



- AZIZAH MOHD
- NORLIAH IBRAHIM
- AFRIDAH ABAS
- NORAINI MD HASHIM
- NASIMAH HUSSIN
- NAJIBAH MOHD. ZIN
- ZATI ILHAM ABDUL MANAF
- ROSLINA CHE SOH @ YUSOFF
- MUHAMMAD AMRULLAH DRS NASRUL

HARMONISATION OF *SHARI'AH* AND CIVIL LAW: PROGRESS AND ACHIEVEMENTS



TABLE OF CONTENTS

<i>Editors</i>	<i>vii</i>
<i>List of Contributors</i>	<i>viii</i>
<i>Forewords</i>	<i>xiii</i>
<i>Preface</i>	<i>xix</i>
<i>Abbreviations</i>	<i>xxii</i>
<i>List of Cases</i>	<i>xxix</i>
<i>List of Statutes</i>	<i>xxxv</i>
<i>List of International Instruments</i>	<i>xl</i>

PART I

MAQASID AL-SHARI'AH AS A GUIDING TOOL FOR HARMONISATION

Chapter 1

DECRIMINALISING ATTEMPTED SUICIDE: AN INSIGHT INTO MAQASID AL-SHARI'AH PERSPECTIVE

Sahida Safuan & Siti Farhana Abu Hasan.....2

Chapter 2

THE FRAMEWORK OF MAQASID AL-SHARI'AH AND ITS IMPACT ON WAQF LAW AND ECONOMY

Mohd Owais & Mohammed R.M. Elshobake.....17

PART II

HARMONISATION OF FAMILY LAW

Chapter 3

CHILDREN'S RIGHTS TO MAINTENANCE UNDER ISLAMIC AND CIVIL LAW IN MALAYSIA: TOWARDS HARMONISATION OF LAWS

*Badrudin Hj Ibrahim, Azizah Mohd, Nadhilah A. Kadir & Normi
Abd Malek*.....46

Chapter 4

HARMONISATION OF *SHARI'AH* AND ALGERIAN FAMILY LAW/ CHILDREN'S MAINTENANCE

Asma Akli Soualhi & Chouaib Abderachid Ihaddaden.....77

Chapter 5

HARMONISING MALAYSIA'S LOCAL LAWS WITH THE CONVENTION ON THE RIGHTS OF THE CHILD TO COMBAT CHILD MARRIAGE

Mohd Al-Ghazalli Abdol Malek & Muhammad Al Adib Samuri...88

Chapter 6

"FOR THE SAKE OF CHILD": ESTABLISHING HARMONISED STANDARD REGULATION FOR MALAYSIANS IN ADDRESSING ISSUES RELATING TO THE INTERNATIONAL PARENTAL CHILD ABDUCTION

Roslina Che Soh @ Yusoff & Norliah Ibrahim.....103

PART III

HARMONISATION OF *SHARI'AH* AND CIVIL LAW

Chapter 7

INTERGENERATIONAL TRANSFER OF DIGITAL ASSETS: A COMPARATIVE STUDY OF ENGLISH COMMON LAW AND THE *SHARI'AH*

Aishat Abdul-Qadir Zubair.....124

Chapter 8

HARMONISATION OF LAWS ON INHERITANCE BETWEEN MUSLIM AND NON-MUSLIM SUBJECTS

Muhammad Amrullah Drs Nasrul, Nurin Athirah Mohd Alam Shah, Zati Ilham Abdul Manaf & Najhan Muhamad Ibrahim.....142

Chapter 9

**CHALLENGES AND PROSPECTS IN LEGISLATING
ASSISTED REPRODUCTIVE TECHNOLOGIES (ART) IN
MALAYSIA AND PAKISTAN THROUGH A HARMONISED
APPROACH**

Majdah Zawawi & Bilal Hussain.....166

Chapter 10

**ETHNOGRAPHIC APPROACH TO HARMONISATION OF
ISLAMIC AND CUSTOMARY LAW IN THE INDONESIAN
LEGAL SYSTEM**

Benny Sultan.....195

PART IV

HARMONISATION OF CRIMINAL LAW AND TORT

Chapter 11

**HARMONISING OF SECTION 113 OF THE EVIDENCE ACT
1950, THAT IT IS A CONCLUSIVE PRESUMPTION A BOY
UNDER 13 YEARS IS INCAPABLE OF COMMITTING RAPE**

Mohamad Ismail Yunus & Shamshina Mohamad Hanifa 208

PART V

**HARMONISATION OF *SHARI'AH* AND INTERNATIONAL
LAW/ CONVENTIONS**

Chapter 12

**HARMONISATION OF *SHARI'AH* AND INTERNATIONAL
TREATY**

Chouaib Abderachid Ihaddaden & Asma Akli Soualhi.....236

Chapter 13

**HARMONISATION OF *SHARI'AH* AND INTERNATIONAL
LAW CONCERNING REFUGEE PROTECTION**

Hoda Ahmad Albarak & Chouaib Abderachid Ihaddaden.....254

Chapter 14

HARMONISATION OF *SHARI'AH* AND INTERNATIONAL HUMANITARIAN LAW RULES FOR THE PROTECTION OF PALESTINIAN JOURNALISTS IN ARMED CONFLICTS

Yousef Y.K. Alhamadin & Mohammed R. M. Elshobake.....268

Chapter 15

HARMONISATION OF *SHARI'AH* AND THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

Mohammed R. M. Elshobake & Mohammed Harara.....286

Chapter 16

HARMONISATION OF THE RIGHTS OF ORPHANS UNDER ISLAMIC LAW AND THE INTERNATIONAL LAW

Munazza Razzaq, Azizah Mohd & Noraini Md Hashim.....311

PART VI

HARMONISATION OF LAW OF CONTRACT AND OTHER AREAS OF LAW

Chapter 17

REVISITING THE POSITION OF UNFAIR CONTRACT TERMS IN MALAYSIA

Suzi Fadhilah Ismail, Juhana Ayob & Syazalia Che Suhaimi.....356

PART VII

CODIFICATION OF ISLAMIC LAW IN CIVIL COURT AND HARMONISATION OF ONE AREA OF LAW TO ANOTHER

Chapter 18

CODIFICATION OF ISLAMIC LAW: *SIYASAH SHAR'IYYAH* A NORMATIVE STANDARD AND LEGISLATIVE INSTITUTIONALISATION

Sidra Zulfiqar.....380

PART VIII
HARMONISATION IN ISLAMIC FINANCE

Chapter 19

**FEASIBILITY FOR HARMONISATION OF *SHARI'AH* AND
COMMON LAW APPROACH IN THE RESOLUTION OF
ISLAMIC FINANCE DISPUTES IN NIGERIA**

Kudirat Magaji W. Owolabi.....400

Chapter 20

**THE POSSIBILITY OF SHARIAH ADVISORY COUNCIL OF
SECURITY COMMISSION MALAYSIA (SAC SC)'S
RESOLUTION AS EXPERT EVIDENCE IN SYARIAH
COURTS: IN THE CASE OF INHERITANCE OF CRYPTO
ASSETS**

*Nur Syaedah Kamis, Norazlina Abd Wahab, Mohammad Azam
Hussain* 427

FEASIBILITY FOR HARMONISATION OF *SHARI'AH* AND COMMON LAW APPROACH IN THE RESOLUTION OF ISLAMIC FINANCE DISPUTES IN NIGERIA

Kudirat Magaji W. Owolabi Ph.D¹

ABSTRACT

A few years back, some states in the Federal Republic of Nigeria announced the adoption of the full application of *Shari'ah*. This raised many questions about the feasibility of the coexistence of *Shari'ah* and Common law in a former British colony whose Constitution is primarily based on the British Legal System. Similar tensions have been displayed towards the application of *Shari'ah* in the resolution of Islamic finance disputes at the Common law courts or where parties adopt alternative dispute resolution (ADR). The reality is how to reconcile these two systems of Common law and *Shari'ah*. The paper therefore highlights resolution strategies as applicable to Islamic finance disputes by Common law-oriented courts in Nigeria and the danger therein. The paper contends that instances of Islamic finance cases appearing before the Common law courts in Nigeria are distressing. There is a need for an Islamic resolution framework to regulate Islamic finance disputes in Nigeria owing to the unique approach in the UK, which gives parallel recognition to Islamic finance matters whether at the English Court or before an arbitration tribunal. This paper therefore suggests that certain *Shari'ah* and Common law principles be harmonised provided the two legal systems are kept in equilibrium. Harmonisation is therefore necessary in the resolution of Islamic financial disputes, especially where the dispute is before the Common law-oriented court or where ADR is adopted.

Keywords: Harmonisation, Common law rules, *Shari'ah* rules, alternative dispute resolution, Islamic finance disputes, Nigeria.

¹ Senior Lecturer, Faculty of Law, Kwara State University, Malete, Nigeria.
Email: kudirat.magaji@kwasu.edu.ng

INTRODUCTION

For several years, there have been constant demands from investors who desire the provision of Islamic finance products in Nigeria.² It is not surprising when the industry receives impressive patronage on its arrival. The Islamic finance industry is growing daily due to its increased demand for Islamic financial products and services. The industry's constant commitment to public awareness with other economic opportunities and benefits plays a significant role in the development of Islamic finance in Nigeria. This is evidenced in the annual growth rate of about 10% recorded globally.³

The principles of Islamic finance are well laid down in the *Shari'ah*. Islamic finance is a system that operates and offers products, services, and instruments by the dictates of Islamic law.⁴ The crux for the inclusion of *Shari'ah* rules into the Islamic finance system is, to bring closer end-to-end *Shari'ah* compliance to people who have faith in *Shari'ah* doctrines, as well as to ease the affairs of the businessmen in commercial transactions by way of risk-sharing.⁵ In other words, Islamic finance contracts, products, and services must comply with the tenets of Islamic law as contained in the Qur'an and *Sunnah*. This explains the reason Islamic finance operates as a just and

² Zakariya Mustapha, Sherin Kunhibava and Aishath Muneeza, "Court Referral and Nigeria's Financial Regulation Advisory Council Expert (FRANCE)," *ISRA International Journal of Islamic Finance, Emerald, Bingley 11*, no. 2 (2023): 207.

³ Patrick Ogi, "Understanding Non-Interest Islamic Banking," The Understanding Monetary Policy Series No 16, 67.

⁴ Mustapha, Kunhibava and Muneeza, "Court Referral and Nigeria's Financial Regulation Advisory Council Expert (FRANCE)," 210.

⁵ Habib Ahmed, "Islamic Banking and Shari'ah Compliance: A Product Development Perspective". *Journal of Islamic Finance 3*, no.2:15-29.

innovative financing alternative in accordance with the dictates of *Shari'ah*.⁶

Hence, *haram* (forbidden) products, activities, and services are explicitly prohibited in any Islamic finance contracts. Islamic law declares certain activities *haram* and form the basis of Islamic finance contracts/transactions. Accordingly, activities such as *riba* (interest), *gharar* (uncertainty), *iktinaz* (hoarding), *maysir* (speculation), *ihtikar* (monopolies), gambling, alcohol dealings, etc., are *haram*. Prohibitions of activities of this nature are fundamental under *Shari'ah* and must be avoided. Islamic financing comes in two categories.⁷ First, is the 'Profit and Loss-Sharing' (PLS), and the second, is the 'Purchase and Hire of goods or assets and services on a fixed-return basis.' PLS operates in the form of *musharakah* or *mudharabah*. The second category, on the other hand, can either be in the form of *murabahah*, *istisna'*, *salam*, *sukuk* or *ijarah*. Invariably, the foregoing are the modes of financing in Islamic finance, though not so familiar with non-Islamic finance experts. Hence, a brief exposition of their connotations becomes expedient.

Musharakah entails a profit and loss sharing partnership or joint ownership contract where two or more partners join capital to finance a business plan or to acquire movable assets or real estate which can run on a permanent or provisional basis. It is pertinent to note that in *musharakah*, profits and losses are shared based on the agreed percentage and in proportion to the capital contributed by individual partners.⁸ *mudharabah* is a profit-sharing and loss-bearing contract between the financier and the manager. Here, the financier supplies all the capital needed for the manager's proposed business plan/idea, and in return, the manager provides managerial expertise with the sole aim of

⁶ Rusni Hassan "Shari'ah Non-Compliance Risk and its Effects on Islamic Financial Institutions," *Al-Shajarah* 21, no.3 (2016): 25.

⁷ Muhammad Ayub. *Understanding Islamic Finance*. (England: John Wiley & Sons Ltd, 2004), 46.

⁸ *Ibid*, 50.

generating profits for both parties.⁹ Profits are shared on the mutually agreed percentage thus, only the financier takes all the risks. The manager only shares the loss if, due to his negligence, he contributed to the loss incurred in the contract, business, or transaction.

Ijarah simply means a lease contract. Under an *ijarah* contract, the lessee is entitled to use the 'leased asset' owned by the lessor for a stated period and at an agreed price while the lessor retains the ownership.¹⁰ Majorly, *ijarah* contracts take the form of a hire-purchase arrangement, and with that, the lessor undertakes to ensure adequate maintenance of the 'leased asset.' This is to enable the lessee to enjoy full possession with uninterrupted access to the leased asset. Therefore, the lessee will be answerable for the damage caused to the 'leased asset' if, by negligence, he caused the damage. *Salam* is another mode of financing in Islamic finance. This is where parties enter into a contract of sale, and in consideration of a specified price.¹¹ Here, the seller undertakes to supply goods to the buyer at a future date, but payment is made at the time the contract is made. Certainty as to the price (consideration), quantity, objects of the contract, date, and place of delivery are essential criteria for a valid *salam* contract of sale. In other words, parties must reach a mutual agreement on issues such as the price, nature of the subject matter, time and mode of delivery and other issues that are essential to the contract.

Istisna' is another Islamic financing model where an advanced instalment payment is made to a contractor in the housing finance sector or to a manufacturer. *Istisna'* affords contractors the opportunity to seek for an advanced finance from the financier for the construction of a project/commodity based on the demand and specifications given by the financier. Hence, the asset is delivered to the financier in the manner agreed to by

⁹ Muhammad Ayub. *Understanding Islamic Finance*. (England: John Wiley & Sons Ltd, 2004), 46.

¹⁰ *Ibid*, 50.

¹¹ *Ibid*, 55.

the parties.¹² *Sukuk* simply means bonds, and they are similar to asset-backed securities that take place in conventional banks. *Sukuk* occupies 60% of the total amount invested in Islamic finance products which, of course, earns *sukuk* the most successful product within the Islamic finance industry in the Nigeria market.

Hence, with all these opportunities available in the Islamic finance industry, one can then ask if there are laws and regulations guiding these activities in Nigeria? This paper attempts to find an answer to the foregoing poser. More so, the various Islamic finance products above are in the form of agreements between business partners or intending parties to such business. Thus, with the complex nature of human existence and interaction, conflict is bound to occur.

The main purpose of this paper is to examine the feasibility of the coexistence of *Shari'ah* and Common law in the area of dispute resolution. The appropriateness of the existing/current resolution framework applicable to Islamic finance disputes in Nigeria shall be analysed. The paper focuses on the resolution of Islamic finance disputes by Common law-oriented courts in Nigeria and the danger therein. In effect, this paper identifies the danger in the continuous and current litigation practice as applicable to Islamic finance disputes, which is more readily available with respect to Islamic finance dispute resolutions. The paper shall question the competence of the Nigerian Common law courts in handling and addressing *Shari'ah* issues in Islamic finance disputes. Emphasis shall be placed on the United Kingdom's (UK) approach to see how courts in the UK handle such disputes. Nigeria, being one of the British colonies, makes it desirable to borrow from the UK's approach. The paper shall contribute to the existing literature on Islamic finance through the discovery of a feasible harmonisation of *Shari'ah* and Common law in the resolution of Islamic finance disputes in Nigeria.

¹² Muhammad Ayub. *Understanding Islamic Finance*. (England: John Wiley & Sons Ltd, 2004), 55

To achieve the above-stated objectives, the paper employed a doctrinal methodology of legal research.¹³ It adopts descriptive and analytical methods. These two selected methods are the most accurate for achieving the aim of this paper, which is to bring out a sustainable legal approach to the lingering legal issues surrounding alternative dispute resolution mechanisms for Islamic finance in Nigeria.¹⁴ A descriptive method of research is necessary to describe and explain the position of the existing resolution framework applicable to Islamic finance disputes in Nigeria. It is also necessary to analyse the danger in the application of the Common law approach in the resolution of Islamic finance disputes in Nigeria. The paper utilises the relevant primary and secondary sources of the materials, which are subsequently subjected to evaluative, descriptive, and content analysis.

LEGAL FRAMEWORK FOR ISLAMIC FINANCE IN NIGERIA

Banks and Other Financial Institutions Act (BOFIA),¹⁵ Central Bank of Nigeria Act (CBN),¹⁶ and Companies and Allied Matters Act¹⁷ are the laws that are often referred to any time the issue of Islamic finance comes up. Regrettably, these laws are not specifically designed to regulate the operation of the Islamic finance industry or activities emanating from the industry.¹⁸ In

¹³ Daniel Coetsee and Pieter Buys. "A Doctrinal Research Perspective of Master's Degree Students in Accounting." *South African Journal of Higher Education* 32, no. 1 (2017): 75.

¹⁴ Vijay M. Gawas, "Doctrinal legal Research method: A Guiding Principle in Reforming the Law and Legal System Towards the Research Development," *International Journal of Law* 3, no.5, (2017): 128.

¹⁵ Cap.B3 LFN 2004.

¹⁶ No7 of 2007.

¹⁷ Cap.C20 Vol.3, LFN 2004.

¹⁸ Ahmed A. Muhammad-Mikaaeel and Abdulrazaaq O. Zakariya. "Corporate Governance Legislation for Islamic banks in Nigeria: Review of

2011, Nigeria amended its laws on BOFIA to give recognition to those banks/financial institutions that are based on profit and loss sharing and also to legalise 'specialised' banks. This amendment is reflected in Sections 23 and Section 61 of the BOFIA, where non-interest banks are labelled or described categorically as 'specialised' banks in Nigeria.¹⁹ However, these provisions do not serve as a *Shari'ah*-based legal framework because the whole content of BOFIA is not structured in accordance with the *Shari'ah* principles and doctrines. For this reason, it cannot form the legal basis for the operation of the Islamic finance industry and its activities in Nigeria.²⁰

Nevertheless, there are numbers of regulatory initiatives released by the CBN to boost the development of Islamic finance hubs in Nigeria. These include guidelines for the Regulation and Supervision of Institution Offering Non-Interest Financial Services in Nigeria in 2011 and Guidelines on the Regulation and Supervision of Non-Interest (Islamic) Microfinance Banks in Nigeria in 2017.

Guidelines for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria 2011 (Guidelines 2011)

At some points, it becomes indispensable for the CBN to develop the Guidelines 2011 to grant the requests of individuals, banks, and other financial institutions who wish to engage in non-interest banking products/services that are rooted in Islamic commercial jurisprudence. To this end, the CBN specifically referred to certain provisions such as Section 33(1)(b) of the

Compliance with Islamic Principles," *Nirma University Law Journal* 12, no.1, (2022): 39.

¹⁹ Lateef W. Adeyemi et al., "Jurisdictional Conflicts Between Shariah Courts and Common Law Courts in the Application of Islamic Banking and Finance in Nigeria," *International Journal of Business Society* 2, no.8, (2018): 12-21.

²⁰ Ibrahim M. Yusoff, and Adewale Abideen, "Establishment and Operation of Islamic Banks in Nigeria: Perception Study on the Role of the Central Bank of Nigeria," *Australian Journal of Business & Management Research* 1, no.2, (2011): 15.

CBN Act; Sections 23(1), 52, 55(2), 59(1)(a), and 61 of BOFIA; Section 4(1)(c) of the Regulation on the Scope of Banking Activities and Ancillary Matters, No. 3 2010 that are explicit on non-interest banking.²¹ Guidelines 2011 is aimed to regulate, supervise, and provide minimum standards to institutions offering Islamic Financial Services.²² The Guidelines define non-interest Financial Institutions (NIFI) to include banks or other financial institutions that are being placed under the purview of the CBN and are into banking business or engrossed in the provision of financial products and services or engage in other business activities such as trading, investment, commercial and operates in accordance with any established non-interest banking principles.²³

To ensure adequate compliance with Islamic finance products and services, the Guidelines 2011 provides for two *Shari'ah* Boards, namely, Financial Regulation Advisory Council of Experts (FRACE) and Advisory Committee of Experts (ACE). Both operate at regulators and institution levels respectively.²⁴ These boards are responsible for guiding, reviewing, and supervising the activities of Islamic Finance Institutions (IFIs) for the purpose of ensuring compliance with the *Shari'ah* and also issuing legal rulings pertaining to IFIs.²⁵ Specifically, FRACE is charged with the responsibility to offer expert opinion and assistance on matters referred to it by other regulatory agencies in the financial sector. FRACE also has regulatory and supervisory powers over the activities of the ACE.

The Guidelines 2011 further identifies two categories in which non-interest banking and finance can take place. The first involves non-interest banking and finance that is based on Islamic commercial jurisprudence. The second category involves non-interest banking and finance based on any other established

²¹ Guidelines 2011, Paragraph 3.1.

²² *Ibid*, Paragraph 2.

²³ Guidelines 2011, Para 1.

²⁴ *Ibid*, Para 8.2, 9.0 & 9.1.

²⁵ CBN Guidelines on the Duties & Responsibilities of FRACE and ACE.

non-interest principles. As regards the first category, the Guidelines 2011 gives a directive that all non-interest financial institutions must be explicit in their companies' memorandum and articles of association as to the nature of business activities of the institutions. Hence, business activities under this category must be in accordance with the principles and practices of Islamic commercial jurisprudence.²⁶ The institutions offering Islamic financial services under the second category will transact business using only financing modes or instruments that are in compliance with the stated principles and as approved by the CBN.²⁷

Guidelines on the Regulation and Supervision of Non-Interest (Islamic) Microfinance Banks in Nigeria 2017 (Guidelines 2017)

The issuance of licenses by the CBN to some Non-Interest Financial Institutions (NIFIs) necessitated the need to develop similar Guidelines for Non-Interest Microfinance Banks (NIMFB) in Nigeria. The Guidelines came at that crucial period when a substantial number of advocates disclosed their interests in setting up such banks. The Guidelines are therefore designed to offer an alternative system different from the regular operations of conventional Micro Finance Banks (MFB). The intention is to operate based on the concept of profit and loss sharing rather than charging interest on their products and services.²⁸ It is the expectation of the CBN that the introduction of NIMFB will produce a broader and healthier competition among MFB's, thereby reducing the cost of doing business in Nigeria. More so, the provision of non-interest microfinance banking services comes with numerous opportunities, some of which include attractive financial inclusion to individuals, communities, and corporations who were left out in the

²⁶ Guidelines 2011: Para 3.2.

²⁷ *Ibid*: Para 10.1.

²⁸ *Ibid*, Para 1.

conventional MFBs. NIMFB can also assist in poverty elevation by way of improving the earnings and well-being of the poor.²⁹

Accordingly, the Guidelines 2017 apply to NIMFB operating under the principles of Islamic Commercial Jurisprudence, one of the categories of Non-Interest Financial Institutions (NIFIs) introduced to operate by the Central Bank of Nigeria.³⁰ NIMFB is defined to include all microfinance Banks licensed by the CBN with the purpose of providing financial products and services or engaging in trading, investment, and other commercial activities.³¹ Hence, there are categories of licenses that the CBN can issue for the NIMFBs. First, is the Unit NIMFB. Second is the State NIMFB and the third is the National NIMFB. The holder of the Unit NIMFB license is authorised to operate with a paid-up capital of Twenty Million Naira and the service branch cannot be more than one in a single location which will be the only branch aside from the head office within the same local government area. The holder of a State NIMFB license is authorised to operate in one State or the Federal Capital Territory (FCT) and is also permitted to open branches within the chosen State or FCT with a paid-up capital of one hundred million Naira. The holder of National NIMFB is authorised to operate in all the states of the federation including the FCT with paid-up capital of two billion Naira.

Paragraph 2 of the Guidelines 2017 forbids the NIMBs from partaking in certain business activities involving *riba*, gambling, or any act that is not in line with the principle underpinning the operations of NIFIs. Also, any business that the subject matter or terms are ambiguous or, unjust is forbidden under the Guidelines. Exploitation/unfair trade practices, dealings with pork, alcohol, intoxicants, arms and ammunition, pornography, and other transactions, products, and services which contradict the principle of Islamic commercial jurisprudence are also prohibited. NIMFBs cannot accept deposits from the government or its agent except if the deposits are for the discharge of payment

²⁹ Guidelines 2011, Para 2.

³⁰ *Ibid.*

³¹ Guidelines 2017: Para 3.

services such as salary, gratuity, pension, etc. Foreign exchange transactions, international commercial papers, international corporate finance, international electronic funds transfer, clearing house activities except collection of money or proceeds of banking instruments on behalf of their customers, collection of third-party cheques, etc are equally prohibited.³²

With the coming into effect of the Guidelines 2011 and 2017, it is not disputable that numerous Islamic finance transactions and banking services have tremendously thrived in Nigeria. The tremendous growth of Islamic finance is proof of the fact that the industry is viable. Hence, the dispute is a normal occurrence in human dealings particularly, in commercial hubs like the Islamic finance industry.³³ With all these emerging new businesses, products, and services that the IFIs are offering to the general public in the Islamic finance industry, disputes are inevitable.³⁴ As an alternative to the conventional financial system, the applicable resolution framework for Islamic financial disputes plays a significant role in the growth of the industry. The major concern is the idiosyncrasy of Islamic principles that are present and adopted by the parties in their financial transactions/contracts between them. Ordinarily, one would have expected the resolution of such disputes is to be carried out in accordance with Islamic doctrines, just as the disputes emanate from Islamic finance transactions.³⁵ Sadly, the opposite is the case in Nigeria. This is because the existing legal and administration of justice delivery systems in Nigeria influence the resolution process.

³² Guidelines 2017, Para 2.

³³ Mustapha, Kunhibava and Muneza, "Court Referral and Nigeria's Financial Regulation Advisory Council Expert (FRANCE)," 207.

³⁴ Abdulfatai O. Sambo, and Abdulkader B. Abdulkader. "The Continuing Influence of Common Law Judges and Advocates in the Adjudication of Islamic Finance Disputes in Nigeria," *Bloomsbury Qaatar Foundation Journals 4*, (2015): 120.

³⁵ Abdul Rasyid, "Relevance of Islamic Dispute Resolution Processes in Islamic Banking and Finance" *Arab Law Journal Quarterly* 27, no.4 (2013): 344.

RESOLUTION OF THE ISLAMIC FINANCE DISPUTES IN NIGERIA

Nigeria operates a tripartite and mixed legal system in terms of the legislative framework and in the administration of the justice system.³⁶ As regards legal framework, Common, customary, and Islamic laws are applicable in Nigeria.³⁷ Nigeria inherited the Common law from the United Kingdom (UK) which led to tremendous impacts on her legal development.³⁸ Customary law in Nigeria consists of the indigenous customs, values, and traditions of a particular community that for a longer period have developed into law within that given community.³⁹ Islamic law is law derived from the Qur'an and the practices of Prophet Muhammad S.A.W.⁴⁰ Hence, where the contract is concluded following Islamic law, especially in cases of Islamic finance, Nigerian courts should be bound to uphold the parties' choice as the governing law.⁴¹

Regrettably, the Islamic finance industry in Nigeria operates under the existing conventional legal and regulatory frameworks.⁴² The lack of a comprehensive specialised legal

³⁶ Abdulmumini A. Oba, "Religious and Customary Laws in Nigeria." *Emory International Law Review* 25, no.2 (2011): 885.

³⁷ Abdulmumini A. Oba and Ismael S. Ismael. "Revisiting the Causes of Delay in the Adjudication of Islamic Personal Law Cases in Nigerian Jurisprudence," *Nnabdi Azikwe University Journal of International law & Jurisprudence* 11, no.1 (2020): 5.

³⁸ Adeyamo et al., "Jurisdictional Conflicts Between Shariah Courts and Common Law Courts in the Application of Islamic Banking and Finance in Nigeria," 17.

³⁹ Owolabi W. Magaji, "A Critical Assessment of Enforcement Mechanism under Customary Arbitration Practices in Nigeria," *Maiduguri Law Journal* 17, (2019): 5.

⁴⁰ Oba and Ismael. "Revisiting the Causes of Delay in the Adjudication of Islamic personal Law Cases in Nigerian Jurisprudence," 5.

⁴¹ *Maidara v. Halillu* (2000) LCN/0855 (CA).

⁴² Mustapha, Kunhibava & Muneeza, "Court Referral and Nigeria's Financial Regulation Advisory Council Expert (FRANCE)," 207.

framework at the levels of operation governing the resolution of such disputes that emanate from Islamic finance contracts gives concern. The operations of the industry are eminently exposed to *Shari'ah* non-compliance frameworks since parties are left with no other than the law, which is incompatible with one governing their financial transactions.⁴³ Consequently, this creates a risk to the set objective of end-to-end *Shari'ah* compliant impression set out to guide the Islamic finance practices. Certainly, the growth of Islamic finance in Nigeria requires beyond just a skeletal structure of what the country currently holds. Positive legislative, policy, and regulatory actions are desirable to attain an active practice in the industry. If *Shari'ah*-based legislation is adequately considered, financial inclusion and gains with other numerous economic and developmental benefits as projected at the infant stage of the industry are guaranteed.

The Nigerian administration of justice system consists of Civil and Shariah courts. These courts are well established in the Constitution of the Federal Republic of Nigeria (CFRN) 1999 with their unique and distinct jurisdictions.⁴⁴ The CFRN, 1999 is explicit on the jurisdiction of the *Shari'ah* courts by empowering the courts to hear issues emanating from Islamic personal law such as family law, gift, *waqf* etc. Regrettably, the jurisdiction conferred on the *Shari'ah* courts in the CFRN, 1999 does not extend to Islamic finance matters.⁴⁵ Consequently, the CFRN 1999 fails to make adequate provision for the adjudication of Islamic finance disputes in Nigeria.⁴⁶ By way of implication, the supreme law charges Civil courts with the jurisdiction to hear and determine finance matters and it does not distinguish where the

⁴³ Ibrahim M. Ahmad and Abubakar Garba. "Shari'ah arbitration in the Shari'ah Governance Structure in Islamic Finance Institutions in Nigeria: A Proposal Model." *Journal of International Banking Law and Regulation* 30, no.4 (2015): 200- 208, 207.

⁴⁴ CFRN, 1999 (as amended), Sections 251-272.

⁴⁵ *Ibid*, Section 277(1) & (2).

⁴⁶ Adeyamo et al., "Jurisdictional conflicts Between Shariah Courts and Common Law Courts in the Application of Islamic Banking and Finance in Nigeria," 15.

nature of the dispute emanates from Islamic-based transactions.⁴⁷ In other words, any dispute from the Islamic finance industry will be heard and determined by the judges of the Federal High Courts (FHCs) in Nigeria. Accordingly, adjudication of Islamic finance disputes is subject to the rules and procedures of the Nigerian courts that lack expertise in Islamic financial jurisprudence. However, where the court is facing difficulty in interpreting certain or specific rules on *Shari'ah*, it may rely on the opinion of an expert witness.

The incompetency of the FHC judges to make independent interpretations and verdicts on the principles of Islamic law is another serious challenge.⁴⁸ Sadly, these judges are not well conversant with the knowledge of Islamic finance. Hence, adjudicating on such cases is detrimental to the Islamic tenets/principles adopted by the parties in their transactions. Several authors have disproved the jurisdiction of the FHCs on issues bordering on Islamic finance. The authors took the position that Civil courts such as FHCs lack appropriate expertise in handling matters emanating from Islamic financial jurisprudence.⁴⁹ These authors contend that those judges expected to be in the position to adjudicate on finance disputes should be those with *Shari'ah* finance proficiency to achieve smooth operation and sustainability of the Islamic finance industry. Justification for this assertion is that the situation will always present itself where the so-called Civil court judges handling Islamic finance disputes will be required to exercise their expertise, opinions, and skills on Islamic jurisprudence. This is correct to the extent that such expertise is vital to

⁴⁷ CFRN 1999 (as amended), Section 251, CFRN 1999.

⁴⁸ Ahmad and Garba. “*Shari'ah* Arbitration in the *Shari'ah* Governance Structure in Islamic Finance Institutions in Nigeria: A Proposal Model,” 204.

⁴⁹ Sambo and Abdulkader. “The Continuing Influence of Common Law Judges and Advocates in the Adjudication of Islamic Finance Disputes in Nigeria,” 120; Umar A. Oseni, “*Shari'ah* Court -annexed dispute resolution of three Commonwealth Countries: A Literature Review,” *International Journal of Conflict Resolution* 26, no.2 (2015): 221; Umar A. Oseni, “Dispute Resolution in the Islamic Finance Industry in Nigeria,” *European Journal of law and Economics* 40, no.3 (2015): 550.

determine issues relevant to the judicial resolution of Islamic finance disputes. Islamic finance research required to properly adjudicate on matters concerning Islamic finance is a matter of *Ijtihad* that is not left to the hands of any Muslim but a versed scholar of *Shari'ah*. The major fear is the unlimited power conferred on the FHC judges to hear and determine matters emanating from Islamic-based transactions, whereas the Shariah Court of Appeal jurisdictions are limited to Islamic personal law. Adjudication of Islamic finance disputes by judges with little or no *Shari'ah* knowledge particularly, where such adjudication is not done in accordance with the *Shari'ah* rules, contravenes the desire of the disputant parties.⁵⁰

Aside from litigation, Islamic finance disputes can as well be resolved through arbitration and other alternative processes. This is so because the essential features of mediation (*sulh*) and arbitration (*tahkim*) are deeply entrenched in the Islamic legal system, hence *Shari'ah* values both reconciliation and discreet conflict resolution.⁵¹ The Nigerian Arbitration and Mediation Act 2023 (AMA)⁵² is the primary law that regulates ADR and specifically, arbitration in Nigeria. Hence, the relevant question is whether the Islamic finance dispute is arbitrable or not in Nigeria. To answer the question, the commercial nature of the disputes is the first step that guides the court whenever, the issue of arbitrability of the subject matter dispute is raised.⁵³

The provision of the ACA defines commercial to cover all kinds of contractual relationships provided it is commercial in nature.⁵⁴ The judicial support of this is the case of *Kano State*

⁵⁰ Ahmad and Garba. "Shari'ah arbitration in the Shari'ah Governance Structure in Islamic Finance Institutions in Nigeria: A Proposal Model," 205.

⁵¹ *Ibid.*

⁵² Arbitration and Mediation Act, 2023

⁵³ Owolabi W. Magaji K. "Determining the Arbitrability of the Subject Matter Dispute by the Nigerian Courts and Its Impacts on the Awards," *Redeemer University Law Journal* 2, (2023): 80.

⁵⁴ Arbitration and Mediation Act, 2023

Urban Development Board v Fanz Construction Co,⁵⁵ where the court held a similar view by defining ‘commercial’ to mean dealings between parties that are commercial in nature. In essence, any dispute arising from a relationship that is not commercial in nature is not arbitrable in Nigeria. Section 35 of the ACA further elaborates on the issue of arbitrability. It provides that where certain existing laws in Nigeria have placed restrictions on the submission of any matter to arbitration, AMA shall not be applicable notwithstanding the presence of an arbitration clause to resolve such disputes by arbitration. It is noteworthy that the existing law as mentioned in the AMA can be national, Islamic, or customary.⁵⁶

Instances of such prohibitions are found in the Companies and Allied Matters Act 2020, Admiralty and Jurisdiction Act 2005, Copyrights Right Act 2004, and Trademark Act 2004. Each of these laws contains provisions that prohibit the submission of issues arising therefrom to arbitration. Arguably, none of these laws can accommodate Islamic finance disputes since the practice and procedure of resolution as stated therein are not *Shari’ah*-oriented. Islamic finance disputes, as one of the categories of disputes envisaged by Section 65(b) of the AMA are *sui generis* in nature and thereby tainted with *Shari’ah*. In addition, no arbitral institution with arbitral power to arbitrate on Islamic finance in Nigeria. Hence, FRACE and ACE as established by the Nigerian CBN do not have arbitral power to arbitrate via alternative means such as ADR or arbitration. The existing structure of arbitration, as provided by the AMA failed to consider the peculiarity of Islamic arbitration. Thus, arbitration of Islamic finance disputes is not illegal but only arbitrable under specialised law, which is Islamic law. These are the challenges facing *Shari’ah*-based ADR and arbitration in Nigeria.

⁵⁵ (1990) NWLR [Pt. 142] 1.

⁵⁶ Ahmad and Garba. “*Shari’ah* Arbitration in the *Shari’ah* Governance Structure in Islamic Finance Institutions in Nigeria: A Proposal Model,” 207.

THE UNITED KINGDOM (UK) APPROACH

In the United Kingdom (UK), Islamic finance is a viable form of finance compared to its counterparts, conventional finance.⁵⁷ The legal basis for Islamic finance in the UK can be traceable to the Finance Act 2005 (now modified as Finance Act 2007) which categorises Islamic finance contracts among the 'alternative finance arrangements.' Subsequently, the English Income Tax Law 2007, the Corporation Tax Act 2009 and Finance Act 2009, the Financial Services and Market Act 2000 and the Financial Services Act are the UK national laws that make significant contributions to the development of Islamic finance in the UK. Thus, English law does not in any way pay special attention to Islamic finance over and above its conventional counterparts, but no form of bias or impartiality towards the industry can be detected.⁵⁸ The decision of the UK Supreme Court in *Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs* attests to this assertion where the apex court upheld the principle of 'no obstacles, but no special favours' towards Islamic finance under English law. The court thereby laid a strong emphasis on the fact that Islamic finance is an alternative yet equal form of finance to conventional finance.

At the introductory stage of Islamic finance, the UK faced similar challenges as currently being experienced in Nigeria particularly, in the area of dispute resolution. English Common law and Common law judges play a significant role in the resolution process of disputes emanating from Islamic finance.⁵⁹ This is so, despite the fact that the foundation of Islamic finance disputes is tainted with *Shari'ah* principles. However, the question arises as to how the English courts resolve disputes in Islamic finance cases. The resolution approach adopted by the English courts is quite different from what is obtainable in Nigeria. This is because in the UK, certain laws and the

⁵⁷ Muhamed Zulkhibri and Turkhan A. Manap eds., *Islamic Finance, Risk-Sharing and Macroeconomic Stability*, (London: Palgrave Macmillan, 2019).

⁵⁸ *Ibid.*

⁵⁹ Ahmed Belouafi, and Abdelkader Chaci. "Islamic Finance in the United Kingdom," *Islamic Economic Studies* 22, no.1, (2014): 40.

amendment of the existing legal and institutional frameworks on Islamic finance were provided, to accommodate the introduction of a parallel Islamic finance system and its peculiarities.⁶⁰ The UK legislative parliament made a series of reformations on their resolution frameworks so the national law can be able to embrace *Shari'ah*-based finance contracts and transactions as one capable of being contractually recognised under English law that can also be enforced. This is done without undermining the well-established English law.⁶¹

The formation in the UK however, makes the Islamic finance contracts vague. This is because the English form of Islamic finance is a mixture of financial devices that are twisted and collectively activated to deliver a *Shari'ah*-compliance function.⁶² This explains the reason the pronouncements of the English courts' cases on Islamic finance contracts/transactions are mostly presented as an ordinary contract that emanates from English law.⁶³ By this, English courts have identified the distinction between contractual and commercial elements of Islamic finance. Hence, parties are at liberty to pick their choice of commercial elements as they wish. Whereas the English contract law will prevail over *Shari'ah* principles of contract, the division of contractual and commercial elements therefore enables the English courts to isolate the contractual governing law of contract away from the Islamic financing mechanisms. By this, English courts will be able to enforce contracts that are *Shari'ah*-based. Hence, the English Court will always interpret *Shari'ah*-based principles and apply them in line with the English law particularly, where dispute before it, is *Shari'ah* oriented or

⁶⁰ Belouafi and Chaci. "Islamic Finance in the United Kingdom," 40.

⁶¹ Mohamad E. Daouk, "English Case law on Islamic Finance: Interpretation and Application of *Shari'ah* principles," *Journal of Islamic Finance* 10, no.2 (2021): 59.

⁶² Johd Dewar ed., *Islamic Finance & Market 2021*. 8th ed. (London: Law Business Research Ltd, 2020).

⁶³ Sayyed Mohammed Musawi v. R. International Ltd ., Sayeed Mohammed Ali & Others; Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd & Others; Beximco Pharmaceuticals Ltd & Others v. Shamil Bank of Bahrain EC.

where the surrounding facts of the case call for the interpretation and application of *Shari'ah* principles. This is to enable the court to reach a well-rounded decision particularly, in situations where commercial and contractual elements cannot be detached as it is intertwined with *Shari'ah* compliant structuring except where the courts interpret the Islamic elements of the finance contract.

In the UK, alternative dispute resolution is also available. Hence, parties can explore ADR processes in Islamic finance disputes. Certain provisions of the English Arbitration Act, 1996 particularly Section 46(1b) permit parties to select arbitral rules of their choice which will govern their arbitration proceedings. This right to choose as conferred on the parties in the 1996 Act extends to the parties' choice of law. Arguably, parties' choice of law can also cover Islamic law; if parties opt for religious law.⁶⁴ Consequently, courts and tribunals in England do apply and uphold *Shari'ah* principles in arbitration matters in appropriate circumstances. This is resorted to if the arbitration agreement between the parties clearly reflects such intention to adopt or apply Islamic commercial jurisprudential rules. This position was well established by the apex courts in *Halpern v Halpern* 2007 and *Hashwani v Jivraj* 2011 cases.

Also, in *Sayyed Mohammed Musawi v R. International Ltd., Sayeed Mohammed Ali & Others*, the High Court decreed an award issued on June 3rd 2004 as valid and enforceable. In this case, there was a *mudharabah* agreement and the parties chose *Shari'ah* as their choice of the applicable law for the resolution of a dispute which may probably arise. Hence, this choice of law was clearly provided for in the arbitration agreement between them to reflect the parties' intentions. The argument was, there is no law except English national law recognised and acceptable as the valid choice of law for governing contracts including arbitration agreements. Nevertheless, the court by virtue of Section 46(1)(b) of the 1996 Act upheld the parties' choice of *Shari'ah* in this case as an applicable law to substantial matters of the disputes in arbitration. Here, the English court

⁶⁴ Daouk, "English Case law on Islamic Finance: Interpretation and Application of Shari'ah principles," 62.

distinguishes the choice of applicable law to the substantive matters of the dispute in litigation and one in arbitration under English law. This approach clarifies some reservations declared for the *Shari'ah* as a non-national law in the earlier decided cases. Interestingly, not only the arbitration agreement and the choice of law clause were approved by the court in this case, but also the award issued was enforced under the 1996 Act.⁶⁵

Unlike Nigeria, there is an established Muslim Arbitration Tribunal (MAT) in the UK that offers arbitration services to all issues relating to commercial matters. The MAT operates legally binding services under the 1996 Act and can render awards that are *Shari'ah* compliant and enforceable before English courts. Thus, English courts enforce awards that emanate from Islamic finance disputes if such finance contracts/transactions give rise to arbitration proceedings. Such Islamic finance awards granted by Muslim Arbitration Tribunal are legally binding contracts. It is important to note that the subject matter must not involve illegal activities contrary to English Law. English Court will still not enforce an arbitral award that violates the public policy of England if the nature of the dispute is not civil.⁶⁶

The decision of the Court in the *Shamil Bank* case testifies to the fact that the UK approach in arbitration cases is the best compared to the court's approach in litigations. This is because English courts now treat *Shari'ah* as a recognised choice of law applicable to the merits of the dispute in arbitration matters. The decision of the court in *Sayyed Mohammed Musawi* case from the practical point of view offers a revolutionary benefit and a greater advantage to disputants in arbitration as against the litigants who approach courts for resolution. Arbitration offers creditable benefits over litigation, and these include the right to appoint an arbitrator with prerequisite knowledge in *Shari'ah* who will decide the dispute based on the doctrines of *Shari'ah*.⁶⁷ Meanwhile, litigants can only benefit when a judge engages the

⁶⁵ Mohammad H. Tavana, "Sharia as the Applicable Law in Islamic Finance Disputes," *Transnational Dispute Management* 19, no.6 (2022): 5.

⁶⁶ 1996 Act, Section 33 and 82.

⁶⁷ Tavana, "Sharia as the Applicable Law in Islamic Finance Disputes." 7.

services of an Islamic law expert in respect of any question of *Shari'ah* that requires determination. Nevertheless, the English courts' efforts to harmonise Common law and *Shari'ah* rules in the resolution framework under English law reflect the UK financial system's positive attributes such as its flexibility and impartial approach explored by the courts. Thus, there is enormous lesson for Nigeria to learn from the UK litigation and arbitration approaches toward Islamic finance disputes.

WAY FORWARD TO HARMONISATION IN NIGERIA

Agitations for the supremacy of the *Shari'ah* over Common law continue to linger in the minds of its advocates in Nigeria. It seems the sovereignty of the *Shari'ah* may not be attainable in a few years to come since the current legal and administration of justice systems in Nigeria do not give room for that. Instead of seeking for sovereignty, harmonisation of the two legal systems may be implored to bring together both the *Shari'ah* and Common law rules by way of harmonisation particularly, in the sphere of resolution of Islamic finance disputes.

In Nigeria today, one of the viable ways to implement rules of Islamic law is through harmonisation with the existing Common law. Thus, the extent to which this harmonisation is feasible largely rests on the country's approach. It means that Nigeria must be prepared to approach the subject of Islamic law with a more open mind and apply the principles that are more readily acceptable and applicable since there is a need to work within the confines of the Constitution. Harmonisation through a system of parallel courts from the lowest to the highest level is ideally anticipated but not feasible as it requires a constitutional amendment. Hence, the process of amendment is rigorous and may not happen in years to come. While we await the constitutional amendment to happen as some have agitated, Nigeria can also focus on ways to infuse Islamic law into the existing Common law system in such a way that will be acceptable to all whether as Muslim and non-Muslim. Non-Muslims will be more willing to opt for Islamic law to govern their transactions and resolution of disputes if they can be

convinced that doing so is more beneficial to them and to the public at large.

Research has shown that *Shari'ah* and the Common law share numerous hysterical similarities compared to their variances.⁶⁸ The most mentioned variances between *Shari'ah* and the Common law include but are not limited to evidence and procedure, adherence to the principle of *stare decisis*, and discretion in evaluating evidence. A substantial procedural difference is that under the Common law, judges are permitted to exercise judicial discretion (they must have heard from both sides) in deciding the credibility of witnesses whereas, Shariah judges or *Kadis* must follow strictly the position of the Islamic law and procedures base on the evidence(s) adduced before the court.⁶⁹ Then, Islamic law does not allow the doctrine of *stare decisis* as it exists in Common law courts. In fact, there is no obligation on the Shariah Court or *Kadis* to rely upon or refer to interpretations of the higher courts' or their previous decisions even where the facts are similar. This is because the prescription of Islamic law is vividly clear.⁷⁰

Again, Islamic law requires that, before any judge determines the applicable law or reach a final decision on a case, all relevant facts should be relatively considered, whether or not those facts were canvassed in the pleadings or through oral evidence(s). This is to ensure that justice prevails and appropriate laws are adequately applied to all relevant facts. In *Chamberlain v Abdullahi Dan Fulani*,⁷¹ the *Kadis* of the Syariah Court of Appeal observed that the counsel to the appellant ignored to argue ground 2 as pleaded. He further observed that the learned Upper Area Court Judge ought to have raised certain questions

⁶⁸ Adnan Trakic ed., *Shariah and Common Law, the Challenge of Harmonisation*, (Berlin: Walter De Gruyter).

⁶⁹ *Shittu v Biu* 1973 NNLR 196; Oba, Abdulmumini A., "Religious and Customary Laws in Nigeria." 888.

⁷⁰ Muhammad K. Masud, "Teaching of Islamic Law in Nigerian Universities" in *Islamic Law in Nigeria*, ed. S.K Rashid (Lagos Nigeria: Islamic Publications Bureau 1985), 142-155.

⁷¹ [1986] 1 Sh. L.R.N 54: 61

during the proceedings, even though it was not pleaded. The *Kadis* then disagreed with the Common law court approach that facts or evidence which have neither been raised nor argued cannot be validly addressed by the court. In justifying this, he observed that it is obligatory for anyone who discovers default to put thing right with what authority he has. He relied on the Prophet Muhammad S.A.W. saying that “*whoever observes evil he should remove it with might, if he cannot, he must do that with the weapon of the tongue, if he could not then he must hate it.*” Accordingly, Islamic law opposes the Common law position that stipulates that it is judicial virtue for a Common law court not to go beyond matters canvassed by the parties.⁷²

Hence, if these identified variances between *Shari'ah* and Common law can be viewed from perspectives of the commonalities, the efforts towards merging the variances would be more helpful enough to achieve a sustainable harmonisation process.⁷³ In essence, the existing legal framework on dispute management should be advanced in such a way that certain *Shari'ah* and the Common law principles would be easily matched. This is possible so long the two legal systems are kept in equilibrium. It may not be an easy task since the country operates a tripartite legal system. Nevertheless, the fact that the existing laws which are necessary and applicable in Nigeria for the resolution of Islamic finance matters are well-matched with the *Shari'ah* principles seems to be a leading way for the harmonisation. Hence, there is no need to enact new laws or go through the rigour of amendment of the existing ones. What is most imperative for the existing laws to be cognizance of *Shari'ah* rules in application. This may require the Common law judges to interpret and pronounce the objectionable parts of the existing laws in such a way that would not interfere with the main objective of *Shari'ah*. Islamic law needs to be seen and interpreted flexibly in order to accommodate these variances that are considered un-Islamic. Nigerian Common law judges need to focus more on substance rather than form.

⁷² *Alhaji Umar v Bayero University Kano* [1988] 7 S.C.N.J 380.

⁷³ Trakic, *Shariah and Common Law, the Challenge of Harmonisation*.

So far, some *Kadis* of the Shariah Court in Nigeria have been able to accommodate some of the variances identified above for harmonisation of the two legal systems. For instance, Justice Kalgo in *Chamberlain v Abdullahi Dan Fulani* case addressed the issue of *stare decisis* under the Islamic law. He pointed out that his court would be guided by established authorities while he decided on the case at hand. Also, in *Alhaji Sulu and Anor v Hamdallah Abike*,⁷⁴ the Kadi therein relied heavily on the Court of Appeal decision which stated that an appeal from Area Courts and Appellate Courts should not be too strict when it has to do with matters of procedure. Hence, illustrations of these judgments of the *Shari'ah* Court of Appeal established how *Kadis* are willing to bring harmony between the two legal systems without necessarily compromising one another. The flexibility in the mindset of our Common law Judges and *Kadis* will definitely play a significant role in harmonising the variances identified with the two legal systems. *Kadis* now understand that the interpretation of Islamic law as was applied centuries ago can no longer meet the ongoing situation in the country. Hence the reality of today must be taken into account whenever interpretation and application of Islamic law is required.

The same goes for Common law judges. The Nigerian Common law approach should adopt certain Islamic law principles that are not offensive to the existing resolution framework applicable in Nigeria, just like the way the English court applies *Shari'ah* which is in line with the English law. Thus, harmonisation may only be feasible to a certain extent as there are some mandatory *Shari'ah* rules and principles to be fulfilled before such contract/transaction can be regarded as *Shari'ah*-compliant. For instance, any contract/agreement that is tainted with *riba* or *gharar* violates the mandatory rules of *Shari'ah* and cannot be enforced under Islamic law. In other words, it may not be possible to completely mix the two legal systems but at least, it will be of benefit to harmonise certain reasonable differences in selected areas of *Shari'ah* and Common law.

⁷⁴ [2002] Kwara State Shari'ah Court of Appeal Annual Report 27: 36.

Analysis of the English cases cited above presents arbitration as a better option compared to litigation particularly when the question of *Shari'ah* as the applicable law is concerned. Nigeria can emulate this in such a way that ADR processes including arbitration will serve as a comfort zone for parties who feel so distressed with the application of Common law approach by Common law judges in the resolution of Islamic finance disputes in Nigeria.

It is worth to note that ADR enables the parties to appoint persons with at least basic knowledge and understanding of the guiding laws and principles to settle their disputes. The adoption is not a substitute for having competent judges of Islamic law whose conferment of powers by the appropriate authority to adjudicate disputes is long overdue. It is rather a viable alternative for a better administration of justice.⁷⁵

CONCLUSION

It is vital to conclude this research by emphatically reaffirming the set objective of this paper that is, to examine the feasibility of the coexistence of *Shari'ah* and Common law in Nigeria particularly, in the resolution of Islamic finance disputes. The paper therefore emphasizes that certain *Shari'ah* and the Common law principles can be harmonised provided the two legal systems are kept in equilibrium. The main purpose of canvassing for harmonisation in the resolution of Islamic finance disputes in Nigeria is to bring together both the *Shari'ah* and the Common law procedural rules by way of harmonisation. This paper has been able to emphasise on the significance of the divine nature of *Shari'ah*, as a binding law to Muslim. *Shari'ah* comprises of wordings of Allah as contained in the Qur'an and *Sunnah* of the Prophet Muhammad S.A.W. *Shari'ah* governs the affairs of Muslims including their commercial dealings. It is therefore canvassed in this paper that Muslims in Nigerians who

⁷⁵ Abdulqadir I. Abikan, Abdulqadir, "Islamic Banking Disputes: Between Judicial pluralism and ADR" *Journal of Islamic Banking & Finance* 1, no.1 (2011), 11-29.

observed *Shari'ah* in their financial contracts/transactions also desire a resolution of their disputes in accordance with their faiths and beliefs.

It is observed that the majority of the judges who are vested with jurisdiction to determine Islamic finance disputes in Nigeria are trained under the English Common law and procedure. Hence, the decisions of these judges are heavily influenced by their understanding of the Common law approach. The passive attitude of the courts towards seeking the opinion of *Shari'ah* experts indicates to a certain extent their reluctance in accepting *Shari'ah* as one of the sources of law. This justifies the need for Nigerian judges with jurisdiction over Islamic finance disputes to acquire appropriate knowledge of the traditional Islamic legal concepts so they can be able to apply them in the context of modern finance. This will certainly form the basis prerequisite to a sound legal framework for the Islamic finance industry. The Nigerian legislature should then give due attention to the suitability and procedures of *Shari'ah* governance particularly the legal status of *Shari'ah* resolution, legal avenues for disputes involving *Shari'ah* issues, and mechanisms of monitoring and supervising *Shari'ah* compliance. The Nigerian Islamic finance industry needs a credible and reliable legal avenue for the settlement of legal disputes arising from Islamic finance transactions. Until Islamic finance is fully developed, the Common law and judges with little or no knowledge of Islamic law will continue to rule and make decisions on Islamic finance cases albeit by way of harmonisation.

ADR can be considered as the best alternative to court proceedings which can streamline the resolution of disputes and avoid the need for court proceedings. However, the lack of an adequate ADR framework that complies with Islamic law and procedure to deal with disputes arising from such *Shari'ah* compliant contracts/transactions remains the major reason for the low adoption of Islamic arbitration and ADR in banking and finance disputes. Presently, the industry is struggling to counter the risk management practices that come alongside conventional litigation when a dispute arises. Investors in Nigeria are more willing to adopt alternative resolution strategies that are *Shari'ah* compliance.

The paper thus recommends the adoption of the legal and arbitral approaches of the UK for harmonisation of the rules of *Shari'ah* and Common law in settling Islamic finance cases in Nigeria. This will take a long way for the rules of Islamic law to be recognised amidst the existing Common law rules in resolving Islamic finance disputes.

