

The Multi-Door Courthouse Concept: Access to Justice, from the Islamic Law Perspective

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Introduction

The above-stated topic will be discussed from the Islamic Law perspective. With the modernization of common law in Great Britain and its development in the United States and other jurisdictions, introduction of technicalities became a major feature of the common law practice. The only known means of accessing justice in the United Kingdom was *litigation* which caused delay in the administration of justice in most cases. No doubt, the expected outcome of litigation was legal justice (Justice in accordance with the existing Law). You will all agree with me that, legal justice in most cases does not reflect social realities. In my humble opinion, legal justice without social justice is not a perfect justice. This circumstance exposed the system of administration of justice to several complaints and strong criticisms. Eventually, access to justice became difficult particularly for the common man as litigation was rapidly becoming expensive, highly stressful and time consuming.

Consequently, frustrated plaintiffs turned to the King, who referred their matters to the royal court of chancery presided over by the Lord Chancellor who was fondly referred to as '*Keeper of the King's conscience*.' The Lord Chancellor was administering justice with Equity which was entirely a different concept as against the prevailing common law. Equity and common law represented opposing values in the English legal system. In 1849, the two legal concepts were merged together to be jointly administered by High court of justice. The essence of the merger was to have easy access to justice; yet litigation remains the greatest obstacle to justice. It is often said that 'justice delayed is justice denied'.

Moreover, the legal justice became too formalistic and too technical. The system elevated form over substance. These all-together naturally led to injustice and rapid decline of good

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conscience. It is in the light of the foregoing that Shariah (Islamic Law) will be briefly explained as it is a necessary premise for discussing *Multi-Door Courthouse concept in Islamic Law*. This, will in turn, transparently reflect the fact that the multi-door courthouse is an easy access to justice.

Shariah (Islamic Law)

For the Muslims, Shariah is not just a Law, but a complete way of life which simply means a divine perfect system that covers the entire spectrum of a Muslim's life from the cradle to grave. In other words, Shariah as a Law is a volume of legal norms which governs the life of a Muslim in his relationship with God on one hand, and his relationship with co-citizens and the State on the other hand.

According to Honourable Justice Abdul-Kadir Orire², "*legally, shariah is the Divine law for all the believers to follow*"³. The Law of Islam is unique because of its distinctive features. For instance, it is one Law that has moulded the people and not the other way round. This fact is more comprehensively established by Dr. Perron in his introduction to the French translation of *Mukhtasar-al-Khalil* (a text on Islamic Jurisprudence) when he wrote:

*'MUHAMMADAN LAW in all its details, religious as well as civil, has for us an immense interest. It necessitates the study of the social institutions of a people which an immutable law has, for twelve and a half centuries, moulded and remoulded at frequent intervals. For here it has been neither the nation nor the people which has made the Law; it is the Law which has made and moulded the nation and the people. Both the outer form and the inner spirit bear the impress of the one word: Religion. In Islam there is but one law, and it is the Religious Law, signified in the word Sharia. In other words it is the only supreme Law; for it emanates from God, Who decreed its main bases in the Koran. With Muhammadans the law is also dogma.'*⁴

² Former Grand Kadi of Kwara State Shariah Court of Appeal

³ Al-Maslaha, Journal of Law and Religion, Vol.3,2004-2006, Nigeria Association of Muslim Law Students (NAMLAS), University of Ilorin Chapter, p.132.

⁴Ruxton, F.H. (1916), Maliki Law, London Luzac & Co., p.1

Sources of Shariah

Shariah has four primary sources. They are the *Qur'an*, the *Sunnah* (Prophetic traditions), the *Ijma'a* (Consensus) and *Qiyas* (Analogical deduction). There are secondary sources of Shariah but our focus here is on the primary sources.

The Qur'an is the chief source and the final authority for both religion and laws governing all Muslims of the world in their personal and communal affairs. About five hundred (500) verses of the Qur'an provide legal provisions on various aspects of human activity. *Sunnah* which is the second chief source of Islamic law is the compendium of the prophetic actions and pronouncements. There are about four thousand (4,000) of such actions and pronouncements representing legal decisions or judgements. The third in the list of principal sources of Islamic law is *Ijma'a* (consensus of opinion). This is the consensus of opinion of the *fuqahahu* (Muslim Jurists) in a particular age on a particular question of law. It is normally resorted to only in a circumstance when the Qur'an and Sunnah are silent on a particular issue. *Qiyas*, the last major source of Islamic law is the individual opinion of the Muslim Jurists just as *Ijma'a* is the collective opinion of the Jurists. In Arabic language, it means < *measurement or comparison* > In other words, the term *Qiyas* represents an opinion a Jurist arrives at on the basis of the principle of analogy. It can be likened to the doctrine of *obiter dictum* in the English common law.

The Shariah Concept of Multi-Door Courthouse

The expansion and wide acceptance of alternative ways of resolving disputes gave birth to the emergence of the Multi-Door Courthouse concept. In recent times, the various alternative means of dispute resolution have been brought under one category known as 'Alternative Dispute Resolution' (ADR). In 1976, Professor Frank Sander, obviously aimed at possible integration of ADR into the American Justice system.⁵ The main objects of the Multi door Courthouse is to provide easy access to justice, reduce delay and to provide links to related services. The question to be addressed now is: what is the concept in Shariah, the Islamic law? More so, Shariah is one of the doors available at Abuja Multi-Door Courthouse (AMDC) of the Federal Capital Territory judiciary, Abuja.

⁵ Simon R., *Modern Law Review: Mediation in the Lawyers' Embrace*, Vol.55, No.2 Blackwell Publishing 1992, p.259

Multi-Door Courthouse (MDC) can be simply defined as an institution whereby disputes are resolved through ADR options. It is not a strange concept in Islamic law. From the first generation of the Muslims, informal multi-door courthouse had been prominent in the Muslim world. The concept is called **Sul’hu** in Shariah. It is provided in the Qur’an that:

“There is no virtue in most of the secret talks of the people, it is however good if one secretly enjoys charity, kindness and reconciliation among people. The one who does this to please Allah will soon be given a great reward”.⁶

ADR processes in Islamic Law include Sul’hu (negotiation), Tahkim (arbitration), Med-arb (combination of sul’hu and tahkim), Muhtasib (ombudsman), Informal justice by the Wali al-mazalim (chancellor) and Fat’wa of Muftis (expert determination)

Sul’hu (Mediation and Conciliation)

Sul’hu literally means cutting off a dispute. In other words, to put an end to a dispute directly or with the assistance of a third party. Dispute resolution is governed by different regulations; therefore, sul’hu includes negotiation, mediation or conciliation as well as compromise of action which easily fits within the definition of ADR. Sul’hu is founded upon the 10th verse of chapter 49 of the glorious Qur’an thus:

“The believers are nothing else than brothers (in Islamic religion). So make reconciliation between your brothers, and fear Allah that you may receive mercy”

The prophet of Islam supported Sul’hu and he encouraged the Muslims to settle their disputes by Sul’hu. In one of the prophetic traditions reported in the collection of Sahih Al-Bukhari he is reported to have said: “..... there is a reward for the one who establishes Sul’hu and justice among the people”

Sul’hu was encouraged and put to practice by the *Khulafai-al-Rashidin*, that is, the rightly guided successors of the holy prophet Muhammad (SAW). For example, in the famous letter written by Umar bin al-Khattab, the second *Khalif* (successor) of the noble Prophet Muhammad (SAW) to Abu Musa al-Ashari on his appointment as a *Qadi* (Judge); there are

⁶ See Q. 4:114

several principles relating to Sul’hu. The Khalif wrote inter-alia that : ‘‘All types of compromise and conciliation are permissible except those which makes *haram* (unlawful) anything that is *halal* (lawful) and *halal* that which is *haram*.’’⁷ It is pertinent to note here that, the rules governing the application of Sul’hu in Islamic Law do not accommodate compromise in the domain of *Huquq-Allah* (i.e Rights of Allah) which relates to *Hudud* (capital punishment) However, in matters involving *Huquq an-nass* (Rights of man), compromise or/and conciliation is not only possible, but also preferable, as long as it is equitable, just and does not violate any of the fundamental provisions of Shariah.⁸

Tahkim (Arbitration)

Tahkim linguistically represents Arbitration in English language. In the pre-Islamic Arabia, the concept of Tahkim was known and it was employed to settle various types of civil and commercial disputes. It is pertinent to note that the position of an Arbitrator is similar to that of a *Qadi* (Judge) in the regular court in the sense that under the Islamic Law, the same jurisdiction is given to the Arbitrator as a judge in terms of resolving dispute and giving an award in a dispute. The most remarkable Qur’anic verse with regard to arbitration is located in chapter 4 where it is provided as follows:

*‘‘If you fear a breach between them twain (husband & wife) appoint two arbiters, one from his family and the other from hers; if they both wish for peace, Allah will cause reconciliation. For Allah has full knowledge and He is acquainted with all things’’*⁹

It is held by Imam Shafi’I, that the word ‘‘reconciliation’’ in the above-quoted Qur’anic verse implies that arbitral awards in Tahkim can only be binding if parties mutually agree to enforce it. Dr S. K Rashid, in his own observation; said that the use of the word, ‘‘reconciliation’’ in the verse of the glorious Qur’an indicates that an arbitral award is not in any way binding on the parties. In my humble opinion the word ‘‘reconciliation’’ should be construed as not implying imposition of any arbitral awards. It should be simply taken for its literal value.

The Law of Islam permits people to seek the aid of Arbitrators when they are unable to resolve disputes in their private matters. Tahkim is not applicable to disputes of criminal

⁷Magolith, D.S., ‘Omar’s Instruction to Qadi (1910), Journal of Royal Asiatic Society, 307 @ PP311-312.

⁸ See Syed Khalid R., ‘Alternative Dispute Resolutio6n in the context of Islamic Law, 2nd International Conference on Law, Commerce and Ethics, 8-10, December, 2003, School of Law, Victoria University, Melbourne, Australia.

⁹ Q:4:35

nature that attract *Hudud* (capital punishment). Furthermore, it is not applicable to matters concerning *Talaq* (divorce), *Li'an* (mutual imprecation), *Nas'ab* (paternity), *Fasakh-Nikah* (judicial abrogation of marriage), *Mafqud al-khabar* (a missing person), *Waqf* (endowments) and revenue matters. All this cannot be resolved by the ADR process of Tahkim in Shariah except by a Judge sitting alone in a court of Law.¹⁰

Prophet Muhammad (SAW) also recognized and practiced arbitration. He appointed Arbitrators and accepted their decisions. He also acted as Arbitrator in several occasions to resolve disputes between individuals as well as between tribes. For instance, he acted the Arbitrator in a dispute among the four major tribes of Mecca with regard to the lifting and positioning *Hajar-al-aswad* (the black stone) after the rebuilding of *Kaaba*, the sacred place of worship. The four disputing tribes unanimously agreed to have him resolve the dispute for them. The Prophet (SAW), removed his outer garment, spread it on the ground and placed the black stone on it. He asked each tribe to produce a representative and all the representatives participated in lifting and placing the black stone in its position. That was how the Prophet resolved the tribal dispute that could have degenerated to a state of war. Muhammad (SAW) himself opted for arbitration to settle the dispute between him and the Bani Anbar.

What can be classified as a *locus classicus* on Tahkim as practiced by the companions of the holy Prophet (SAW) after his demise was the political case between Khalif Ali bin Abu Talib (the 4th rightly guided Khalif) and Muhawiyya bin Abu Sufian (the governor of Ash-sham which is the present day Syria, Lebanon, Palestine and Jordan). Muhawiyya had refused to recognise Ali bin Abu Talib's right to the Khilafah (caliphate). The dispute led to a civil war between the two parties. Muawiyya demanded for resolution of the conflict through arbitration process, Ali accepted and each party appointed his Arbitrator. The two Arbitrators were nominated in the arbitration agreement which specified the procedure, the duration, the venue of arbitration and the Qur'an with Sunnah as the applicable Law. The two Arbitrators were to decide who would be the suitable Khalif. What a perfect precedent for an arbitration process.

Sul'hu bi Tahkim (Med-Arb)

Med-Arb is a combination of the principles of mediation and arbitration. When mediation fails to reconcile the parties, arbitration begins, while where mediation succeeds, it is incorporated

¹⁰ S. K Rashid, *Alternative Dispute Resolution*, op.cit.

into the arbitral award. The relevant authority for this ADR option is found in the same 4th chapter verse 58, where Allah provides thus:

“Allah does command you to render back your trusts to those whom they are due; And when you judge between man and man that you judge with justice: verily, how excellent is the teaching which He gives you! For Allah is He who hears and sees all things”¹¹

In the Ottoman code called *Majallah al-Adliyah* popularly referred to as the Mejele, it was provided in its Article 1851 that disputants should proceed to arbitration when mediation attempts fail. This is a proof that the contemporary ADR process of Med-Arb has been recognized by Shariah and practised by the muslim nations for the past 1436 years.

Muhtasib (Ombudsman)

What is meant by Muhtasib in Shariah is Ombudsman. The Muslim world has been practising muhtasib before the advent of the holy prophet Muhammad (PBUH). However, the glorious Qur’an conferred authority on the practice of ombudsman where it prescribes thus:

“You are the best of people evolved for mankind, enjoining what is right and forbidding what is wrong.....”¹²

The glorious Qur’an *de-facto* is the origin of ombudsman. Apart from the above-quoted Qur’anic verses, there are many other verses of the glorious Qur’an espouse the concept of ombudsman. Just one of them suffices to be a basis for Muhtasib. It reads as follow:

“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”¹³

In Islamic Law, the main object of ombudsman is *Hisbah*(account taking). His function therefore covers religious cum-moral activities of the citizenry. He regulates community affairs and behaviour in the public places including markets, hospitals, motor parks and various similar public offices. Among his multiple assignments are accuracy of weight and measures, honesty in business dealing and also municipal affairs like keeping the streets clean

¹¹ Q. 4:58,

¹² Q.3:110

¹³ Surah An-nisai (4) : 58, See further Surah Al-Imran (3) :114, Surah At-Tawbah (9) : 71 and Surah Lukman (31) :17

and lit at night and preventing industrial or residential buildings from clashing with the community interests.

Moreover, the prophet of Islam, Muhammad (SAW) himself appointed Sa'ad bin Al'Aas bin Umayyah as Muhtasib of Mecca and Umar bin Al- Khattab as that of Madina while Abdullah bin Utbah al-Mas'ud became the Muhtasib of Madina during the Khilafah (caliphate) of Umar bin Al-Khattab.

Informal administration of justice by the Wali al-Muzalim (the Chancellor)

Al-wali al mazalim (the chancellor) in Shariah is considered as a fusion of a judge and an ombudsman'. He is a public officer appointed by the king to effect the coercive authority of the ruler and the adjudicative function of a Judge at large in order to bring about quicker, cheaper and just settlement of disputes. The settlement of disputes by Wali al-Muzalim was done in a purely in-formal manner. The procedure differed from that of established courts in many respects. For instance, the Chancellor could admit evidence which a formal court might declare in admissible and he could also call persons who were not qualify as witnesses before a formal court to give evidence before him. That is not all, a Wali al-Muzalim may also rely on his own personal knowledge and/or expertise when deciding a matter to compel the litigants to accept arbitration and dispense away with matters which require strict proof before a court of Law.

During the era of Khalif Haruna Rashid, Bin Khalidun and Ja'afar bin Yahya were appointed to the office of Wali al-Muzalim. The jurisdiction of the Chancellor covers the following matters:

- Complaints about misappropriation of property.
- Complaints lodged by stipend holders.
- Complaints against misdeed in administration of lands given as private or public endowment.
- Complaints against the corruption of government.
- Complaints against the indiscretion in public records kept by Registrars, Accountants and Clerks.
- Complaints against things which normally fell in the jurisdiction of a Muhtasib; and complaints against individuals.

Fat'wa of Muftis

A Fat'wa is an Islamic religious ruling, a scholarly opinion on a matter of Islamic Law. The question that is likely to arise here is: 'How does a Fat'wa of Muftis become an ADR process? The fat'wa of Muftis is ADR method just like evaluative mediation or conciliation, mini trial (i.e Executive Tribunal) and Fat'wa (expert determination) allows an impartial third party, chosen by the parties to make a non-binding evaluation assessment on a dispute based on the merit and on his own expertise. In the history of Shariah multi-door courthouse, Fat'wa of Muftis has proven to be an effective mechanism for solving disputes among disputants. Normally, any fat'wa issued should be premised on *Ijtihad*(reasoning). What the Muftis do is that they either settle disputes in the light of the existing precedents or extend the law, if necessary, from the prevailing general principles of Islamic law. In the alternative, the Muftis might formulate a new principle on condition that the new principle formulated will satisfy the laid down requirements by Shariah.

Conclusion

Flowing from the foregoing, it is very transparent that the contemporary ADR and the Multi-Door Courthouse concept are not new in Islamic Law. Basically, the modern ADR is the shadow of the Shariah ADR. As indicated above in the early part of this paper, the emergence of Multi-Door courthouse was a clear response to the inadequacies of the litigation process which was the only door to justice. The glaring demerit of litigation became so transparent through its gross evasiveness of privacy and destruction of reputation. It paralysed productive activities. Litigation was and still remains costly and extravagant; corrupting the Litigants by tempting them to harass each other, and to twist, stretch, hide facts in order to secure favourable judgement. It is acrimonious, widening resentment between disputing parties who might ordinarily find occasion to co-operate and become best of friends.

In conclusion, the Shariah Multi-Door Courthouse concept provides easy access to justice and it is universal in nature.