

THE SIGNIFICANCE OF SHARI'AH AND ITS INFLUENCE ON MODERN LEGAL SYSTEM IN NIGERIA

Ibrahim Muhammad Ahmad*
Mohammed Babakano Aliyu**
Aishatu Kyari Sandabe***

Abstract

Pursuit for knowledge is compulsory. It is the sole feature that distinguishes human race from other creatures. Without knowledge one is equal to an animal. Shari'ah guides and regulates Muslim's conducts and equally the non-Muslim who willfully submits to its jurisdiction. The conduct in this sense is holistic of both spiritual and mundane. However, the question that sprung up here is whether knowledge of Shari'ah is obligatory to a Muslim and particularly to lawyers and judges who represent clients and adjudicate on Islamic law matters. Similarly, in modern legal systems, Shari'ah play a vital role in many aspects. Particularly, in the judiciary, politics, governance and finance industry. Most of the world's Muslim-majority countries have laws that reference Shari'ah. Many western countries also adopt Islamic model of finance in their finance industry either as a window or full-fledged.

Keywords

Judge, Knowledge, Lawyer, Legal System, Nigeria, Shari'ah

* LLB, LLM, Ph.D, BL, Reader, Head, Department of Sharia, Faculty of Law, University of Maiduguri. He can be accessed through ibrahimahmad2003@gmail.com or ibrahimahmad2003@unimaid.edu.ng

** LLB, LLM, Ph.D, BL, Reader, Department of Sharia, Faculty of Law, University of Maiduguri. Currently, he is the Head of Department of Sharia, Faculty of Law, Modibbo Adama University, Yola. He can be accessed through mohammedjada@yahoo.com

*** LLB, LLM, Ph.D, BL, Reader, Department of Sharia, Faculty of Law, University of Maiduguri. She can be accessed through asandabe@yahoo.com

Introduction

Allah gives preference to human race above other creatures for the sake of knowledge for which a man is endowed with. Adam was given a priority over other race because of the knowledge Allah taught him. knowledge is the sole feature that distinguishes human race from other creatures. Without knowledge a man is not more than but equal to animal. Therefore, pursuit for knowledge is compulsory. This is to make one live the life of humans. Islam attached importance to the pursuit for knowledge and even makes it a marching step towards paradise. Plato said "I surpass and transcend my pairs in knowledge because, I spend in fueling my lamp as I drink."¹

The paper examines the significance of knowledge, its virtues and the obligation for its pursuit. It also analyses the influence of Shari'ah on modern legal systems with emphasis on the Nigerian regime.

Significance of Knowledge

Islam attached importance for human pursuit of knowledge. Those possessed of knowledge are not the same with those who are not possessed of it.² Allah, the Exalted, acknowledges only His servants possessed of knowledge as those who fear Him³ and understand.⁴ 'Allah bears witness that none has the right to be worshiped but He, and the angels, and those endued with knowledge..⁵ Allah testifies on those endued with knowledge as the third in the hierarchy of this grand testimony⁶ which is the philosophy behind the creation of human race and jinn.⁷ Ibn Kathir, on the interpretation of the verse that acknowledges those endued with knowledge, said 'this is a peculiar recognition to scholars.'⁸

¹ Ibn Abdilbarr, A.Y. Jami'u Bayani al-Ilmi wa Fadhlihi (Dar Ibn Al-Jawzi, Cairo, 2018) Pp.116-117

² Qur'an 39:9

³ Quran 35:28

⁴ Qur'an 29:43

⁵ Qur'an 2:18

⁶ Imam Al-Gazali, A.M.M. Ihyaa'u uloom al-Deen Vol.I (Dar al-Taufiqiyah, Cairo, 2015) Pp. 14-15.

⁷ Qur'an 51:56

⁸ Ibn Kathir, A.A. Tafseer Al-Qur'an Al-Atdheem Vol.1 (Dar al-Fajr, Cairo, 2013) Pp.528-529

Al-Qurtubi in the interpretation of the same verse said;

This shows the higher status of people possessed with knowledge. If there is any with higher status than them, his name could have been mentioned along with that of Allah and *mala'ikah* (angels). Thus, Allah said on the virtues of knowledge "and say, my lord increase me in knowledge."⁹ Prophet SAW is enjoin to ask for more knowledge because it accords honour.¹⁰

Iqra, meaning "read," was the first verse that was revealed to the Prophet SAW. *Iqra* opens the door for reading, writing and to ponder. The Quran urges the human race to think, ponder, reflect and acquire knowledge that brings them closer to God. The Quran repeated the word *ilm* (knowledge) 750 times.¹¹ This is due to the importance Islam accorded to knowledge.

Imam al-Bukhari designed a chapter in Sahih al-Bukhri that reads 'it is essential to know a thing before saying or acting upon it.'¹² Abu Hurairah narrated that Prophet SAW said 'when a man dies, his good deeds come to an end except three; ongoing charity, beneficial knowledge and righteous offspring who will pray for him.'¹³

Seeking for Knowledge

'Pursuit for knowledge is an obligation on every Muslim.'¹⁴ Seeking for knowledge is an obligation on issues that touches *wudhu*, *salah* and other things that he does. Such as *zakah* if he has money. Actions must be done in accordance with the shari'ah and this can be achieved by possession of knowledge. Knowledge could not be possessed unless

⁹ Qur'an 20:114

¹⁰ Al-Qurtubi, A.M.A. Al-Jami' li Ahkami al-Qur'an Prt.IV (Dar al-Ghad al-Gadeed, Cairo, 2018) Pp. 35-36

¹¹ Available at <https://digitalcommons.unl.edu/libphilprac/718/> visited on 05/12/2020

¹² Ibn Hajar al-Asqalani, A.A. Fathu Al-Bary Vol.I (Dar Ibn Al-Jauzi, Cairo, 2013) Pp.218-221

¹³ Muslim Haith No. 1631, *Hadeeth* No.52 reported by Ibn Abdilbarr, A.Y. Jami'u Bayani al-Ilmi wa Fadhlihi (Dar Ibn Al-Jawzi, Cairo, 2018) P.16

¹⁴ Ibn Majah No.224, *Hadeeth* No.24,25,26,27 and 28 reported by Ibn Abdilbarr, A.Y. Jami'u Bayani al-Ilmi wa Fadhlihi (Dar Ibn Al-Jawzi, Cairo, 2018) P.16

pursued. However, a respite to this is through befriending scholars and asking on issues that one does not their solutions.¹⁵

a man said to Abu Hurairah that I want to learn but I fear wasting it. Abu Hurairah replied him not pursuing for knowledge is enough wastage of knowledge.¹⁶ Imam al-Mawardi said; 'ignorant is dead before his death and his body is in grave before the grave.'¹⁷

However, old age is not an excuse. The life of the prophet and his companions should be our mirror for reflections. Some of the companions accepted Islam at old age but that has not stopped them from seeking for knowledge and transmitting the religion to generations after generations up to this tome.

Legal Representation

Legal representation is *Wakala*. The question here is, who has the capacity to make it? The answer is a legal practitioner within the meaning of the extant laws of the land. The next question is whether all legal practitioners are learned in Islamic law? The answer could be in the affirmative or otherwise. However, the law allows a legal practitioner to appear in court subject to certain requirements, such as payment of Annual Practicing Fees.¹⁸ The cumulative understanding of the above is that a legal practitioner is assumed learned in Islamic law and thus capable to represent a litigant in court of law. It is also trite that lawyers whether possessed of knowledge of Islamic law or not do appear and make submissions on critical Islamic law issues.

Having answered some of the above questions, whether a lawyer can represent a client without knowing shariah verdict on the case at hand or knowing fully that his client has no case. These two scenarios, though the paper has no empirical evidence to support it, are prevalent among lawyers, Muslims and non-Muslims alike. The Hadeeth of the Prophet on three types of judges covers this.¹⁹ A lawyer could save himself from the two categories of the judges that will go hell to the third category that enters paradise through the pursuit of knowledge

¹⁵ Imam Al-Akdhari, A. Mukhtasar al-Akdhari

¹⁶ Ibn Abdilbarr, *Op. Cit.* P.117

¹⁷ Al-Mawardi, A.A.M. *Adab al-Dunya wa al-Deen* (Al-Qudus, Cairo, 2012) P.28

¹⁸ Section 3 LPA

¹⁹ See discussion on the *Hadeeth* under discussion on Judges.

and upholding the truth by practicing the knowledge. Imam al-Shafi'ee said while giving explanations to the *Hadeeth* narrated by Abu Hurairah that a *mujtahid* who makes a mistake in the course of *ijtihad* would be rewarded not for the mistake but for making the mistake in his passion for the truth.²⁰

The requirement of Knowledge for Judges

As part of the requirements for appointment of a person to the office of a Judge, he must be learned, intelligent, conscious, trustworthy, upright, capable of making *ijtihad* by applying raw legal texts to the case before him or at most apply the interpretation of *fuqaha* of a particular *madhab* or *madhahib (pl)*. Okunola JCA abhors a Judge not learned toiling with the sacred law.²¹

The hadeeth of the Prophet that categorizes Judges into three is enough for a Judge to acquaint himself with the required knowledge of law in discharging his responsibilities. Two of the Judges will go to hell and one in paradise. He goes to paradise because he knows the truth and judge accordingly. The other two will go to hell because, while one knew the truth and refused to pass judgment accordingly. Whereas the other one pass judgment not possessed of knowledge and shy of saying I do not know.²² This *hadeeth* is of general application. It does not apply to Shariah Court Judges alone. It applies to all courts irrespective of the law it applies provided the Judge is a Muslim.

State High Court, Court of Appeal and Supreme Court hear and determine sharia appeals from Area Courts, Shariah Courts and Sharia Court of Appeal as the case may be. It could not be an excuse to exonerate the Judge from application of the above *Hadeeth* on the ground that he is appointed to apply common law or that the court is

²⁰ Ibn Abdilbarr, A.Y. Jami'u Bayani al-Ilmi wa Fadhlihi (Dar Ibn Al-Jawzi, Cairo, 2018) P.287

²¹ Husain V. Bagade CA/K/798/89 (Unreported) cited in Abubakar, A. Islamic Law Practice and Procedure in Nigerian Courts (Malthouse, Lagos, 2017) Pp.13-14.

²² Al-Warzazi, M.M.A. Sharhu Lamiyatu Al-Zaqqaq (Dar Ibn Hazm, Beirut, 2017) Pp.304-307. The *Hadeeth* is narrated by Abi Buraidah (R.A) with similar wordings as reported by Abu Dawud No.3573, Ibn Majah No.2315 and *Hadeeth* No.1656, 1657 and 1658 reported by Ibn Abdilbarr, A.Y. Jami'u Bayani al-Ilmi wa Fadhlihi (Dar Ibn Al-Jawzi, Cairo, 2018)

not an Islamic court if he sits on appeal and review judgements of Shariah Courts.

The principle of *Fiqhu al-Haal* which means Possession of knowledge of the issue at hand applies to all Muslim Judges in Nigeria. This can be attributed to the nature of the Nigerian legal system and particularly the northern part. The principle is derived from the popular *Hadeeth* 'search for knowledge is obligatory on every Muslim' it is necessary to ask and/or look for solution when face with an issue in religion.²³

Furthermore, keeping the judicial responsibility aside, a Muslim is expected to keep in pursuit of knowledge throughout his life. search for knowledge is an obligation on every Muslim. It is not necessary that one must be versatile. However, the principle of *Fiqhu al-Haal* should be applied whenever an issue needs solution. Thus, one is indebted to have an answer to what he is into but not necessary to what he is not into provided a segment of the *ummah* are possessed of it.²⁴

Islamic Finance in the Nigerian Finance Industry

Islamic Finance is a system that is practiced based on the pristine provisions of *Fiqh al-Mu'amalat* (Islamic Commercial Jurisprudence). Islamic financial institutions are referred to as non-interest banks. Non-interest bank is defined as 'Non-interest bank otherwise known as profit and loss sharing bank, means a bank which transacts banking business, engages in trading, investment and commercial activities as well as the provision of financial products and services in accordance with the principles and rules of Islamic finance.'²⁵ The CBN and other statutory regulatory institutions issued guidelines for the establishment and regulation of Islamic finance industry as a result of Keen interest and persistent call by customers and other stake holders, such as promoters and financial institutions.²⁶ The guidelines for the

²³ Ibn Abdilbarr, Hadeeth No.32,33 and 34 *Op. Cit.*

²⁴ *Ibid.*

²⁵ Section 131 Banks and other Financial Institutions Act (BOFIA) 2020

²⁶ Muslims have called for Islamic Finance. It is their belief that the Traditional and Conventional Financial System is against their religious belief. Conventional Financial Institutions called for it because, it's believe that, it will contribute to the increase of GDP, diversify the economy and increase profitability, particularly, looking at the recent global economic crises that starts late 2007; Interview with Lere, M. Deputy Director, CBN Banking Policy and Regulation Department and FRACE

supervision and regulation of the industry were issued pursuant to the CBN Act, Banks and other Financial Institutions Act (BOFIA) and other legislations and circulars issued by the relevant regulatory bodies.

The legal frame work consists of statutes and persuasive legislations. The statutes were principally meant for the regulation and supervision of the conventional regime. However, some provisions favour the establishment of Islamic finance industry within the conventional regime.

Regulatory Guidelines of IFIs

The Statutory Regulatory institutions of finance industry²⁷ have released respective Regulations for the operation of Islamic Finance in Nigeria.²⁸ The said provisions were released upon reliance of certain provisions of Banks and other Financial Institutions Act (BOFIA), Central Bank of Nigeria (CBN) Act and host of other legislations. Although BOFIA and CBN Act along other laws are not sufficient and comprehensive but have made an operational ground for a smooth

Secretariat, Head CBN Non-Interest Banking and Hamisu, M. Deputy to Lere (Abuja 20 December 2016) ; Interview with Dogarawa, A.B. Member, ACE Jaiz bank, Associate Professor and Head, Department of Accounting, Ahmadu Bello University (ABU) Zaria (Zaria, 19 December 2016); see Aliyu, Islamic Banking and Finance in Nigeria: Issue, Challenges and opportunities Pp.1-5; paragraph 1.0 of CBN Guidelines for the Regulation and supervision of Non-Interest Islamic Financial Institutions (NIFIs); Section 1.0 of CBN Guidelines for the Regulation and Supervision of NIFIs.

²⁷ The Regulatory Institutions are; Central Bank of Nigeria (CBN); Nigeria Deposit Insurance Corporation (NDIC); Securities and Exchange Commission (SEC) and National Insurance Commission (NAICOM).

²⁸ CBN issued Guidelines for non-Interest Islamic Banking on 21st June, 2011 see www.cbn.gov.ng, NDIC has released a Draft Frame-work for Non-Interest Deposit Insurance Scheme in September 2011, NAICOM issued Guidelines for the Operation of Takaful Insurance in April 2013 which is to take effect in March 2013, See Agabi, C. 'Guidelines on Takaful Insurance' Daily Trust Newspaper (Nigeria 19 April 2013) <http://www.dailytrust.com> accessed on 19 April 2013, SEC has also released its Guidelines see Aliyu, S.U.R 'Islamic Banking and Finance in Nigeria: Issue, Challenges and Opportunities' <http://mpira.ub.uni-muechen.de/425573/> accessed on 8th may 2013 Pp.1-3.

operation of the industry. The CBN also issued some Guidelines for Non-Interest Financial Institutions.²⁹

The Guidelines made by the CBN pursuant to the said statutes³⁰ are persuasive delegated legislations. The Guidelines are not statutes in themselves but have the spirit of statute and the influenced the passage of the new BOFIA which have expressly, though not comprehensive, provided for Islamic finance industry.³¹

Judicial Powers

The Constitution vested the power of interpreting the law on the judicial arm.³² The Constitution is glaringly clear on the need for appointment of certain number of justices, who are learned in Islamic law, to the Court of Appeal.³³ However, the Constitution is silent on such requirement in the Supreme Court. Similarly, one can validly argue that, certain number of justices who are learned in Islamic law should constitute the Supreme Court as appeals on matters of Islamic Personal law go to Supreme Court. The Constitution also establishes Sharia Court of Appeal of the Federal Capital Territory and Sharia Court of Appeal of a State.³⁴

Some states Houses of Assembly also made laws pursuant to the Constitution for the establishment of courts with varying degrees of powers and jurisdiction to hear and determine matters on Islamic law. This include Sharia and Upper Sharia Courts and Area Courts. Some states in northern Nigeria empowered the Sharia Court to hear and determine criminal cases based on Islamic penal laws. It was argued that state legislature can enlarge powers of the *Shari'ah* Court. Notwithstanding, judicial and scholarly counter-opinion, the step taken

²⁹Abikan, A.I. 'The Legal Framework for Islamic Banking in Nigeria' Pp.20-39.

³⁰ The CBN guidelines are; CBN Guidelines on the Governance of Financial Regulation Advisory Council of Experts (FRACE) 2015 and Advisory Committee of Experts (ACE) for NIFIs 2015 in addition to CBN Guidelines for the Regulation and Supervision of Institutions Offering Non-interest (Islamic) Financial Services in Nigeria (NIFS), 2011.

³¹ Some sections of BOFIA which are relevant to Islamic Finance Industry include the following sections; 3 (1) (d), 4 (1), 22, 26, 30, 43, 56, 57, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 95 and 131.

³² Section 6 Constitution of the Federal Republic of Nigeria, 1999.

³³ Section 237 (2) (b) Constitution of the Federal Republic of Nigeria, 1999.

³⁴ Section 260 and 275 Constitution of the Federal Republic of Nigeria, 1999.

by some states in the North seems to have settled the matter.³⁵ However, the Court of Appeal in the case of *Haruna & 1 OR Vs Suleiman & AG Zamfara State*³⁶ and the case of *Mai-Daura Vs Tudun-Iya*³⁷ has decided that legislation can only enlarge the jurisdiction of Sharia Court of Appeal where the enlargement is used to allow similar jurisdiction to be created based on the established principle of interpretation of statutes of *Ejusdem Generis*.

The Court of Appeal further states that the law made by the Zamfara State House of Assembly and Katsina State House of Assembly that enlarged jurisdiction and conferred powers on the State *Shari'ah* Court of Appeal to hear and determine criminal and civil matters on Islamic law generally has taken the jurisdiction of the *Shari'ah* Court of Appeal outside the *rem* of Section 227 (1) and (2) of the Constitution. Its effect amounts to amendment of the provision of the Constitution. This is clearly *Ultra Vires* the State House of Assembly.³⁸ Therefore, the position of the jurisdiction of *Shari'ah* Court of Appeal remains as it is unless the Constitution is amended.

Furthermore, some conventional courts are empowered to hear and determine specific matters on Islamic law. Such as the State and the Federal High Courts. They are empowered to adjudicate Islamic banking matters in Nigeria. However, the High Court judges are not trained in the application of Islamic commercial jurisprudence which is the law governing commercial and financial transactions in the Islamic banking industry.³⁹ The *Shari'ah* Court of Appeal that applies

³⁵Abikan, A.I.' Islamic Banking Disputes: Between Judicial Pluralism and ADR' (2011) Journal of Islamic Banking and Finance Pp.15-16.

³⁶ SQLR (2014) Vol.2 Prt IV Pp.521-542.

³⁷ SQLR (2013) Vol.1 Prt IV Pp.72-90.

³⁸ Ibid.

³⁹Section 272 Constitution of the Federal Republic of Nigeria, 1999. Even the Federal High Court that hitherto claims jurisdiction in banking matters has been robbed of jurisdiction in banker customer relationship see proviso to Section 251 (1)(d) of the same Constitution. A. O. Sambo & A. B. Abdulkadir, '*Shari'ah*, Constitutional Challenges and Adjudication of Islamic Finance Disputes in Nigeria' in K. I. Dandogo et. al, *Essentials of Islamic Banking and Finance in Nigeria*, (Benchmark Publishers, Kano) 2013; A. O. Sambo & A. B. Abdulkadir, 'The Continuing Influence of Common Law Judges and Advocates in the Adjudication of Islamic Finance Disputes in Nigeria' in Hatem A. El-karanshawy et. al, *Ethics, Governance and Regulation of Islamic Finance*, (Bloomsbury Qatar Foundation Journals, Qatar,) 2015.

Islamic law does not have jurisdiction to entertain Islamic financial transactions, because its jurisdiction is limited to Islamic law of personal status.⁴⁰ The consequences of this, is that aggrieved parties are left with no remedy than their dispute to be adjudicated by an unlettered person which may lead to miscarriage of justice.

Courts are important institutions in the regulation and supervision of a nation's financial system. Virtually all the laws establishing other regulatory bodies and other banks and financial institutions refer to situations where regulatory matters would have to be referred to Courts for adjudication. Such situations are meant to give correct interpretation of the regulatory laws and check the abuse of the powers of the head of the regulatory bodies including *Shari'ah* Boards (SBs) in case of IFIs. The contentious area which as far as regulatory challenges is concerned is recognition of *Shari'ah* in High Court⁴¹ and the competence of the High court judges in handling *Shari'ah* cases.

It has been established that the High Court of a State and the Federal High Court are the Courts that are vested with jurisdiction to hear and determine banking and financial transactions and their allied matters in Nigeria.⁴² This depends on the issue before the court. The High Court of a State has exclusive jurisdiction to hear and determine a dispute between a customer and his bank⁴³ whereas other banking related disputes are to be determined by Federal High Court. This is a complete aberration from the entrenched *Shari'ah* Governance of Islamic finance because the Courts are not *Shari'ah*-oriented courts; the rules of practice and procedure of the Courts are not guided nor governed by the *Shari'ah*. Above all, the judges are not trained in the *Shari'ah*.

However, in some jurisdictions like Malaysia, these problems were overcome by establishing certain Specialised Courts. A division was established in the Malaysian High Court known as High Court *Muamalat* Division. All Islamic financial transactions are adjudicated by the said division.⁴⁴ The innovation of efficient judicial system

⁴⁰ See Section 277 Constitution of the Federal Republic of Nigeria 1999.

⁴¹ High Courts are not *Shari'ah* Court. The judges are trained to perceive and interpret issues in common law perspective.

⁴² See Sections 251 (1) (d) and 272 1999 Constitution.

⁴³ See proviso to Section 251 (1) (d) 1999 Constitution.

⁴⁴ Ahmad, I. M. & Buba, T. M. '*Shari'ah* Governance and Dispute Resolution in Islamic Financial Institutions in Nigeria' In Aliyu, S.U.R., Tahir, K.B., Ahmad, N.

within the Malaysian judiciary and the Malaysian *Shari'ah* Governance structure in Islamic finance is a move towards effective *Shari'ah* Governance which the Nigerian judicial system lacks. Competent and resourceful judges in Islamic finance should be appointed to adjudicate over such disputes within the spirit of *Fiqh al-Mu'amalat*. However, such could be done upon establishing specific legislation for the industry.

Conclusion

Knowledge is the sole feature that distinguishes human race from other creatures. Without knowledge one is equal to an animal and therefore, search for knowledge is compulsory. *Shari'ah* guides and regulates Muslim's conducts and equally the non-Muslim who submit to its jurisdiction. The conduct in this sense is holistic of both spiritual and mundane. *Shari'ah* plays a significant role in modern legal systems and especially in Nigeria. Such as in the judiciary, politics, governance and finance industry. This paper calls for pursuit of knowledge and particularly for persons that occupy delicate positions of bench and bar. It urges lawyers and Judges to pursue for *Shari'ah* knowledge. This is to guard themselves against the two categories of adjudicators.

A., Muhammad, A. D., Idris, M. & Umar, A. (eds) *Islamic Banking and Finance: A Leaf From Theory to Practice* Proceedings of the 1st International Conference organized by IIIBF 17th – 19th April, 2014 (Benchmark Publishers Ltd, Abuja, 2014) Pp. 560-572.