ots=UHK7BgsR9S&sig=kAiCdVxnw15tWlfzaYR6KqdlA8E&hl=en&ei=fZGbS63kDo2wrAf30ciOAw&sa=X&oi=book_result&ct=result&resnum=10&ved=0CB8Q6AEwCQ#v=onepage&q=hisbah%20in%20nigeria&f=false> (accessed March 13, 2011)

²⁷“Crackdown on Nigeria *Shari-ah* Group,” *BBC News*, 10 February, 2006.<<http://news.bbc.co.uk/2/hi/4700314.stm>>(accessed March 13, 2011); See also Roger Blench, Selbut Longtau, Umar Hassan and Martin Walsh, “The Role of Traditional Rulers in Conflict Prevention and Mediation in Nigeria, “ (2006), 73.<<http://www.rogerblench.info/Development/Nigeria/Conflict%20resolution/Final%20Report%20TRs%20September%2006.pdf>> (accessed February 9, 2011)

The year 2000 saw the reintroduction of the application of *Shari-ah* Law in Zamfara State. Besides, *Hisbah*: an enforcer to ensure Islamic regulations are kept in place.

²⁸Abdulsalam Muhammad, “Kano *Hisbah* Destroys Drinks Worth Millions of Naira,” *Vanguard*, March 12, 2010; See also <<http://www.vanguardngr.com/2010/03/12/kano-hisbah-destroys-drinks-worth-millions-of-naira/>> (accessed March 13, 2011)

²⁹“Crackdown on Nigeria *Shari'ah* Group,” *BBC News*, 10 February, 2006. <<http://news.bbc.co.uk/2/hi/4700314.stm>>,

³⁰Attorney General of Kano State v. Attorney General of the Federation, Suit No. S. C. 26/2006. Or see <<http://www.nigeria-law.org/Attorney-General%20of%20Kano%20State%20v%20Attorney-General%20of%20the%20Federation.htm>> (accessed March 13, 2011). At the Supreme Court the matter was held to be incompetent and was struck out for lack of Jurisdiction.



Court of Appeal and were paid compensation for unlawful detention.³¹ Nonetheless, the idea of *Hisbah* and *Muhtasib* in Nigeria has been criticized on the ground of its actual implementation which, it is alleged, does not align with the true practice in Islam. The criticism against the form of *Hisbah* practiced in Nigeria is expressed in the following:

The point is that even the much more emphasized *Hisbah* as presented today is not *Hisbahper se*. Today in Kano the person employed for the work of *Hisbah* is popularly known as 'Dan Shizba' (apology to Kwankwaso) not *Muhtasib* as called in the real institution. In the proper institution of *Hisbah*, a *Muhtasib* is under duty to investigate all improper conducts in order to call for their stoppage. His task is to preserve the Islamic social order, moral integrity of the State and promote social justice in the society. He is primarily responsible for safeguarding people's means of subsistence and ensuring economic stability. As an institution that operates under the stipulation of *Al-amr bi al ma'aruf* (commanding of good) and *Al-nahy an al-munkar* (forbidding of evil), a *Muhtasib* is expected to be skilful and well informed about the customs, practices and behaviour of the people. Not just 'erection' of beard as the criterion is today. He should be just, judicious, sharp and knowledgeable of the apparent *Munkarats* (forbidden acts).³²

It is argued that *Muhtasib* (Ombudsman) in Nigeria is presently more of a uniformed officer, like an ordinary traffic warden on Nigerian road. It is contended that the fact that *Shari'ah* (Islamic Law) is only applicable to the common man on the street without adequate check on executive and official misconduct is a source of concern. It is therefore, alleged that there are still a lot of corruption within the State Government begging for correction. In effect, this has generated a concern and had created an impression that the slogan of implementation of *Shari'ah* (Islamic Law) and *muhtasib* (Ombudsman) is more of a political strategy than real.³³ Furthermore, *Fatwa* (expert determination) is also considered to ascertain the extent of the application as to whether real or supposed.

1.3. *Fatwa* of Mufti (Expert Determination)

It is common knowledge that on an annual basis in Nigeria, various issues beg for answers, particularly religious issues³⁴ that are better determined by experts who are knowledgeable in *Shari'ah* (Islamic Law). This inevitably requires the need for an expert determination. *Fatwa* is a non-binding evaluative opinion offered by a *Mufti* (Jurist Consult) in answer to issues raised by a questioner (*Mustafti*) concerning a

³¹See <<http://www.triumphnewspapers.com/archive/DT29032007/right293207.html>> (accessed March 13, 2011).

³²Jafar A. Jafar, "Dictatorship in *Shari-ah* Apparel: A Kano Model," December 6, 2005. <http://www.dawodu.com/jaafar2.htm> (accessed March 13, 2011)

³³Ibid.

³⁴Like the determination of the commencement of *Ramadan* Fast (particularly on sighting of Moon) and important issues.



dispute or an unresolved issue.³⁵ In Nigeria, under the Sokoto Caliphate, *Mufti* (Jurist Consult) was an official connected with the administration of justice. Though the *Qadi* (judge) is assisted by the *Na'ib* (Deputy) and the *Mufti* (Jurist Consult), he is more learned in matters of *Shari-ah* (Islamic Law) and as such he gives *Fatwa* (expert determination).³⁶ *Fatwa* of *Mufti* is similar to the non-binding evaluation of an Expert called upon to provide an expert determination. *Fatwa* has always been used by the Muslims to solve ambiguous issues and for offering the best solution to resolve a dispute. Although it is non-binding, yet the stature of *Mufti* gives it a respectable status. There have been many collections of *Fatawa* (expert determinations / Islamic rulings) in the Muslim world.³⁷

In Nigeria, after the Sokoto Caliphate the importance of *fatawa* has declined. The importance and respectability of its application was expressed. According to Doi there was a time:

When Lord Lugard, who was first appointed Governor of the Protectorate of Southern Nigeria, was transferred to Northern Nigeria as Governor, he found that the Emirs' Courts were filled with *Mallams* (*Mu'allim* or *-Alim*), the learned and pious Muslim jurists whose decisions (*fatawa*) were always based on the authority from the *Qur'an*, *Sunnah* and the other Islamic law books, particularly those of the Maliki school of thought.³⁸

Nonetheless, this recognition has been phased out under the guise of Justice, Equity and Good Conscience as applied by the colonial rulers.³⁹ In Nigeria today, there is decreasing importance of *Muftis* and their *fatawa*. In contrast, in Malaysia,

³⁵See Muhammad Khalid Masud, Brinkley Messick and David S. Power, eds. "Muftis, Fatwas, and Islamic Legal Interpretation," in *Islamic Legal Interpretation, Muftis and their Fatwas* (Cambridge, Massachusetts: Harvard University Press, 1996), 3; See also Rashid, "Alternative Dispute Resolution: The Emerging New Trend of Informal Justice," 29.

³⁶That is, an Islamic ruling. See A. A. Gwandu, "Aspect of the Administration of Justice in the Sokoto Caliphate and Shaykh Abdullah Ibn Fodio's Contribution to It" in *Islamic Law in Nigeria (Application and Teaching)*, Syed Khalid Rashid ed., (Lagos: Islamic Publication Bureau, 1986), 20; See also Ahcene Lahsasna, *Introduction to Fatwa, Shari'ah Supervision and Governance in Islamic Finance* (Kuala Lumpur: Cert. Publications, 2010), 3-5.

³⁷Rashid, "Alternative Dispute Resolution," 29. Collections of *fatawa*, like the earliest one *Kitabal-Nawazil* compiled by Abu Layl al Samarrqandi (d. 983) and also – *Fatawa* of Abu Zahrah (Beirut, 1998), others like *Fatawa Kiski*, *Fatawa Islamiyyah*, *Fatawa Ibn Taymiya* constitute a vast literature on the settlement and avoidance of disputes by accepting the advice of a neutral third-party knowledgeable in *Shari'ah*. In countries where no *Shari'ah* Courts and *Qadis* exist to settle disputes among Muslims in accordance with *Shari'ah*, the institution of *ifta* assumes much importance. The whole of *fatawa* literature symbolizes a deep and sincere urge among Muslims to settle their disputes amicably out of court in accordance with *Shari'ah*.

³⁸Abdur Rahman Doi, "The Impact of English Law Concepts on the Administration of Islamic Law in Nigeria," in *Bayreuth African Studies Series 11, African and Western Legal Systems in Contact* (W. Germany: Bayreuth University, 1989), 29.

³⁹*Ibid.*



legal recognition is given to the appointment of Mufti together with legal recognition to *Fatwa*. In the relevant law relating to administration of Islamic law a whole part with eight sections is devoted to the appointment of *Mufti*, authority in religious matters and Islamic legal consultative committee.⁴⁰ The authority of the *Mufti* is set out clearly in the Act, “The *Mufti* shall aid and advise the *Yang di- Pertuan Agong* (Monarch) in respect of all matters of Islamic law, and in all such matters shall be the chief authority in the Federal Territories after the *Yang di-pertuan Agong* (Monarch), except where otherwise provided in this Act.”⁴¹

The *fatwa* of *Mufti* which is the ruling on any unsettled or controversial question of or relating to Islamic Law⁴² is binding on all the Muslims within his jurisdiction. It is categorically stated that, “Upon publication in the *Gazzette*, a *fatwa* shall be binding on every Muslim resident within the Federal Territories as a dictate of his religion and it shall be his religious duty to abide by and uphold the *fatwa*, unless he is permitted by Islamic Law to depart from the *fatwa* in matters of personal observance, belief, or opinion.”⁴³

The judicial recognition of *fatwa* in Malaysia as provided in the Act further strengthened its position and application.⁴⁴ In accordance with the dictate of justice in Islamic law, a *fatwa* in Malaysia may be amended, modified or even revoked by a *Mufti* when circumstance demands such line of action irrespective of whether it is issued by a serving *Mufti* or his predecessor.⁴⁵ Besides, the beauty of the Malaysian practice is evident in the fact that *Madhab Shafie* (Shafi’ school of thought) is favoured in issuing *fatwa* but where the strict adherence to this school of thought will be repugnant to public interest then the *mufti* is allowed to follow any of the other approved schools of Islamic jurisprudence. However, if doing so does not serve any better purpose, the *Mufti* is allowed to resolve the case according to his knowledge of *Shari’ah* (Islamic Law), and sense of justice and fair play.⁴⁶

It is observed that in Nigeria there was earlier a proposal to appoint a *Mufti* during the reign of General Muritala Mohammed (the then Head of State) but after him (his demise), the proposal died out. It appears useful to have a *Mufti* to issue *fatawa*. Some States have done so, for example, Kwara State of Nigeria, Sheikh Kamal-deen Abibullahi Al-Adaby was the former *Mufti* and next to him is Alhaji K.

⁴⁰ See Part III, sections 32-39 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) of Malaysia. See also, sections 28-36 of Selangor Administration of Islamic Law Enactment 1989 (En. No. 2 of 1989) of Malaysia that deals with authority in religious matters.

⁴¹S. 33 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505).

⁴²S. 34 (1) *ibid*.

⁴³S. 34 (3) *ibid*.

⁴⁴S. 34 (4) *ibid*.

⁴⁵S. 36 (1). *ibid*.

⁴⁶S. 39 (1), (2) and (3) *ibid*



S. Apaokagi⁴⁷ after him is Alhaji Sofihulai Kamal-deen who is also late and presently there is no serving one in Ilorin Kwara State of Nigeria. It therefore, suggested that there should be a law to create the office of *Mufti* in Nigeria. The law should further lay down his powers and duties. The law in this regard will go a long way to provide and emphasize the legal importance of the office, as done in Malaysia. This will put a stop to the unwarranted debate and ranting that are usually generated on controversial Islamic issues in dare need of resolution by expert determination or ruling.

2. Conclusion

It is a fact that ADR, that is, both conventional ADR processes and Islamic ADR mechanism are still relevant, important and useful in the resolution of disputes generally. It is shown that there are various Islamic ADR practices. This Islamic ADR practices even though they are similar to the conventional ADR processes, yet they are better for Muslims because they conform to the dictates of Allah (SWT). Moreover, it is shown that much has still to be done in Nigeria towards strengthening the application of these Islamic ADR processes.

The criticism against the use of *Muhtasib* (Ombudsman) is so potent that it cannot be said to be in active use in Nigeria. Though the re-introduction of *Shari-ah* (Islamic Law) in the North, particularly in states like Zamfara and Kano has brought about the establishment of *Hisbah*, but it has been criticized as not in the true sense of *Hisbah* regardless of the controversies trailing its operation and the legal action against its legality. However, *Muhtasib* in Nigeria is seen as more of a uniformed traffic warden than a functional officer or institution as it is actually expected.

Fatwa of *Mufti* (expert determination) also suffers the same fate in Nigeria and in dare need of correction to meet the ideal standard in other jurisdiction. This expert ruling, opinion or determination that resolves controversial Islamic issues was only functional once upon a time in the past under the Sokoto Caliphate but has been phased out by colonialism and / or modernism. Efforts at resuscitating this useful dispute resolution mechanism in Nigeria have not been successful, unlike Malaysia where *Fatwa* as well as the office of *Mufti* is the creation of law and enjoy statutory recognition.

The need for a statutory backing to give life to the proper application of these processes becomes imperative. It is not enough to legalize Islamic ADR processes but the training of the personnel is as well most important. The practice of Islamic ADR processes officers who are not well-grounded in Islamic Knowledge portends danger for the administration of justice. Accordingly, adequate training should be ensured to acquire the required skill and knowledge to conduct the process successfully to avoid

⁴⁷Interview by author with One of the *Qadi of the Shari'ah* Court of Appeal, Ilorin Kwara State Nigeria, 1st December, 2009 and the situation is still the same to date in 2016



perpetration of illegality and injustice due to lack of knowledge. Training will aid the administration of justice and quick dispensation of justice as it is found that adequate skill and knowledge are essential tools for an effective process. This skill and knowledge acquired through training will equip the officers with the ideals of the process together with the qualities and ethical standards required of an officer as standardized and applied in Malaysia.

Therefore, to achieve legality, equality, impartiality and equity in the resolution of dispute, training must be coupled with statutory reform. The practice in Malaysia, Saudi Arabia, Singapore and a host of other countries practicing these Islamic ADR processes is worthy of emulation in Nigeria to ensure proper application and strengthen the administration of justice.



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