THEORY OF COURT SYSTEM UNDER ISLAMIC LAW AND THE PRACTICE IN NIGERIA

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Abstract

Dispute is common in human co-existence. Therefore, establishment of judicial institution is necessary for every society. Theories of court system are rules that guide resolution of disputes in Islamic courts. This paper examines theory of Islamic Courts and its practice in Nigeria. It adopts doctrinal methodology in the analysis of the *fiqh* theories. However, doctrinal and empirical methodologies were used in examining the Nigerian regime. The paper observes that Nigerian legal training does not avail one a considerable knowledge in Islamic law and thus leads to scarcity of talents in the practice and application of Islamic law in Nigeria. The paper recommends for review of the Nigerian legal education curriculum and its training sector. Arabic should be adopted as one of the languages of instruction in *Shari'ah* education and training. Training and retraining of judges of Sharia Courts on Islamic law should be improved. This can be done by entering into bilateral agreement with some traditional Ulama and foreign universities.

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1. INTRODUCTION

This paper examines theory of Islamic Courts and its practice in Nigeria. Theories of *fiqh* are general concepts that consist of solutions to all legal matters.[1] It is cumbersome to present a comprehensive theory of Islamic Courts and its practice in a journal paper. Therefore, the paper gives brief outlook of the topic.

The purpose of *Sharī'ah* is its application to the daily affairs of mankind. It guides human beings to success in this world and in the Hereafter. It is a complete legal system that establishes the rights and duties of individuals, communities and states. *Sharī'ah* cannot be properly applied without its knowledge. For this reason, messengers and prophets were sent to teach people the *Sharī'ah*.

Sharī'ah is meant to be obeyed.[2] Al-Mawardī and Abu Ya'lā are of the view that it is part of the responsibilities of the State to safeguard the religion, resolve disputes with justice by halting the oppressor from transgressing, protect properties and safeguard them so that people can enjoy their livelihood and travel around peacefully.[3]

Theories of court system are rules that work towards establishing justice by resolving disputes in Islamic courts. Islamic courts in Nigeria are referred to as Sharia Courts and Sharia Courts of Appeal. The applicable law in the Sharia Courts is Islamic law.[4] The various states laws confined it to the Maliki School interpretation.[5] However, multiple interpretations are often offered in some legal issues within the school. The Constitution and states laws set a standard for qualification for the appointment into the office of a Sharia Court judge. The paper examines the Nigerian regime along the *Sharia'ah* theories of court system.

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[1] Al-Rūmī, H.F.A.,*Al-Siyāgha al-Fiqhiyyah fī al-Asr al-Hadīth,* (Riyadh, Dar al-Tadmuriyyah, 1433H/2012), p. 514.

[2] Ibn HirzAllah, A. *Dawābit I'tbār al-Maqāsid fī Majāl al-Ijtihād wa Atharuhā al-Fiqhī*, (Riyadh, Maktabat al-Rushd, 1428H?2007), p. 69.

[3] Al-Qāḍī Abu Ya'lā, Muhammad bin al-Husain bin Muhammad bin Khalaf Ibn al-Farā', Al-Aḥkām al-Sulṭāniyyah, vol. 1, (Beirut, Dar al-Kutub al-Ilmiyyah, 1421H/2000), p. 27-28; Al-Māwardī, Abū Al-Hasan Ali bin Muhammad bin Habīb, *Al-Ahkām Al-Sulṭāniyyah*, vol. 1, (Egypt Al-Halabī,: n.d.), p. 26.

[4] Sections 262 and 277 of Constitution of the Federal Republic of Nigeria, 1999, sections 3 and 24 Kaduna State Sharia Courts Law, 2001, section 2 and 7 Borno State Sharia Administration of Justice Law, 2000

[5] *Ibid*.

2. OBLIGATION TO ESTABLISH ISLAMIC COURT

2.1 Obligation to Establish Islamic Court

Disputes are common occurrence for mankind. Therefore, establishment of judicial institution is a necessary for every society. Establishment of a judicial institution is an obligation upon the State. This obligation is found in several provision of the Qur'an, *Sunnah* as well as consensus of jurists (*Ijmā'*). Allah, the Most High said in the Qur'an:

> *"O Dawud! We did indeed make thee a vicegerent on earth: so judge thou between men in truth: nor follow thou the lusts (of thy heart), for they will mislead thee from the Path of Allah."*[6]Allah, the Most High further said: *"And Judge thou between them by what Allah hath revealed"*[7]

The Prophet (SAW) was reported to have said:"Whenever a judge ruled and he tried his best and arrived at an apposite decision, he has two rewards; and where he ruled and tried his best but made a mistake, he has a reward."[8]

2.2 Power to Appoint Judges

Jurists have agreed that the power or authority to appoint judges is exclusive to the State through the ruler. This is because the judiciary is an institution for safeguarding public interest which is the primary responsibility of the state. The power can be delegated to the relevant authority.[9]

The jurists have however differed in instances where there is no ruler or he cannot be reached. Hanafis have opined that in such condition, it is mandatory upon the people to select a leader who shall appoint a judge or adjudicate by himself.[10] According to the Malikis, the community leaders and its scholars should unite and appoint the most qualified person among them. Their appointment shall be presumed to have been on behalf of the ruler based on the principle of necessity.[11] The opinion among the Hanbalis is not much

[6] *Qur'an 38:26*

[7] Qur'an 5:49.

[8] Al-Bukhāri, Muhammad bin Isma'il bin Ibrahim bin Al-Mughīrah, *Sahīh Al-Bukhari, (*Riyadh, Darussalam 1997), Hadith No. 7352; Al-Naisābūriy, Muslim bin Muslim Abul Husain al-Qushairi, *Sahīhu Muslim*, (Beirut, Dār Ihyā Al-Turāth Al-Arabī n.d.), Hadith No. 4583.

[9] Al-Mausū'a, vol. 33, p. 296

[10] Ibn Hammam, *Fath Al-Qadīr*, vol. 5, p. 461; Ibn Abidīn, vol. 5, p. 369;

[11] Raudat Al-Qudāt, vol. 1, p. 61; Tabsirat Al-Hukkām, vol. 1, p. 21.

different from that of Malikis.[12] Shafi'is on their part only consider such appointment valid in the absence of ruler for a long time and with no possible time limit of his absence; and where no judge could be found in a near-by town; and there is a unanimous agreement by all leaders of the community on the chosen person. Where the community disagrees and separates into two camps, with one camp accepting the appointment and the other rejecting it, the judge shall only have authority over the part that accepts his authority. Where all those conditions are met, the appointment is valid and his ruling shall be binding on the whole community. This is because establishment of a judicial institution in the absence of a ruler so empowered to appoint, a collective obligation (*farḍ kifāyah*) on the society.

However, whenever the qualified person is appointed by the community and he accepts the position, the obligation is lifted upon the others. But if all qualified persons declined to take the position or the entire community agrees not to have a judge in their midst, they have wronged collectively. Allah, the Most High said: *"O ye who believe! Stand out firmly for justice"*[13]The Prophet was reported to have said: Allah does not purify a nation in which the right of its weak is not preserved. It was reported in another narration: How can a nation in which the right of its weak is not taken from its strong be purified.[14]

It could be understood from the verse and the *hadith* stated above that absence of a formal judicial institution that establish justice in the state leads to chaos and conflicts. In addition, the verse consists of a command, and all commands are construed as obligatory unless otherwise qualified (*al-Amr li al-Wujūb*).[15]

It is permissible for the state to appoint more than one judge in the same jurisdiction, and limit or delimit territorial jurisdiction of each to a particular area of the town or matters.[16] In *Maliki* School, the jurisdiction can limit and

[12] See: Al-Maqdisī, *Al-Mughnī*, vol. 9, p. 106; Al-Buhūtiyy, *Kashshāf Al-Qinā',* ibid, vol. 6, p. 188.

[13] Qur'an 4:134

[14] Transmitted by Ibn Majah, vol. 2, p. 810; Ibn Hibbārn, Mawārid al-Zamān, p. 374; Al-Hākim, vol. 3, p. 258; Al-baihaqī, vol. 10, p. 93. Its narrators are trusted (See: Mujma' al-Zawā'id, vol. 4, p. 297; Talkhīs al-Habīr, vol. 2, p. 402; Al-Bath al-Kabīr, vol. 1, p. 351).

[15]Al-Āmidī AM, *Al-Ihkām fī Uṣūl al-Ahkām*, vol. 2, (Beirut, Al-Maktab al-Islāmī 1402H) p. 144; Al-Zarkashī, BMBA, *Al-Bahr Al-Muhītfī Uṣūl al-Fiqh*, vol. 2, (Dār Al-Kutub Al-Ilmiyyah 1421H/2001), p. 348; Al-Sarakhsī, A.M.A., Al-Usūl, vol. 1, (Beirut, Dar al-Kitāb al-Ilmiyyah, 1414H/1993), p. 11; Al-Bukhārī AAA, *Kashf Al-Asrār 'an Uṣūl Fakhr Al-Islām Al-Bazdawī*, vol. 1, (Dār Al-Kutub Al-'Arabiyyh 1414H/1994), p. 101; Al-Shaukānī, Irshāf al-Fuhūl, p. 92; Al-Qarāfī SAI, *Sharh Tanqīh al-Fuṣūl fī Ikhtiṣār Al-Mahṣūl fī Al-Uṣūl*, (Dār Al-Fikr 1393H), p. 127; Al-Zuhailī, M.M., Al-Wajīz fī Usul al-Fiqh al-Islāmī, vol. 2, (Damascus, Dar al-Khair, 1428H/2006), p. 23.

[16] Al-Mausū'a vol. 33, 301-302.

delimit to a territory or matters. The power of the judge to adjudicate and deliver rulings should however be independent of the other judge or court.

Likewise, Hanafis, Hanbalis and some Shafi'is are of the opinion that two or more judges can be appointed as quorum for some decisions to be made.[17] The other schools did not however accept multiplicity of judges; they rely on possibility of the judges to agree on some issues of *ijtihād*. However, this hurdle could nevertheless be avoided by recognising the opinion of majority as final decision which is the opinion held by some Shafi'is.[18]

Hisbah is an institution in the executive arm with judicial powers. *Hisbah* is a noun of *ihtisāb* which means in the expectation of Allah's reward. It also connotes good administration ability. In its technical sense, majority of jurists have described it as commanding the good where its omission becomes obvious and preventing the wrong where its commission becomes obvious.[19] The relationship between regular court and *al-hisbah* is that both the judge of regular court and the *muhtasib* have judicial powers on specific types of claims that relate to clear wrongs such as cheating in measure, defrauding consumers, misrepresenting merchandise, refusal to pay back debt even though one has ability. The scope of judicial powers of *hisbah* is limited to religious wrongs. Thus, claims and denials regarding private rights and interests shall not be entertained by the *muhtasib*.

Hisbah institution is however more powerful than a regular court in relation to religious wrongs. Religious obligations are specific rights of Allah. The *muhtasib* acquires his power from the power of the ruler to impose the provisions of the *Sharī'ah* in relation to religious and social wrongs while a judge in the regular court is to do justice and be fair to litigants that appear before him.[20]

Wilāyat al-Mazālim: The *mazālim* court is a special court that is not restricted by procedure of regular court. *Mazālim* court has wider powers than regular court due to hierarchy and in issues involving senior state officials that a regular court judge may not have power to bring before him. The judge has

[17] Al-Fatāwā Al-Hindiyyah, vol. 3, p. 317; Al-Fiqh Al-Islāmīy wa Adillatuh, vol. 8, p. 6248.
[18] Mughnī Al-Muhtāj, vol. 4, p. 380; Al-Mughnī, vol. 9, p. 105; Hāshiyat Al-Dusuqī, vol. 4, p. 134; Al-Fiqh Al-Islāmī wa Adillatuh, vol. 8, p. 6248.
[19] Al-Māwardī, Ali bin Muhammad Habīb al-Baṣrī, *al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, (Beirut, Dar al-Fikr, 1983), p. 232.
[20] Al-Māwardī, Ibid, p. 232; Abu Ya'lā, Muhammad bin al-Husain al-Farrā' al-Hanbalī, *al-Aḥkām al-Sulṭāniyyah*, (Cairo, Mustafa al-Babī al-Halabī, 1421H/2000), p. 269.

some executive powers as representative of the Caliph.[21] As a result, where a judge cannot properly adjudicate a matter or execute the matter or even bring a litigant before him, the case can be transferred to a *Mazālim* Court.

3. Appeal System of Islamic Courts:

Courts are graded on hierarchy for determination of disputes, except in certain instances where a decision of a Court may be taken up by the *mazālim* Court. The Court that hears a matter rehears it where there is justification for a retrial or reassessment of evidence presented. This is based on the fact that the judge is qualified to adjudicate and the presumption that he is a credible person and has followed the laid down procedure in arriving at the decision. Judgements are presumed valid unless suspicion exists. This is based on the rule of presumption of regularity (*al-Aslu al-Salāmah*).

Al-Zuhaili[22] referred to the judgement of Ali (RA) in Yemen where the litigants were unsatisfied by the judgment to appeal to the Prophet who will be in Makka. The Prophet confirmed the ruling of Ali and did not reprimand the litigants regarding their appeal.[23] Likewise, Umar (RA) in his letter to Abu Musa al-Ash'arī has implied to the permissibility of appeal through review. He said: "A judgement you passed should not prevent you from reviewing it if your opinion has changed, to return to what is truth or right. The truth is ancient and cannot be invalidated by anything and reversing to the truth is better than continuing the wrong.'' Therefore, hierarchy is a ladder of a litigant through different grades to ventilate his grievances.

The office of Qāḍī al-Quḍāt (Chief Judge) was created by the Abbasids. It was at that time, that Imam Abu Yusuf, the famous companion of Abu Hanīfa was appointed to take the position. His responsibilities include recommendation for appointment into judicial offices and its supervision. The Chief Judge is the head of the judiciary in the State.[24]It can safely be argued that it was one of the early instances in which formal system of review of judgement was established.

[21] Al-Māwardī, ibid, p. 233; Abu Ya'lā, Al-Ahkām al-Sultaniyyah, p. 58; Ibn al-Arabī, *Tabsirat al-Hukkām*, vol. 1, p. 12.

[22] Al-Zuhailī, Al-Fiqh al-Islāmī wa Adillatuhu, vol. 8, p. 836.

[23] Ahmad bin Hanbal, *al-Musnad*, vol. 2, p. 15: Musnad Ali bin Abi Talib, Hadith No. 573; Ibn Hayyan, Muhammad bin Khalaf, *Ahbar al-Qudat,* vol. 1, (Beirut, 'Ālam al-Kutub, n.d.) p. 96-97.

[24] Al-Māwardī's Adab Al-Qāḍī, vol. 2, p. 396; Tabṣirat Al-Hukkām, vol. 1, p. 77; Mu'īn Al-Hukkām, p. 26.

4. QUALIFICATIONS AND QUALITIES OF A JUDGE

4.1 Qualifications of a Judge

The major qualification of a judge in Islam is his ability of *Ijtihād.* A *Mujtahid* is a jurist who has knowledge of deducing the law directly from the raw sources (*Qur'an* and *Sunnah*). The jurists unanimously agree over this as a prerequisite condition.[25] Majority of Malikis are however of the opinion that a *faqīh* (jurist) with knowledge of the provisions of the law suffices even if he is a *muqallid* (imitator) of another *mujtahid*. In the absence of an absolute *mujtahid* a *muqallid* should be appointed.[26] According to Hanafis, it is enough if one has ability to refer to the *fatawa* of other scholars and their statements.[27] He should have the ability to find legal issues and principles of adjudications.[28]

In most jurisdictions of Muslim countries of today the qualification of a judge is set based on academic qualification of a university degree or diploma in *Sharī'ah* or Islamic Studies. This may not abreast the candidate of the required knowledge for the office. However, the reason behind academic qualification is to have a judge who may be conversant with the legal provisions of Islamic law (*fiqh*), knowledge of verses and *ahādīth* of *ahkām* (injunction) as well as the terminologies of *Sharī'ah* which other academic disciplines may not offer.[29]

4.2 Qualities of a Judge

Jurists are unanimous that a judge must be Muslim, sane, adult and free not a slave.[30] These are discussed hereunder:

1. The condition of being a Muslim is based on the fact that the office of a judge is a form of authority or guardianship (*wilāyah*). A non-Muslim has no authority or guardianship over a Muslim. Allah, the Most High said: *"And*

[25] This opinion has been attributed to Imam Malik, Shafi'ī and Hanbali.

[26] Al-Dusūqī, *Hāshiyah,* ibid, vol. 4, p. 129 .

[27] Al-Kāsāni, Abubakar bin Mas'ūd bin Ahmad, *Badā'i Al-Sanā'i' fī Tartīb Al-Sharā'i',* vol. 7, (Al-Matbū'āt Al-'Ilmiyyah 1327H), p. 3; Ibn Qudāmah, *Al-Mughnī*, ibid, vol. 9, p. 41.

[28] Durar al-Hukkām, vol. 4, 529.

[29] Al-Zuhailī, M., Mausū'at Qaḍāyā Islamiyyah Mu'āsirah: Ma'ālim al-Qaḍā' al-Islāmī, (Damascus, Dar al-Maktabī, 1430H/2009), p. 416.

[30] Ibn Farhūn, Burhanuddīn Ibrahim bin Ali Al-Madanī Al-Mālikī, *Al-Dībāj Al-Mudhahhab fī Ma'rifati A'yān 'Ulamā' Al-Madhhab*, vol. 1, (Dār Al-Kutub Al-Ilmiyya, Beirut: n.d.), p. 7; Ibn Ābidīn, Muhammad Amīn, *Hāshiyat Radd Al-Mukhtār 'alā Al-Durr Al-Mukhtār*, vol. 5, (Būlāq: n.d.) p. 354; Al-Shirbīni, *Mughnī al-Muhtāj,* ibid, vol. 4, p.3 75; Al-Buhūtiyy, *Kashshāf Al-Qinā'*, ibid, vol. 6, p. 285

never will Allah grant to the unbelievers a way (of authority) over the believers."[31]

On whether a non-Muslim can be appointed to adjudicate between non-Muslims, the majority of jurists took the position that it is not permissible for a non-Muslim to be a judge.[32] However, Abu Hanifa stated that, it is permissible to appoint a non-Muslim judge to adjudicate between people of his religion. He based his opinion on the fact that it is allowed for them to testify on one another as well as to act as guardians in their marriages. Thus, it is appropriate for them to have a judge within themselves to adjudicate between them in accordance with their customs. Shafi'i Jurists expressed similar opinion.[33]

2. *Al-Adālah* (Piety and Credibility) is also a requirement of a judge. *Al-Adālah* is described by jurists as desisting from *kabā'ir* (sins) while not persisting on committing *saghā'ir* (minor sins) as well as avoiding anything that dents one's Credibility. A *fāsiq* (unrighteous) shall not be appointed as a judge. This can be understood from the saying of Allah, the Most High: *"O ye who believe! If an unrighteous person comes to you with any news, ascertain the truth, lest ye harm people unwittingly."*[34] On the part of the Hanafis, *'adālah* is not a condition rather is a recommended quality. Thus, a *fāsiq* can be appointed as long as he did not violate the limits of *Sharī'ah*.[35]

3. Majority of jurists are on agreement that a judge must be male. Therefore, it is illegal to appoint a female judge. The Prophet said: "A people that handed their affairs to a woman will not succeed."[36]It has never been reported that a woman was appointed as a judge or governor of any region in Islamic state.[37]

However, the Hanafi's permit the appointment of a woman as judge in matters that do not include *hudūd* (prescribed punishments) or *qiṣāṣ* (retributions). As she has no capacity to testify on these matters so she cannot adjudicate on them.[38] Ibn Jarīr Al-Tabarī shares the opinion and further states that it is

[31]Qur'an 4:141.

[32] Zaidān, Abdulkarim, *Niẓām al-Qaḍā'i fi al-Sharī'ah al-Islamiyyah*, (Mu'assasat Al-Risālah 1409H/1989), p. 27

[33] Al-Harīrī, Ibrahim Muhammad, *Al-Qawā'id wa al-Ḍawabit al-Fiqhiyya li Nizām al-Qada'i fi al-Islām*, (Dār 'Ammār 1420/1999), p. 158.

[34]Qur'an 49:6

[35] Zaidān, *Nizām Al-Qadā'*, ibid, p. 29.

[36] Bukhārī, ibid, Hadith No. 4425.

[37] Ibn Qudāmah, *Al-Mughnī*, ibid, vol. 9, p. 39-40; Al-Nawawī, Abu Zakariyyā Yahyā bin Sharaf, *Al-Majmū' Sharh Al-Muhadhdhab*, vol. 18, (Dār Al-Fikr, Beirut: n.d.) p. 263.

[38] Al-Kāsānī, *Al-Badā'i'*, ibid, vol. 7, p. 4; Ibn Hamam, *Fath Al-Qadīr*, ibid, vol. 5, p. 454.

similar to the office of a muftī which is not exclusive to males. Ibn Hazm Al-Zāhirī shares the view. He relies on a narration that Umar appointed Al-Shifā' bint Abdullah Al-Adawiyyah to supervise conducts of traders (*hisba*) in the Medina market.[39]

However, the opinion of the majority of jurists is authoritative when compared to the general practice of the Prophet and his Companions. The appointment of Shifā' to the market *hisba* by Umar is not similar to the office of a judge. In fact, Ibn Al-Arabī implied that the narration in respect of *Shifā'* is a weak narration because of falsification of innovators, and therefore invalid.[40]

Despite the Shafi'i's rejection of a woman as a judge, they are of the opinion that whenever a strong ruler appoints a woman as a judge, her judgements are valid and it should be executed accordingly.[41]

4. A judge should be fit in all his senses. He should have the ability to speak, hear and see.[42]According to Malikis, the attributes should be present in a judge at the time of his appointment and as long as he retains the post. His judgements are also valid if he loses one of those senses while on the post. But are divergent over its validity if he loses two of the stated senses and they have agreed that his judgements are not executable if he loses all the three senses.[43]

5. The judge should also be strong but not violent; simple but not weak; intelligent and perceptive that cannot be easily deceived.[44]These conditions are not stringent as above; they are nevertheless desirable quality for a judge to possess. Thus, they are resorted to in the presence of many qualified persons who have fulfilled the above essential conditions.

[39] Ibn Hazm's Al-Muhallā vol. 9, p. 429-430; Ibn Rushd's Bidāyat Al-Mujtahid, vol. 3, p. 384; Qal'ah Jī, Muhammad Al-Rauwās, *Mausū'at Fiqh Umar bin Al-Khattāb*, (Maktabat Al-Falāh: 1981), p. 101; See also: Ibn Abdul-Barr's *Al-Istī'āb* p. 1868.

[40] Ibn Al-Arabi, *Ahkām Al-Qur'ān*, *in his commentary in Surat Al-Naml.*

[41] Al-Shirbīnī, *Mughnī Al-Muhtāj*, ibid, vol. 4, p. 377;

[42] Al-Maqdisī, *Al-Mughnī*, vol. 9, p. 41; Al-Ramlī, Muhammad bin Ahmad bin Hamzah, *Nihāyat al-Muhtāj ilā Sharh al-Muhtāj*, (Mustafa Al-Halabi: 1357H), vol. 8, p. 226.

[43] Ibn Rushd, Muhammad bin Ahmad, *Bidāyat Al-Mujtahid wa Nihāyat Al-Muqtasid,* (M. S. Hallāq Eds.*,* Maktabat Ibn Taimiyyah, Cairo: 1415H), vol. 2, p. 450; *Tabsirat Al-Hukkām*, p. 23-24; Al-Dusūqī, *Hāshiyah,* ibid, vol. 4, p. 130.

[44] Al-Maqdisī, *Al-Mughnī*, vol. 9, p.1 2

4.3 Application for the office of a Judge

It is disliked for a man to pursue and seek the office of a judge. Anas bin Malik narrated that the prophet, may Allah be pleased with him said:

> Whoever that sought the post of judgeship through intercessors, shall be left to his own devices; and whoever that is compelled to take it, Allah will send him an angel as a guide.[45]

Other jurists have however limited the *karāhah* (aversion) to where there are better qualified persons with ability to deliver justice. However, where the qualified person is confident of his ability to shoulder the demands of the post, it becomes binding upon him to seek the post.

Thus, it is rare for a qualified jurist to apply for the office of a judge in an Islamic Court. For this reason, qualified jurists are asked to recommend persons that are deem most qualified for the position. It is *wajib* (obligatory)[46] upon the qualified jurist who, in the absence of any qualified jurist, is asked to take the post. Under such circumstances, he would have committed a sin if he declines it.[47] The Malikis are of the opinion that taking the office of Judge is obligatory upon a person who fears his persecution or injustice being inflicted upon him if he declines it.[48] Maliki school further makes it *mustahab* (recommendatory)[49] for a jurist to accept the office if is a poor man to secure an income from *bait al-māl* by occupying the office; or to spread knowledge to benefit the public through the office where the scholar is not popular but extremely knowledgeable.

Shafi'is and Hanbalis said that taking the office of judge is *mubah* (lawful) where the person has ability to deliver justice and make *ijtihād* (independent legal reasoning) in the presence of others in the town that are like him. Taking the office of judge is *makrūh* (reprehensible or disliked) where the intention is to gain superiority or high standing in society. The *karahiyah* also applies where the person is rich and does not require the income from *bait al-māl*; or he is famous scholar who does not need a platform for spreading his

[45] Transmitted by Tirmidhī, vol. 3, p. 605; Al-Manāwī declared it as defective Hadith in *Faiḍ Al-Qadīr* because one of its narrators is unknown and another as weak.

[46] An act is said to be obligatory if the directive to do it is mandatory and its omission is sinful.

[47] Kuwaiti Ministry of Endowment and Religious Affairs, *Al-Mausū'a Al-Fiqhiyyah,* vol. 33, (Egpt, Dār Al-Safwah, 1416H/1995), p. 285.

[48] Al-Dasūqī, Muhammad bin Ahmad bin Arafah, *Al-Hāshiyah Alā Al-Sharh Al-Kabīr,* vol. 4, (Dār Al-Fikr n.d.), p. 130.

[49] An act is said to be *mustaha*b where the command to carryout something is not obligatory but preferred. It is also synonymous to al-Mandūb. (Al-Bāhusain, al-Hukm al-Shar'ī, p. 163).

knowledge; or where there are other persons better qualified than him. The office of judge is *harām* (prohibited) in respect of *jāhil* (an ignorant person) who has no knowledge of *qaḍā'* (adjudication); or has the knowledge of the law but is unable to properly carryout the required responsibility; or is involved with conducts that dent his piety or *adālah* (credibility); or to revenge against his enemies.[50]

5. PERSONNEL OF THE COURT AND AIDES OF A JUDGE

The Judge of an Islamic Court needs a number of aides to assist him in administering justice in his jurisdiction. They include, the Scribe of the Judge, the police, the judge's doorman, al-muzakkī (general purpose witness to ascertain credibility or otherwise of witnesses) as well as an interpreter. The bases for the aides are examined hereunder:

The Scribe of Judge or Court Clerk: It is *mustahab* (recommended) for a Judge to have a scribe. The Prophet appointed Zaid bin Thābit and others as his scribes.[51] The scribe (or the Registrar, Court Clerk or any servant) should be *'ādil* (credible Muslim), has the knowledge of recording proceedings and keeping records. It is desirable that he has the knowledge of *fiqh* (the law) and good writing. He should have the ability to write what he hears accurately if his knowledge of *fiqh* is minimal. He should seat in a place that he is fully visible to the Judge.[52]

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[50] Sadr Al-Shahīd, Husām Al-Dīn Umar bin AbdulAzīz, *Sharh Adab Al-Qāḍī*, vol. 1, (Matba'at Al-Irshād, Baghdād 1397H/1977), p. 134; Ibn Hamām, *Sharh Fath Al-Qadīr alā al-Hidāyah,* vol. 5, (Mustafa al-Bābī 1389H) p.4 59; Group of Indian Scholars in'' the 11th Century Hijra, *Al-Fatāwā Al-Hindiyyah,* vol. 3, *(*Dār Al-Ma'rifah 1393H), p. 210; Al-Kāsāni, Abubakar bin Mas'ūd bin Ahmad, *Badā'i Al-Sanā'i' fī Tartīb Al-Sharā'i',*vol. 7, (Al-Matbū'āt Al-'Ilmiyyah 1327H), p. 3-4; Ibn Abi Al-Dam, Shihābuddīn Ibrahim Abdullah Al-Hamawī Al-Shafi'ī, *Adab Al-Qaḍā,* (Maktabat Al-Haram Al-Makkī n.d), p. 82-83; Al-Jamal, Sulaimān bin Umar, *Hāshiyat Al-Jamal alā Sharh Al-Manhaj*, vol. 5, (Ihyā' Al-Turāth Al-Arabī n.d), p. 335-336; Al-Shirbīnī, *Mughnī Al-Muhtāj*, ibid, vol. 4, p. 373; Al-Dusūqī, Muhammad bin Ahmad bin Arafah, *Al-Hāshiyah Alā Al-Sharh Al-Kabīr,* vol. 4, (Dār Al-Fikr n.d.), p. 130-131; Ibn Farhūn, *Tabsirah,* ibid, vol. 1, p.1 2; Al-Maqdisi, Abdullah bin Ahmad bin Qudāma, *Al-Mughni fī Fiqh Al-Imām Ahmad bin Hanbal Al-Shaibānima'a al-Sharh Al-Kabīr*, vol. 9, (Beirut, Dār Al-Fikr, 1405H), p. 34-37; Al-Buhūtīyy, Mansūr bin Yūnus bin Idrīs, *Kashshāful Qinā' 'an Matn Al-Iqnā',* vol. 6, (Maktabat Al-Nasr Al-Hadītha, Riyadh: n.d.), p. 286-288.

[51] The Hadith is narrated by tirmidhī, vol. 5, p. 67-68, Hadith No. 2714. The Hadith is weak (*ḍa'īf*) according to Tirmidhi and fabricated (*mauḍū'*) according to al-Bānī.

[52] The preferred position in the Maliki School is that appointing a scribe for a Court is obligatory (*wājib*) directive. see Al-Dusūqī, *Hāshiyah*, ibid, vol. 4, p. 138; Al-Sharh Al-Saghīr, vol. 4, p. 202; Al-Kāsānī, *Al-Badā'i'*, ibid, vol. 7, p. 12; Al-Shirbīnī, *Mughnī Al-Muhtāj*, ibid, vol. 4, p. 338, 339; Al-Maqdisī, *Al-Mughnī* vol. 9, p. 72; Ibn Abī Al-Dam's Adab Al-Qaḍā, p. 109.

Other Aides of Judge: They have the responsibility of producing litigants in the Court and maintaining order among the litigants and other persons present. It is desirable that such official should be religious and trustworthy persons.[53] Nowadays, these aides are represented by bailiffs and police officers assigned to courts.

Judge's Doorman (*Hajib Al-Qāḍī*): A *Hajib* is responsible for admitting litigants in the Court.[54] One is allowed to see the Judge with the *hājib's* leave. Shafi'is and Hanbalis state that it is undesirable for a Judge to have somebody preventing people with complaints coming for their needs. They relied on the saying of the Messenger of Allah:

> Whoever that Allah appoints to a position of authority to rule over Muslims but secluded himself with a chamberlain (hājib) from them and their needs and poverty, Allah will exclude Himself from against his needs and his poverty.[55]

The *Hajib* may admit a late comer over a first arrival. However, they allow it in case of large crowds in Court.[56]

Al-Muzakkī: The Court relies on *Al-Muzakkī* to determine the credibility of litigants' witnesses. The default rule is that a Judge relies on his knowledge of the witness to determine whether he qualify to be a witness. Would the judge appoint a public *muzakkī* to investigate credibility of a witness where he does not know the witness? The judge will seek the advice of credible as well as religious persons who know the conditions of their communities. The *Muzakkī* will go to the witness's community, places of business, the mosques he prays and his neighbours the kind of person the witness is. Trustworthy persons should be asked on credibility or otherwise of the witness and same be reported to the judge based on the agreement of at least two persons on the witness.

Interpreter: There should be an interpreter who speaks the language of litigants and witnesses. One interpreter is enough for this purpose. Zaid bin Thābit said, the messenger of Allah has directed me to learn the scripts of Jews and said: I do not trust Jews to write on my behalf. He said, I learnt it a fortnight. After learning it, I used to reply to the letters of the Jews and read

[53] Sadr Al-Shahīd, Sharh Adab Al-Qāḍ, vol. 1, p.2 44; Ibn Abī Al-Dam, Adab Al-Qaḍā, p. 108.

[54] Al-Mausū'a, vol. 33, p.310.

[55] Transmited by Abu Dāwūd, vol. 3, p.2 57

[56] Al-Hamawī's Adab Al-Qāḍī, p. 106; Al-Māwardī's Adab Al-Qāḍī, (Ammār P), vol. 1, p. 204

its content to the Prophet.[57] However, if an interpreter is invited by a litigant or purposefully called upon by the judge to translate in a specific case, more than one is required as he is regarded as a witness. Shafi'is and Hanbalis construe interpretation as *shahādah* (testimony) and therefore require all the necessary conditions of testimony.[58]

6. APPLICABLE LAW IN SHARĪʿAH COURT

6.1 Application of the Sharī'ah Provisions

The objective of judiciary is the promotion of justice and protection of people's interest as well as safeguarding the religion of Allah among His servants. Applying the law of Allah to the conduct of His servants and resolving their disputes based on His directives is an act of worship. This is because it is part of the religious duty carried out by the Messengers and Prophets of Allah. Allah said:

> O Dāwud (David)! Verily! We have placed you as a successor on earth, so judge you between men in truth (and justice) and follow not your desire for it will mislead you from the Path of Allah. Verily! Those who wander astray from the Path of Allah (shall) have a severe torment, because they forgot the Day of Reckoning.[59]

HE also Said: "And so judge (you O Muhammad) between them by what Allah has revealed."[60]

Therefore, the primary duty of a judge as the Head of the Sharī'ah court is seen as a religious duty and an act of worship to seek the pleasure of Allah the Most High. The Prophet, peace be upon him, was reported to have said: "Actions are (judged) on intention and everyone gets that which he intended."[61]

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[57] The Hadīth is narrated by Tirmidhī, Hadith No. 2715. According to Tirmidhī, the Hadith is Hasan Sahīh. Al-Bānī too has declared it Sahīh in See: *Mishkāt Al-Maṣābīh*, No. 4659; *Sahīh wa Ḍa'īf Sunan Al-Tirmidhī*, Hadith No. 2715.

[58] Al-Kāsānī, *Al-Badā'i'*, ibid, vol. 7, p. 12; Al-Dusūqī, *Hāshiyat,* ibid, vol. 4, p. 139; *Al-Rauḍah,* vol. 11, p. 136; Al-Shirbīnī, *Mughnī Al-Muhtāj*, ibid, vol. 4, p. 389; Al-Maqdisī, *Al-Mughnī*, vol. 9, p. 100,101.

[59] *Qur'an 38:26*

[60] Qur'an 5:49.

[61] Transmitted by the six Hadith transmitters namely: Bukhari, Hadith No. 1, Muslim, Hadith No. 1907, Abu Dawud, Hadith No. 2203, Tirmidhi, Nasa'i, and Ibn Majah. Others have also transmitted it such as: Ibn Khuzaimah in his *Sahih*, Imam Ahmad in *Musnad*, Humaidi also

6.2 Protection of General Objectives of Sharī'ah

The objective of Sharī'ah is to protect of the religion, life, mind, progeny as well as wealth. Some added dignity as the sixth necessity[62] which Al-Subkī agrees with.[63] This addition is not however without its critics.[64]

Muslims are oblige to act in accordance with the objectives, the role of the judiciary (*al-Qaḍā' al-Islāmiyy*) is central in the maintaining the objectives. The protection of the religion of Islam is established through both affirmative and punitive ways. In the affirmative way, it is protected by establishing general laws and specific rules.[65] As the Lawgiver reveals the law and the Prophet conveys the message, the law has to be maintained and applied through scholars and jurists who teach and issue *fatwa* to address the needs of Muslims. These are the affirmative ways of protecting the religion. The punitive aspect of the protection of religion is undertaken through state authorities mainly represented by the Sharī'ah Court. This is by resolving disputes based on the provisions of the Sharī'ah. This objective is central to the role of the Islamic Court.[66]

On the punitive side, religion is protected by preventing anything that contradicts its provisions or dents it.[67] This is the responsibility of scholars and the state. Scholars are guardians of the Sharī'ah, while the state implements the commands of Allah among His creation. The Court's responsibility of establishing the law of Allah is ensuring that people are abiding by its dictates. According to al-Māwardī, one of the functions of a Court is the implementation of *Hudūd* punishments: If there is an

in his *Musnad* and Dar Qutni in Sunan, etc. [See Al-Borno, Muhammad Sidqi bin Ahmad bin Muhammad, *Mausū'at Al-Qawā'id Al-Fiqhiyyah*, (Riyadh, Al-Taubah, 1997), 1:130].

[62]Shihābuddīn Abu al-Abbās Ahmad bin Idriss Al-Qarāfī, *Sharh Tanqīh al-Fuṣūl fī Ikhtiṣār al-Maḥṣūl fī al-Usūl,* (Beirut: Daral-Fikr, 1424H/2004),391.

[63]Al-Banānī, Hāshiyat al-Banānī, 280.

[64]Ibn Ashūr, *Maqāsid al-Sharī'ah*, 81-82.

[65]Al-Shāṭibī, *Al-Muwāfaqāt*, vol. 2, p. 8.

[66] Shettima, M., Biu, H.A., 'Role of Objectives of Sharī'ah in Islamic Adjudication and Procedure' (2017) 3, *Journal of Islamic Legal Studies*, 1, 14.

[67]Ibid.

infringement on the Rights of Allah, Judicial action is initiated even without complaints through *ḥisbah*,[68] confession or evidence.[69]

Protection of life[70] refers to sacred soul that the Sharī'ah prevented from being violated. Islam protects life through prohibition of transgression against a person, blocking all the means of killing, retribution, requirement of proof as evidence of killing, guaranteeing the life either through *diyyah* (blood money) or *qiṣāṣ* (retribution) so that life is not violated; delaying retribution to preserve the life of a foetus that may be affected, pardoning a killing to protect the life of the accused and accepting *diyyah* as an alternative, and provisions that render prohibited lawful because of necessity to protect life.

The Sharī'ah Court is also responsible for the punitive aspect of protection of life. It is responsible for determining whether an act of killing requires retribution (*qiṣāṣ*). The guardian of the slain will be allowed to execute it under judicial supervision; or can delegate a competent authorised person to carry it out. Other retributions that do not amount to death as well as *hudūd* punishments should be executed by duly authorised persons. Hanbalis state that all punishments of *qiṣāṣ* should be carried out by persons delegated by the state and employed for such purpose.[71]The role of the Court in the implementation of the law of Allah regarding *qiṣāṣ* is undisputed. Self-help is not allowed. It is exclusive duty of the State through the court.

Protection of the mind (*al-aql*) or mental health is described as the root of conduct and the key for the validity of obligations. Sharī'ah prohibits anything that physically harms, such as alcohols, drugs and anything that spiritually damaged the mind.[72] The punishment for consumption of alcohol is a *hadd* punishment.[73]The punishments are under the exclusive power of the

[68]*Hisbah* testimony refers to a situation where a witness initiates a claim where the right of Allah has been violated. It is a testimony "in expectation of Allah's reward." Example is where a man is living with his wife despite divorcing her thrice or a woman who married a husband within her waiting period or where a Muslim stops praying the five daily prayers. (*Al-Mausū'ah al-Fiqhiyyah*, vol. 20, p. 298).

[69]Abū Al-Hasan Ali bin Muhammad bin Habīb Al-Māwardī, *Al-Ahkām Al-Sulṭāniyyah*, (Egypt, Al-Halabī, n.d.), 68.

[70] Al-Yobi, *Maqāṣid al-Sharī'ah*, p. 211. Habib, Muhammad Bakr Ismā'īl, *Maqāṣid al-Sharī'ah: Ta'ṣīlan wa Taf'īlan*, (Mecca, Da'wat al-Haqq Series, 1427H), , p. 314.

[71] Abdukarīm Zaidān, *Niẓām al-Qaḍā' fī al-Sharī'a al-Islamiyyah*, (Mu'assasat al-Risālah 1989/1409H), 284.

[72]Wanīs,*Baḥth Mukhtaṣar*, 43.

[73]Al-Hanafī, AbdulGhaniy al-Maidānī, *Al-Lubāb fī Sharh al-Kitāb*, (Al-Maktaba al-Ilmiyyah, n.d.), 3:194; Ibn AbdulBarr, Abu Umar Yusuf bin Abdullah al-Namrī, *Al-Istidhkār al-Jāmi' li Madhāhib Fuqhā' al-Maār wa 'Ulamā' al-Aqtār,* (Abu Dhabi: Mu'assasat al-Nidā', 1422H/2002), 9:185; Ibn Qudāmah, *Al-Mughnī,* 304.

State delegated to the Court. The prohibition of drugs is due to its effect of intoxicating on the mind.[74]

Protection of the progeny may be through affirmative and punitive means. Protection of the progeny is affirmative through encouragement for marriage and for marrying fertile woman as well as desirability and lawfulness of polygamy. It is punitive by prohibiting anything that deters marriage, minimizes it or ends it after its existence. This also happens by prohibiting anything that prevents pregnancy or abortion. It also includes prohibition of any illicit or unnatural sexual activities as it hampers nobility of people's progeny. Like all *ḥadd* punishments, the Islamic Court has exclusive power over the proof and implementation of the punitive measures to protect progeny. For example, *li'ān* (mutual imprecation) between a husband who accuses his wife of committing adultery which she denies can only occur in the Sharī'ah Court.[75] Likewise, the *ḥadd* of adultery can only be proved before a judge after four credible witnesses have come and testified that they have seen the accused committing the act.[76]

Sharī'ah also protects rights and properties of individuals. Allah the Most High said:

> O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.[77]

Eating people's property without any legal basis is prohibited.[78] The Prophet, peace be upon him was reported to have said: "The property of a Muslim does not become lawful but with soul's consent".[79]

[74]Abu al-'Abbas Ahmad Ibn Taimiyyah, *Al-Siyāsah al-Shar'iyyah fī Iṣlāḥ al-Rā'ī wa al-Ra'iyyah*, (Cairo: Dar al-Sha'ab, n.d.) 128.
[75]Al-Mausū'ah al-Fiqhiyyah, 7:249.
[76] Zaidān, *Niẓām al-Qaḍā'i,* 187.
[77] Qur'an 4:29
[78] Ibid.
[79] Ahmad bin Muhammad bin Hanbal Al-Shaibānī, *Musnad Al-Imām Ahmad bin Hanbal,* (Cairo, Mu'assasat Al-Qurṭubah, n.d.), 5:72; Ali bin Umar bin Ahmad bin Mahdī Al-Dārqutni, *Al-Sunan*, (Dār al-Ma'rifah, Beirut: 1386/1966), 3: 26; Ahmad bin Husain bin Ali bin Musa Abubakar Al-Baihaqī, *Sunan Al-Baihaqī Al-Kubrā*, (Mecca, Dār Al-Bāz, 1414H/1994), 6:100. Al-Bānī has declared it as authentic in Muhammad Nasiruddīn Al-Albānī, *Irwā' al-Ghalīl fī Takhrīj Ahādīth Manār al-Sabīl,* (Beirut, Al-Maktab al-Islāmī, 1405H), 5:279.

On the affirmative aspect of protection of property, Islam encouraged pursuit of livelihood in a manner that is lawful. On the punitive aspect it prohibit extravagant spending, transgressing on people's properties, usury and bribery. It established punishments of *hadd* for theft, hirābah, as well as ta'zīr (discretionary punishment) for misappropriation and bridge of trust. It also obliged liability for torts against properties. Allah, the Most High said: *"As to the thief, Male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in power."*[80]

Protection of properties by the Court can also be seen from the way the interests of the creditors are protected. A judge may restrict insolvent's right to dispose off his property. Following judicial restriction on his powers, he becomes like a minor who has reached the age of discretion. All dispositions that may harm the interest of the creditors are subjected to their ratification.[81] Likewise, the Court can restrict disposition of a *safīh* (prodigal). A person who reaches the age of majority without attaining reason will be barred from disposing off his property. The property remains under the management of his guardian until he attains the level of reason.[82]

Allah, the Most High said:

> And give not unto those of weak understanding your property which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice..[83]

Objectives of Sharī'ah are essentially protected and preserved through the Islamic Court. This makes the Court an essential institution in the smooth running of the Sharī'ah as well as a tool of preservation of rights.

6.3 Establishment of Justice

Justice should be established and guaranteed. Allah the most High said:

> Verily, Allah enjoins *Al-Adl* (i.e. justice and worshipping none but Allah Alone -- Islâmic Monotheism) and *Al-Ihsân* [i.e. to be patient in performing your duties to Allah, totally for Allah's sake and in accordance with the *Sunnah* (legal ways) of the Prophet in

[80]Qur'an 5:38.
[81] Wahbah Al-Zuhailī, *Al-Fiqh Al-Islamī wa Adillatuhu*, (Damascus: Dār al-Fikr 1428H/2007), 4:2976.
[82] Al-Sarakhsī, *Al-Mabsūt,* 24 :299
[83]Qur'an 4:5

> a perfect manner], and giving (help) to kith and kin (i.e. all that Allah has ordered you to give them e.g., wealth, visiting, looking after them, or any other kind of help, etc.): and forbids *Al-Fahshâ'* (i.e all evil deeds, e.g. illegal sexual acts, disobedience of parents, polytheism, to tell lies, to give false witness, to kill a life without right, etc.), and *al-Munkar* (i.e. all that is prohibited by Islamic law: polytheism of every kind, disbelief and every kind of evil deeds, etc.), and *al-Baghy* (i.e. all kinds of oppression), He admonishes you, that you may take heed.[84]

This verse enjoins all forms of *maṣālih* (beneficial things) and deter against all evils. *Al-Adl* means equality and justice; while *Iḥsān* refers to either acquisition of benefit or prevention of detriment or evil. The same should also be said regarding the definite article in *al-faḥshā* (obscenity), *al-munkar* (abominable) and *al-bagh'y* (injustice) is inclusive of all forms of wrongs and obscene behaviours.[85]

Justice is at the core of the objective of the Court in Islam. Umar said in his famous letter to Abu Musa al-Ash'arī, "Equate between people in your mood, court and judgements, so that the noble will not crave after your biasness nor the weak will despair from your justness."[86] It was narrated some people in Medina instituted a claim against the Khalīfah, Abu Ja'far al-Mansūr in the court of a Medinan, Muhammad bin Amrān. Abu Ja'far arrived Medina as a pilgrim, the judge summoned him to appear before him along with the litigants. The suit was heard and a judgement was delivered against the Khalīfah. The Khalīfah applauded the judge and said: May Allah reward you the best reward."[87]

[84]Qur'an 16:90.

[85] Abdul-Azīz bin Abdussalam Izzuddīn, *Qawā'id al-Ahkām fī Iṣlāh al-Anām*, (Damascus: Dar al-Qalam, 1421H/2000), 1:642.

[86] Muhammad bin Abibakr Ibn al-Qayyim, Al-Jauziyyah, *I'lām Al-Muwaqqi'īn 'an Rabb Al-'Ālamīn*, (Beirut: Dār Al-Jīl, 1973), 1:85; Abubakr bin Mas'ūd bin Ahmad Al-Kāsāni, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, (Al-Matbū'āt Al-'Ilmiyyah 1327H), 7:9; Burhanuddīn Ibrahim bin Ali Al-Madanī Ibn Farhūn Al-Mālikī, *Tabsirat Al-Hukkām*, (Damascus: Al-Halabī n.d), 1: 28; Abubakar Muhammad bin Ahmad Al-Sarakhsi, *Al-Mabsūt fil Fiqh al-Hanafi,* (Beirut: Dar al-Ma'rifa, 1406H), 6:63.

[87]Shihābuddīn Ibrahim Abdullah Ibn Abi Al-Dam, Al-Hamawī Al-Shafi'ī, *Adab Al-Qaḍā',* (Maktabat Al-Haram Al-Makkī n.d.), 1:55-56; Shettima, Muhammad, Principles of Procedure in Islamic Law, an unpublished work, p. 84.

The following textual provisions imply maxims of *fiqh* that are closely connected to *Maqāsid al-Sharī'ah*. Allah said: *"Allah intends every facility for you; He does not want to put to difficulties."*[88]

The verse is one of the bases of the maxim *al-Mashaqqah tajlib al-Taisīr*[89](Hardship begets facility). The applications of this maxim can be found across the Islamic law where a witness due to necessity of sickness, travelling, death or any other justifiable excuse, is unable to testify before the Court, can be delegate his testimony to another person in order to testify on his behalf. This is known as *Al-Shahādah 'alā Al-Shahādah* which literally means testimony over a testimony. An original witness can testify to two credible witnesses who have all legal requirements of a competent witness and request them to bear his testimony and deliver it before a Judge. In a nut shell, the original witness is delegating two secondary witnesses to testify on his behalf.

6.4 Flexibility and Compassion

The theme of mercy and compassion is clearly noticeable from the objective of Islamic Court. This is in accordance with the general feature of Islam that the Prophet was sent for mercy. Allah Said: "And We have sent you (O Muhammad) not but as a mercy for the *'Alamîn* (mankind, jinns and all that exists)."[90]

The Sharī'ah did not put stringent conditions for the proof of one's right in Court. Instead, there is always an alternative if the *aṣl* (basic rule) for proof is not obtainable for a litigant. For instance, in the absence of two witnesses in pecuniary claims, one witness along with an oath of plaintiff is enough to proof a claim. Pecuniary rights can be proved in favour of a plaintiff with the testimony of one witness and the plaintiff's oath.[91] Likewise, claim can be

[88] Qur'an 2:185

[89] Muhammad bin Musallam bin Majid Al-Dausarī, *al-Mumti' fī al-Qawā'id al-Fiqhiyyah,* (Riyadh: Dar Zidnī, 1424H), 191; Al-Borno, Muhammad Sidqī bin Ahmad, *al-Wajīz fī Īḍāh al-Qawā'id al-Fiqhiyyah, al-Kulliyyah* (Riyadh: Mu'assasat Al-Risālah, 1996), 234.

[90] Qur'an 21:107.

[91] Muwaffaq al-Dīn Al-Hanbali Ibn Qudāmah, *Al-Mughnī fī Al-Fiqh Sharhu Mukhtasar Al-Kharqi,* (Beirut: 'Alam al-Kutub, n.d.), 12:10; Muhammad bin Idris al-Shāfi'ī, *Al-Umm*, (Beirut: Dār Al-Fikr, 1403H), 6:275; Muhammad bin Ahmad bin Hamzah Al-Ramlī, *Nihāyat al-Muhtāj ilā Sharh al-Muhtāj*, (Damascus: Mustafa Al-Halabi, n.d.), 8: 313; Abu Zakariyyā Yahyā bin Sharaf Al-Nawawī, *Rauḍat Al-Talibīn wa 'Umdat Al-Muftīn*, (Al-Maktab Al-Islāmī, 1405H), 11:278; Abu Umar Yusuf bin Abdullah al-Namrī Ibn AbdulBarr, *Al-Kāfī fī Fiqh Ahl al-Madīnah al-Mālikī,* (Dār Al-Kutub Al-Ilmiyyah, 1407), 471; Bilal Faiṣal al-Bahr Al-Baghdadī, *Ilal al-Uṣūliyyīn fī Radd Matn al-Hadīth wa al-I'tidhār an al-'Amal bihi*, (Cairo: Dar al-Kutub al-Maṣriyyah 1431H/2010), 110.

proved by customs and habituations as it is related to ẓāhir (evident). An example is that possession of a property is a proof of ownership based on presumption.[92]

6.5 Functions of Courts in Islam

The function of Courts in Islam is within the exclusive authority of the Head of State as it falls under the general function of*al-wilāyah al-'āmmah*. However, in most cases they are delegated to competent persons. *al-wilāyah al-'āmmah* of a Court (or judge) are confined to the following ten matters as enumerated by Al-Māwardī in his *Ahkām al-Sultāniyyah*:

1. resolving disputes and adjudicating between conflicting parties either through reconciliation or through a binding judgement;

2. taking rights from persons who refuse to pay their liabilities and hand it back to its rightful owners;

3. guardianship over persons whose dispositions are suspended either due to minority, insanity; and the restriction of the dispositions of a bankrupt and prodigal to protect properties for the benefit of those who have rights over them;

4. taking charge or supervision of endowments (*auqāf*) by protecting it, developing and collecting its proceeds as well as expending it in favour of the sectors declared in the endowment;

5. execution of bequests in accordance with the terms stipulated within the limits of the Sharī'ah. Where its beneficiaries are designated, he gives its possession to the designated persons; and where they are not then its execution is based on the Ijtihād of the judge;

6. enforcement of Hudūd punishments: If they are infringement on the Rights of Allah, he initiates judicial action even without complaints, or be proved through confession or evidence. But where it is an infringement of the rights of individuals, judicial action is based upon complaint of those whose rights have been infringed;

7. marrying off of widows and orphans who have no legal guardians;

[92] Muhammad bin Muhammad Abu Hāmid Al-Ghazālī,, *Ihyā' Ulūm Al-Dīn*, (Beirut: Dār Al-Ma'rifah, n.d.), 2:100.

8. prevention of harm by prevention of trespass on streets and residential apartments. The judge has such responsibilities even if no complaint was filed before him. However, such authority shall only be exercised by the judge if there is an explicit authority given to him by the state. Usually, this is a position held by the muḥtasib.

9. supervision of Court officials or the judge's aides working in his Court as well as scrutiny and investigation of the characters of witnesses that are brought before the court;

10. equality in the pronouncement of judgement between the strong, the wealthy, the noble and the common.[93]

Some of the above elements can, of course, be combined with others as part of the judge's responsibility to the litigants. Restricting jurisdiction of a Court in some of the above authorities is referred to as *al-Wilāyah al-Khāssah*.[94]

6.6 Competence and Jurisdiction

Normally, the plaintiff institutes his claim before a competent court which has jurisdiction over the matter. Jurisdiction is the power of a Court to decide a matter in controversy and it presupposes the existence of a duly constituted Court with control over the subject matter and the parties.[95] A Court without jurisdiction over a matter has no power to entertain such a case. Normally, the Court in an area resided by the defendant has jurisdiction or competence to hear the case. According to Muhammad bin Hasan of the Hanafi School, the Court in which the defendant resides has jurisdiction over the suit.[96] According to Malikis, Shafi'is and Hanbalis where there is more than one Judge in a particular locality, the plaintiff chooses the Court in instituting the action.[97] This is because the plaintiff (*mudda'ī*) will not be compelled to continue with the suit if he decides to withdraw it. Therefore, he should have the option of the Court in which the suit is heard. The second position taken mostly by Hanafis maintained that the defendant (*mudda'ā alaih*) has the right to choose the location in which the case is to be heard. However, where the subject matter of the suit is a landed property, the Court under whose

[93] Al-Māwardī, *Al-Ahkām Al-Sultāniyyah*, p. 67-69.
[94] Ibid.
[95] Manu v. Dangoma (2015) 3SQLR (Pt III
[96] Qadrī Afandi Sheikh AbdulQadir bin Yusuf, *Wāqi'āt al-muftīn*, (Cairo, Būlāq, 1300H), p. 219.
[97] Al-Dasūqī, *Hāshiyat*, ibid, vol. 3, p. 431; Ibn Nujaim, Zainuddīn, *Al-Bahr Al-Rā'iq ,* vol. 7,ibid, p. 193; Al-Ramlī, *Nihāyat al-Muhtāj*, ibid, vol. 8, p. 86.

jurisdiction the property is situated is competent to hear the case according to Ibn Mājishūn of the Maliki School.[98]

6.7 Restricting a Court to a Particular School

In Nigeria today, Islamic law based the Maliki School interpretation is regarded as the basis for adjudication. It is for this reason that it is conditional for an Islamic Court judges to confine themselves to the interpretation of Maliki jurists. However, a question can be raised whether it is lawful for the state to restrict a particular school of thought to be followed by Courts?

In the Maliki School, the appointment is valid but the condition is void. However, where there is a specific directive on a point of law such as "I am appointing you to give male and female heirs equal shares", both the contract and condition are invalid. Where he is however prohibited from adjudicating on certain matters such as *hudūd* or *qisās*, the contract and condition are valid. This is perceived as limiting the judge's jurisdiction to certain areas of law he is not prohibited.

Nevertheless, where the condition in the form: "I am appointing you only to rule base on the opinions of Maliki jurists, the appointment (contract) is valid but the condition is void according to Ibn Farhūn. In other words, the judge is not required to stick such stipulation in the Sharī'ah. The Judge should as a result rule base on his own *ijtihād* whether it is in agreement with the stipulated condition or not. Ibn Farhūn has however added this is only where the Judge has capacity of *Ijtihād*. However, in the absence of such calibre a *muqallid* may be appointed. This is the reason why some Cordova governors were reported to have directed some judges to rule base on the opinions of Ibn Qāsim where available; and that Sahnūn is stipulating to judges not to judge but base on the opinions of Medinans.[99]

Hanbalis are of the opinion that it is not permissible to restrict a judge to a particular school as Allah Ta'ālā has said: *"So judge thou between people in truth (and justice)."*[100]Truth is not confined to a particular school. The appointment is however valid even though there is dispute on the validity of the condition among them.[101]

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[98] Illīsh, Muhammad bin Ahmad bin Muhammad, *Minah al-Jalīl Sharh Mukhtasar Khalīl,* vol. 6, (Beirut, Dar al-Fikr, 1409H/1989), p. 146.

[99] Ibn Farhūn, Tabsirat Al-Hukkām, vol. 1, p. 22-23; 57-58.

[100] Qur'an 38:26

[101] Kashshāf Al-Qinā', vol. 6, p. 292, 293; Sharh Muntahā Al-Irādāt, vol. 3, p. 467; *Al-Mughnī*, vol. 9, p. 106.

On the whole, it is preferable that a judge has the ability to research and investigate the truth by himself without being frozen on imitation. Also, due to increasing importance of Islamic Law especially in banking and *takāful* insurance sectors, areas that have developed by combining the study of all schools of thoughts, it to base all transactions on opinion of a single school of thought without looking at other schools.

7. MEANS OF PROOF IN SHARĪ'AH COURTS

Means of proof refers to the various means through which a plaintiff attains his right or protects his interest. If the plaintiff is able to prove that the defendant is impeding him from enjoying his right or is violating his right, the judge shall issue an injunction prohibiting the defendant from such interference or directs him to surrender the plaintiff's right. Admission (*iqrār*), testimony (*shahādah*), oath (*al-yamīn*) and the decline to take it (*al-nukūl*) as well as *qasāmah* are Sharī'ah evidence upon which a judge should rely in his judgements.[102]Other means of proof upon which the jurists have argued include circumstantial evidence and documentary evidence.

Iqrār (admission or confession) has its basis from the Qur'an and Hadith. From the Qur'an, we have the Saying of Allah:*"Nay, man will be evidence against himself."*[103]Qatādah said the verse means man shall be the witness against himself.[104] The Messenger of Allah was narrated to have stoned Mā'iz and the woman from the Ghāmidi tribe based on their admission to have committed adultery.

Testimony has its basis from the Qur'an, Sunnah and *Ijmā'*. For instance, Allah, the Most High said: *"and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses."*[105] HE also said: *"Conceal not testimony"*Qur'an 2:283

[102] Ibn Rushd, Muhammad al-Qurṭubī, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid,* vol. 2, (Beirut, Dar al-Ma'rifah, 1405H)*,* p. 501; Ibn 'Abidīn, Muhammad Amīn bin Umar, *Radd al-Muḥtār alā al-Durr al-Mukhtar fī Sharḥ Tanwīr al-Abṣār,* vol. 4, (Dar al-Kutub al-Ilmiyyah, nd.) p. 462, 653; Al-Ramlī, Muhammad bin Ahmad bin Hamzah, *Nihāyat al-Muhtāj ilā Sharh al-Muhtāj*, vol. 8,(Mustafa Al-Halabi, 1357H), p. 314.

[103]Qur'an 75:14

[104] Ibn Kathīr, Abu al-Fidā' Ismā'īl bin Umar al-Qurashī al-Dimashqī, *Tafsīr al-Qur'an* XE "Qur'an" *al-Azīm*, vol. 8, (Dar Taibah, 1420H/1999), p. 277

[105]Qur'an: 282

In the Sunnah, there are several Prophetic traditions establishing the role of testimony. The Prophet was reported to have said to Wā'il bin Hijr, may Allah be pleased with him:"(Produce) your witnesses or he will take an oath".[106]

On the legal basis of oath from Qur'an, Allah said:*"Allah will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate oaths"*[107]… that is with serious intention. This verse indicates that Allah will hold man accountable for an oath he has taken for making a claim.

On the legal basis of oath from the Sunnah, the Prophet, peace be upon him was reported to have said:"If people were given their claims, some men would have claim properties of other people and their bloods; but oath is upon the defendant". In another version: "But evidence is upon the plaintiff and oath is on him who denies."[108]

On the legal basis of nukūl (refusal to swear an oath), Allah said: *"or else they would fear that other oaths would be taken after their oaths"*[109]This is where a defendant refuses to swear an oath and the oath is returned back to the plaintiff, if he agrees and swear an oath, judgement shall be passed in his favour. Returning oath back to plaintiff has also been reported from Umar, Uthman and Ali, may Allah be pleased with them.[110]It was narrated that Umar has sworn over ownership of date palm trees claimed by Ubayy bin Ka'ab which he then gave him as a gift and said: I was afraid if I did not swear people will avoid swearing oaths in proving their rights.[111]

The bases of circumstantial evidence include the following: Allah said: *"They stained his shirt with false blood. He said: "Nay, but your minds have made up a tale (that may pass) with you, (for me) patience is most fitting: Against that which ye assert, it is Allah (alone) whose help can be sought."*[112]

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[106] Muslim, Hadith No. 373.

[107]Qur'an 5:89

[108] Part of a hadith transmitted by Baihaqī from Ibn Abbās may Allah be pleased with him. Its origin is also found in Bukhāri and Muslim. (Al-Dirāyah fī Takhrīj Ahādīth Al-Hidāyah, (Al-Fijālah Al-Jadīdah), vol. 2, p. 175. See also: Naṣb Al-Rāyah, (Dār Al-Ma'mūn), vol. 4, p. 95-96.

[109]Qur'an 5:108

[110] Ibn Juzai, *Al-Qawānīn Al-Fiqhiyyah*, ibid, p. 301; Ibn Rushd, *Bidāyat Al-Mujtahid*, vol. 2, p. 456; Al-Dasūqī, *Hāshiyah*, ibid, vol. 4, p. 187; *Tahdhīb Al-Furūq*, vol. 4, p.1 51; Al-Shirbīnī*, Mughnī Al-Muhtāj*, ibid, vol. 4, p. 486; Al-Shīrāzī, *Al-Muhadhdhab,* ibid, vol. 2, p.3 01; Al-Maqdisī, *Al-Mughnī*, vol. 9, p. 225; *Al-Turuq Al-Hukmiyyah*, p. 116.

[111] Ibn Qudāmah, *Al-Mughnī*, vol. 8, p. 987; vol. 9, p. 232;

[112]*Qur'an 12:18.*

The above verse is used in support of recognising qarā'in (signs and indicators) which are also referred to as circumstantial evidence. Imam Qurtubī states that, jurists used this verse in the use of circumstantial evidence to arrive at results in cases like *qasāmah*.[113]

The Prophet, peace be upon him said:"A widow is better qualified to decide for herself than her guardian; while the virgin's permission should be sought and her permission is her silence".[114]The Prophet recognised a virgin's silence as indication (*qarīnah*) of her consent. A testimony to this effect can therefore be given that she has consented to the marriage.

On documentary evidence, Allah, the Most High said:*"O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing."*[115]

8. PRINCIPLES OF PROCEDURE IN SHARĪ'AH COURTS

Major principles of procedure in Islamic Court are briefly presented here under;

8.1 Fair Hearing

Every litigant shall be given the right to present his evidence. In other words, each litigant has the right to be given the opportunity to present his evidence, respond to claim, counter-claim as well as challenge evidence presented against him.[116]The judge should be patient with the plaintiff until he expresses all that which he has and understand him and certain of his demand. Ali, peace be upon him, said when appointed by the Prophet as judge in Yemen: "… when the two disputing parties are seated before you, do not make your ruling until you hear from the other as you have heard from the first. That way judgement between them shall be clearer."[117] This is a basic principle on judgements.[118]

Izar is part of fair hearing and a condition for the validity of judgement. It is the right given to a litigant to disprove or challenge claim made against him through evidence. It is usually described as an instance where the Court asks

[113] Al-Qurṭubī, A.M.A., *Al-Jāmi' li Ahkām al-Qur'an Tafsīr*, vol. 9, (Dar al-Kātib al-Arabī 1387H/1967), p. 149

[114] Al-Naisābūriy, M. M. A. Q, *Sahīhu Muslim*, (Beirut, Dār Ihyā Al-Turāth Al-Arabī, n.d.), Hadith No. 3542.

[115]Zaidān, *Niẓām al-Qaḍā'i,* 188-189

[116]Alu Khunain, *Al-Madkhal*, ibid, p. 258.

[117] Al-Māwardī, *Adab al-Qāḍī*, ibid, p. 254-258.

[118]Ibn Farhūn, *Tabṣirat al-Hukkām*, ibid, vol. 1, p. 199.

a litigant whether he has a defence or criticism on evidence presented against him. If he has any objection regarding the evidence or testimony, it is obligatory upon the judge to hear it. If on the other hand he has no objection, the judge shall go ahead and admit the testimony as presented and rule that the witness is credible.[119] The practice is that, after testimony, the judge shall turn to the party against whom evidence is given and ask him: what would you say regarding the witness and his testimony?[120]

8.2 Equality before the Law

This is one of the fundamental principles of Islamic procedure in Islamic Court. This is because justice between litigants is one of the basic functions of a judge. Allah said:

> O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you may avoid justice, and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do.[121]

Umar referred to equality in his letter to Abu Musa al-Ash'arī when he said: "Equate between people in your mood, court and judgements, so that the noble will not crave after your biasness nor the weak will despair from your justness."

8.3 Judgement after Clarity of Facts

The judge shall clarify every intricate issue till disputed facts are fully resolved. He shall not rule if there is misconception of facts before him. Hasty and speedy judgement without resolving all matters is not proficiency. Ascertaining facts and clarifying its ambiguities does not mean delaying the verdict. However, whenever the case becomes clearer and the judge is certain concerning the facts he should deliver his judgement as soon as possible; and any delay is prohibited. Speedy delivery of judgement is an objective of adjudication that should not be ignored. The objective is to lift the wrong

[119]Ibn Māzah, *Sharh Adab al-Qāḍī*, ibid, vol. 3, p. 79; Ibn Farḥūn, *Tabṣirat al-Hukkām*, ibid, vol. 1, p. 94; Al-Ramlī, Muhammad bin Ahmad bin Hamzah, *Nihāyat al-Muhtāj ilā Sharh al-Muhtāj*, vol. 8,(Mustafa Al-Halabi, 1357H), p. 257; Ibn Qudāmah, *al-Mughnī,* ibid, vol. 11, p. 452.
[120]Al Khunain, *Al-Madkhal*, ibid, p. 267.
[121]Qur'an: al-Nisā' XE "Qur'an" 4:135.

done to a litigant, sin from the wrong-doer, protect the judge from suspicion that he may be attempting to frustrate the litigant to abandon his claim.[122]

8.4 Reconciliation between Litigants

Reconciliation (*al-Ṣulh*) is a contract through which two disputants can amicably settle their differences.[123] Reconciliation is lawful between disputants especially if the case is intricate that there is no clarity regarding facts and their proof or the applicable provision of *Sharī'ah*. It is also appropriate and encouraged in cases that involve relatives, friends and those who gratuitously intervene to settle communal disputes.[124]

Umar (RA) refers to reconciliation when he said, reconciliation is permissible between Muslims unless it makes the lawful prohibited or prohibits the lawful.The Prophet, peace be upon him said:*"Reconciliation is permitted among Muslims; with the exception of reconciliation that prohibits the lawful or legalizes the prohibited."*[125]

8.5 Normative Proceeding in Islamic Court

The default rule in Islamic law is that both parties to a suit should be seated in front of the Judge before the case is heard. This is based on the Hadith narrated by Abdullah bin Zubair; may Allah be pleased with him in which he said, the Prophet has obliged that disputants should be seated before the judge.[126]

The Judge should treat both parties with equality throughout the deliberation. Both parties should be given equal opportunity to establish their cases. The manner in which the judge speaks to them should also be the same. He should not therefore smile at one party and frown at the other; and should speak to both in the same language they can understand. Umar bin al-Khattāb is reported to have said: "Equate between people in your mood, court and

[122] Ibn Nujaim, Zainuddīn bin Ibrahim, *al-Ashbāh wa Al-Nazā'ir*, (Beirut, Dār al-Fikr, 1983), p. 226; Al-Qarāfī, Shihābuddīn Abu al-'Abbās Ahmad bin Idrīs, *al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Ahkām wa Taṣarrufāt al-Qāḍī wa al-Imām,* (Beirut, Maktab al-Maṭbū'āt al-Islāmiyyah, 1416H/1995), p. 75; Ibn Farḥūn, *Tabṣirat al-Hukkam*, ibid, vol. 1, p. 74; Al-Māwardī, *Adab al-Qāḍī*, ibid, vol. 2, p. 68; Al-Buhūtī, *Sharh Muntahā al-Irādāt*, ibid, vol. 3, p. 487; Ibn 'Ashūr, *Maqāṣid al-Sharī'ah*, ibid, p. 200.

[123]Ibn Qudāmah, *al-Mughnī,* ibid,vol. 5, p. 2.

[124]Alu Khunain, *Al-Madkhal*, ibid, p. 271.

[125]Tirmidhī, Hadith No. 1352. Tirmidhī says, the hadith is sound and authentic while Al-Bānī has also said, it is authentic (ṣaḥīḥ). (Tirmidhī, vol. 3, p. 634.)

[126] Abu Al-Tayyib, Muhammad Shamsulhaq Al-Azīm Abādī, '*Aun al-Ma'būd Sharh Sunan Abi dāwūd*, vol. 9, (Beirut, Dār Al-Kutub Al-Ilmiyyah 1415H), p. 498-499.

judgements, so that the noble will not crave after your biasness nor the weak will despair from your justness."[127]

The judge shall thereafter ask the plaintiff to state his complaint which should be written without any addition or subtraction. Where the suit is irregular (*fāsid*), the plaintiff will be directed by the Judge to rectify it as a fatwa and not judgement. If the suit is valid, the case will be heard based on the laid down Islamic law of practice and procedure.[128] Then the defendant will state his response to the complaint made against him. The defendant has the right to demand to see the copy of the suit and the judge is required to provide him with such copy if he so demands and a reasonable reprieve (*imhāl*) be given to him to respond to the complaint.[129] After the lapse of the time or the plaintiff has not demanded any reprieve for his response and wants to respond immediately, the response will be heard. As different procedural rule applies depending on the response, this can be classified into three:

The defendant either: i. admits or acknowledges the complaint against him; ii. denies the claim; oriii. refuses to either acknowledge or deny the claim made against him. Each of those responses has its own specific legal effect as follows:

a. If the defendant acknowledges the claim against him, the judge should write his acknowledgement as uttered and direct him to execute what he admits. There is no need for further proof if a party admits the fact claimed.

b. Denial of the Claim: If the defendant denies the claim, the judge shall write down the denial as spoken by the defendant without any addition or subtraction. The judge then turns to the plaintiff and asks him if he has any evidence for his claim. If he has his evidence ready to be heard by the Court, it will be immediately heard and recorded. Where the evidence is not available for the Court to hear immediately and the plaintiff asked for a time to make the evidence available, the Judge shall grant him a reasonable time for the evidence to be provided. If the evidence presented is not contended by the defendant; or he fails to convince the judge on his attempt to discredit the evidence, the complaint is admitted by the Court.

   However, following the denial of the defendant and failure of the plaintiff to provide evidence, the judge shall ask the plaintiff if he wants the

[127] *Al-Fatāwā Al-Hindiyyah,* vol. 3, ibid, p. 324; Al-Māwardī, *Adab al-Qāḍī*, ibid, vol. 2, p. 241; al-Dasūqī, *Hāshiyat al-Sharh al-Kabīr*, vol. 4, ibid, p. 142.
[128] Zaidān, *Niẓām al-Qaḍā,* ibid, p. 139.
[129] Ibid, p. 140.

defendant to take an oath. If the response is positive, the judge will order the defendant to take an oath. If he agrees to take the oath, the Judge shall strike out the complaint. If he refuses to take the oath on the other hand, the oath shall be returned back to the plaintiff. If he took the oath, judgement will be given in his favour. Otherwise the matter will be struck out.

c. Where the defendant refuses to respond to the claim and simply kept mute, neither admitting nor denying, he shall be forced to either admit or denied. If he refused to speak, his status is the same as a person who refused to swear. However, the plaintiff will be asked to take the oath. If he does so, a judgement shall be passed in his favour.[130]

On the other hand, where the plaintiff fails to present convincing evidence, the judge will strike the case out. The plaintiff still has the right to restart the action again if he has obtained enough evidence.[131]

9. PRACTICE OF ISLAMIC COURTS IN NIGERIA

Islamic courts in Nigeria are referred to as Sharia Courts and Sharia Courts of Appeal. Sharia Courts are established by states law; they consist of Sharia Court and Upper Sharia Court. Sharia Courts of Appeal are two; they are Sharia Court of Appeal of the Federal Capital Territory (FCT) and Sharia Court of Appeal of a state. The two Sharia Courts of Appeal are established by the Constitution.[132] In addition to Sharia Courts and Sharia Courts of Appeal, other courts[133] exercise original and or appellate jurisdictions in civil and or criminal proceedings involving questions of Islamic law. However, such exercise does not make the courts Islamic.

9.1 Structure of Islamic Courts in Nigeria

The structure of Shari'ah courts consists of superior courts of record and non-superior courts. The non-superior courts are creation of state law while the superior courts of record are creation of the Constitution, Act of the National Assembly and state laws.

[130] Ibn Farhūn, *Tabsirat al-Hukkām*, ibid, vol. 1, p. 43-49; 109-163; Al-Māwardī, *Adab Al-Qāḍi*, ibid, p. 261-262; Ibn Abī Al-Dam, *Adab Al-Qaḍā*, ibid, p. 88.
[131] Ibn Farhūn, *Tabṣirat al-Hukkām*, ibid, vol. 1, p. 176.
[132] Sections 260 and 275 of Constitution of the Federal Republic of Nigeria, 1999.
[133] Superior courts that include High Courts, Court of Appeal and Supreme Court.

9.2 Non-Superior Courts of Record

Non-superior courts of record are Sharia Courts and Upper Sharia Courts. They are established in states that implement *Shari'ah* in middle of 1999 to 2000. However, the main change after *Shari'ah* implementation is obviously the replacement of Area Courts by Sharia Courts. This ceases the operation of Area Courts in the states.

9.3 Superior Courts of Record

Superior courts of record are Sharia Court of Appeal of the FCT and Sharia Court of Appeal of a State. They are established by the Constitution.[134] The Sharia Court of Appeal of the FCT in addition to the powers conferred on it by the Constitution exercise such other jurisdiction as may be conferred upon it by an Act of the National Assembly.[135] Sharia Court of Appeal of a state exercise such other powers as may be conferred upon it by the law of the state In addition to the powers conferred on it by the Constitution[136]

Other superior courts of record also adjudicate appeal cases that were tried based on Islamic law. These are High Court of a State, Court of Appeal and Supreme Court.[137] The High Court of a State in addition to appellate jurisdiction has powers to exercise original jurisdiction on questions that involved an individual customer and Islamic bank in respect of a transaction between the individual customer and Islamic bank.[138] Whereas the Federal High Court exercise original jurisdiction in causes and matters connected with or pertaining to Islamic banking, Islamic banks, other Islamic financial institutions, including any action between an Islamic bank and another, any action by or against the Central Bank of Nigeria arising from Islamic banking or other Islamic financial transactions.[139]

[134] *Ibid*.

[135] Section 262 (1) and 264 of Constitution of the Federal Republic of Nigeria, 1999.

[136] Sections 277 (1) and 279 of Constitution of the Federal Republic of Nigeria, 1999.

[137] Sections 272 (2), 244 (1) - (2) (a), 247 (1) (a) and 233 of the Constitution of the Federal Republic of Nigeria, 1999.

[138] Section 251 (1)(d) Constitution of the Federal Republic of Nigeria, 1999.

[139] *Ibid*.

10. Applicable Law in Sharia Courts in Nigeria

The applicable law in Sharia Courts is Islamic law.[140] The various states laws confined it to the Maliki School interpretation.[141] This means the Sharia Courts must interpret the law based on the interpretation of *Qur'an*, *Sunnah* and other sources of Islamic law as adopted by the *Maliki* School. This makes any other interpretation than the one adopted by the *Maliki* School as inapplicable.

However, multiple interpretations are often offered in some legal issues within the school. For instance in the case of a husband that is yet to consummate his marriage and pay *Sadaaq* (dowry). Imam Malik said the husband should be given two years within which to pay the *Sadaaq* if the wife demands for it and is unable to pay it. However, Ibn al-Qasim said this is within the discretion of the judge to decide.[142]

Al-Maliki al-Qadeem and *al-Maliki al-Jadeed*[143] is just like the old and the new Imam Muhammad bin Idris al-Shafi'ee interpretations.[144] The scholars of the Maliki School are divided into first and second generation. The first generation starts with Imam Malik and his students. They include Ibn Al-Qasim, Ash'hab, Ibn Wahab, Sah'noon, Ibn Kinanah, Ibn Al-Majishoon and a host of others. The second generation starts with Ibn Abi Zaid al-Qairawani and others like Al-Lukhami, Ibn Abdil-Barr, Ibn Rushd, Ibn Al-Arabi up to the contemporary scholars like Ibn Ashur.[145] The *fatwa* of the old Maliki scholars a times differs from that of the new; this may be due to change of time and place, exposure and advancement. These are attributed to the change in *Fatwa* of *Imam Al-Shafi'ee.*[146] Khalil in one of the most popular book of the second generation books admitted this fact in the introductory part of the

[140] Sections 262 and 277 of Constitution of the Federal Republic of Nigeria, 1999, sections 3 and 24 Kaduna State Sharia Courts Law, 2001, section 2 and 7 Borno State Sharia Administration of Justice Law, 2000

[141] *Ibid*.

[142] Al-Kafi, M.Y. I*hkaam al-Ahkaam ala Tuhfatu al-Hukkaam* (Dar El Fikr, Beirut, 2018) Pp.120-122.

[143] Old Maliki School and the Maliki interpretations

[144] Imam Muhammad bin Idris al-Shafi'ee *Fataawa* before coming to Egypt are labelled as old and new Shafi'ee after coming to Egypt. See *Mughni al-Muhtaaj Ila Ma'arifati Ma'ani Alfaazdh al-Minhaaj* by *al-Khateeb al-Shirbini*

[145] Macer, A. *Taqrib Mu'jam Mustalahat al-fiqh al-Maliki* (Dar Al-Kotob Al-Ilmiyah, Beirut, 2007) Pp.159-161.

[146] *al-Khateeb, Mughni al-Muhtaaj Ila Ma'arifati Ma'ani Alfaazdh al-MinhaajOp. Cit*.

book[147] that the mention of the word التردد **(**divergence of views**)** refers to either the silence of the first generation on the issue or divergent views of the second generation.[148]

It could be observed that Asim Al-Garnati the author of *Tuhfatu al-Hukkaam*, which is known as *Manzumatual-Asimiyah* is among the second generation scholars of the Maliki School.[149]*al-Asimiyah* is among the widely used books on practice and procedure in Sharia Courts in Nigeria. The author displays multiple interpretations on issues and points to the most preferred view within the interpretations. The sixth verse of introduction to *al-Asimiyah*[150] states the methodology of the book in displaying various interpretations of scholars on legal issues by looking at the status of the scholar and strength of the argument.[151] This means the book only brings onboard those interpretations that are popular in the school with strong reasons. Khalil, the author of the most popular book of the second generation,[152] also states the methodology of the book[153] in presenting various interpretations of scholars within the school; the word فيها refers to *al-Mudawwanah*[154]whereas أول refers to divergent understanding of scholars in interpretation of *al-Mudawwanah*.[155]

It could be deduced from the above that divergent interpretations exist within the school. The question here is; what should be the methodology to be adopted by a Sharia Court judge in selecting an interpretation to be applied in a case before him?

[147] Khalil, I.J. *Mukhtasar Khalil Fi al-Fiqh al-Maliki* (Dar al-Fadeela, Cairo, 2011) Pp,23-24

[148]*Ibid*.

[149] The new Maliki Scholars.

[150] Al-Kafi, M.Y. I*hkaam al-Ahkaam ala Tuhfatu al-Hukkaam* (Dar El Fikr, Beirut, 2018) P.7

[151]*Ibid*.

[152]*Mukhtasar Khalil Fi al-Fiqh al-Maliki*.

[153] Khalil, I.J. *Mukhtasar Khalil Fi al-Fiqh al-Maliki* (Dar al-Fadeela, Cairo, 2011) Pp,23-24.

[154]*Al-Mudawwanh al-Kubra* is a collection of interpretations of the Maliki School based on questions and answers. It was codified by Imam Sahnoon (abdulSalam bin sa'eed al-Tanukhi) after he has collected it from AbulRahman bin al-Qasim who also collected same from Imam Malik

[155] Khalil, *Mukhtasar Khalil Fi al-Fiqh al-MalikiOp*. *Cit*. Pp.23-24.

11. Jurisdiction

The Constitution conferred jurisdiction on Sharia Courts of Appeal on matters and questions of Islamic personal law.[156] This limits the powers of Sharia Courts of Appeal to the items listed by the Constitution.[157] Therefore, Appeals from Upper Sharia Court on questions of Islamic law that are not within the items listed by the Constitution go to High Court of a State. In addition to the appellate jurisdiction, The High Court of a State has power to exercise original jurisdiction on questions that involved an individual customer and Islamic bank in respect of a transaction between the individual customer and Islamic bank.[158] Whereas the Federal High Court exercise original jurisdiction generally in causes and matters connected with or pertaining to Islamic banking, Islamic banks and other Islamic financial institutions other than questions that involved an individual customer and the financial institution.[159] However, the consequences of this, is that aggrieved parties are left with no remedy than their disputes to be adjudicated by a judge not learned in Islamic law.

It was argued that state legislature can enlarge powers of the *Shari'ah* Court of Appeal. The step taken by some states in the North could not settle the matter.[160] However, the Court of Appeal in the case of *Haruna & 1 OR Vs Suleiman & AG Zamfara State*[161] and the case of *Mai-Daura Vs Tudun-Iya*[162] decided that the legislature 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 Sharia Court of Appeal to hear and determine criminal and civil matters on Islamic law generally has taken the jurisdiction of the Sharia 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 *UltraVires* the

[156]Sections 262 and 277 Constitution of the Federal Republic of Nigeria, 1999.
[157]*Ibid*.
[158] Section 251 (1)(d) Constitution of the Federal Republic of Nigeria, 1999.
[159]*Ibid*.
[160]Abikan, A.I.' Islamic Banking Disputes: Between Judicial Pluralism and ADR' (2011) Journal of Islamic Banking and Finance Pp.15-16
[161] SQLR (2014) Vol.2 Prt IV Pp.521-542
[162] SQLR (2013) Vol.1 Prt IV Pp.72-90

State House of Assembly.[163] Therefore the position of the jurisdiction of Sharia Court of Appeal remains as it is unless the Constitution is amended.

Shari'ah appeals from High Court of a State and Sharia Courts of Appeal go to Court of Appeal and then to Supreme Court.[164]

However, the requirement of the Constitution for quorum of the Court of Appeal of at least three Justices of the Court of Appeal learned in Islamic personal law in respect of Appeal from Sharia Courts of Appeal does not cover the field.[165] The Constitution is silent on other *Shari'ah* appeals from High Court to the Court of Appeal and then to the Supreme Court.[166] This means other justices of the Court of Appeal can hear the appeal irrespective of their knowledge in Islamic law.

12. QUALIFICATION AND TRAINING OF SHARIA COURT JUDGES:

12.1 Qualification

The Constitution set a standard for qualification to the appointment into the office of Grand Kadi or Kadi of Sharia Court of Appeal of FCT or of a state that a person shall not be qualified unless;

> (a) he is a legal practitioner in Nigeria and has so qualified for a period of not less than ten years and has obtained a recognised qualification in Islamic law from an institution acceptable to the National Judicial Council; or
>
> (b) he has attended and has obtained a recognised qualification in Islamic law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than twelve years; and
>
> (i) he either has considerable experience in the Practice of Islamic law, or
>
> (ii) he is a distinguished scholar of Islamic law.[167]

[163] Ibid.

[164] Sections 233 and 240 Constitution of the Federal Republic of Nigeria, 1999.

[165] Section 247 (1) (a) *Ibid*.

[166] Section 233 *ibid*.

[167] Sections 261 (3) and 276 (3) of Constitution of the Federal Republic of Nigeria, 1999.

It could be observed that the Constitution paraded three categories of people who are qualified to hold the office of Kadi or Grand Kadi; a legal practitioner of not less than ten years post call experience with considerable knowledge in Islamic law, or a recognised qualification in Islamic law with considerable experience in the practice of Islamic law, or a distinguished scholar of Islamic law.

However, some states laws adapted the provision of the Constitution for qualification into the office of a Kadi as a qualification for appointment into the office of Sharia Court judge and Upper Sharia Court judge in the first and second category and further added degree in Arabic or Islamic Studies as a minimum qualification. A distinguished and versed knowledge in Islamic law was made a qualification for Mufti only in the law[168] contrary to the constitution that set it as a third category requirement for appointment into the office of a Kadi or Grand Kadi.

The aim of the law in setting the qualification of a Kadi of Sharia Court of Appeal and a Sharia Court judge is knowledge and considerable experience in the practice of Islamic law. However, the Kaduna State Sharia Courts Law that made a holder of degree in Arabic qualified to occupy the office of a Sharia Court and Upper Sharia Court[169] derails from the objective of the law in having a person with considerable knowledge and sizeable experience in the practice of Islamic law to occupy the office.

12.2 Training Personnel of Sharī'ah Courts

The first category of qualification for appointment into the office of a Kadi of Sharia Court of Appeal and a Sharia Court judge is to qualify as a legal practitioner with a recognised qualification in Islamic law. It could be understood from the provision of the law that a legal practitioner with a recognised qualification in Islamic law from an institution acceptable to the National Judicial Council is really not any other person than a legal practitioner with combined degree training of Bachelor Degree in Law and Sharia (LL.B. & Sharia).

12.2.1 LL.B. & Sharia (Bachelor of Law and Sharia)

The principal objective of this programme is to graduate students with combined degree in common law and Islamic law. The programme is designed to create manpower of lawyers with combined training to fill in the gap in the bar and the bench. This can be inferred from the introduction of the

[168] Section 7 of Kaduna State Sharia Courts Law, 2001

[169] *Ibid*.

combined law degree. However, the assumption that the programme is meant to establish superiority of common law and open a way for gradual disappearance of sound and real knowledge of *Shari'ah* in the judicial system cannot be ruled out. The accusation is predicated on the following reasons;

a. When law faculties were established in the Nigerian universities in the 1960s the idea of including Islamic law as a separate part of the law curricula was discouraged and rejected. Until the mid 1970s when Ahmadu Bello University (ABU), Zaria introduced combined degree of common law and *Shari'ah* that other universities in the north borrowed the idea.[170]
b. The draft NUC BMAS[171] provides for LLB curriculum alone, it is silent on the combined degree of LLB and *Shari'ah*. Although, it provides for Islamic law as the sixth department and some compulsory and elective *Shari'ah* courses in the curriculum such as *Muamalaat* (Islamic law of transactions), *Mirath* (Islamic law of succession), *Murafa'at* (Islamic law of evidence and procedure), *Usul al-Fiqh* (principles of Islamic jurisprudence) among others. The Islamic law department is just a host of such courses and nothing more. The establishment of the department of Islamic law is discretionary, as the minimum standard is two departments and six as the maximum.[172]
c. The requirement for admission to study law in the Nigerian university do not encouraged people with traditional *Shari'ah* background to be admitted. The ordinary level requirements (SSCE or its equivalent) for admission are five credits to wit; English, English literature, Mathematics and any other two arts or social science subjects. For those seeking to be admitted to LLB and *Shari'ah* programme in addition to the above requirements, the candidates must possess credit in Arabic or IRK.[173] This favours students from conventional secondary schools than products of *Madrasah*. The products of *madrasah* are the candidates with potential Arabic background that can comfortably study *Shari'ah* because of their Arabic and Islamic studies background. Some faculties have closed the door for admitting *madrasah* products some years ago.[174]

[170] Oba, Lawyers, Legal Education and Shari'ah Courts in Nigeria P.13

[171] NUC BMAS for Law, 2018.

[172] Ibid.

[173] Ahmad, I.M. Conversation with Chiroma, M. Chairman, Faculty of Law Admission Screening Committee, Senior Lecturer, Faculty of Law, University of Maiduguri, (Maiduguri, 2018), see also NUC BMAS for Law, 2018.

[174] Ahmad, I.M. Conversation at the Dean's Office with Kabir, A. Dean, Faculty of Law, Bayero University Kano, (BUK) (Kano, 2009).

d. The curriculum of the combined programme and language of instruction in the programme reveal a bias for common law. Common law courses have priority over *Shari'ah* courses.[175] The language of Islamic law is Arabic. All *Shari'ah* reference books are in Arabic language, though some were translated to some languages. Therefore, a lawyer must be well grasped of the law and its language, which is Arabic in the case of *Shari'ah*, to have the ability of consulting mother and reference materials when confronted with issues that need *Shari'ah* solution. Thus, Students are not exposed to primary and secondary sources of *Shari'ah*.

12.2.2 Professional Legal Education

Admission into the Nigerian Law School is restricted to law graduates of universities accredited by Council of Legal Education. The Council in giving accreditation considers law degrees that are patterned after the English system. Until recently graduates of law from Arab and Middle-East countries were not eligible to be admitted into the Nigerian law school. This is a positive development in the Islamic Legal Education in Nigeria. Graduates of Al-Azhar University, Islamic University Madina, Sudan and others are now eligible to be admitted into the Nigerian Law School. They attend bar part I at any accredited law faculty in Nigeria whereby they study prescribed law courses for two years before attending bar part two at the Law School.[176]

However, the curriculum of the law school has not changed; it is still based on English style. The content of the curriculum does not reflect *Shari'ah*.

12.2.3 National Board for Arabic and Islamic Studies (NBAIS)

The National Board for Arabic and Islamic Studies (NBAIS) was established in 1960 by Alhaji Sir, Ahmadu Bello Sardauna of Sokoto. It was a department in (ABU) at Institute of Education as a regulatory Board for the Northern part of Nigeria only with few Schools and Colleges under it. Consequent to the recognition and approval of National Council on Education (NCE) at its 57th meeting held at Sokoto in February, 2011, the Board is now a National Examination and Regulatory Body that covers the whole nation with over 900 recognized schools and colleges.[177]

[175] Oba, Lawyers, Legal Education and Shari'ah Courts in Nigeria P.13

[176] Conversation with Alaro, A.A. Professor of Law, University of Ilorin, Nigeria (Ilorin, 2016)

[177] Available at https://nbais.com.ng/ visited on 20th/09/2018

The aims of the board among others include integrating Arabic and Islamic curricula as well as responding to the demand of Nigerian Communities in developing religious discipline. The responsibilities of the Board also include Collaboration with state Ministries of Education in recognition and coordination of Arabic and Islamic Schools, review of Syllabi for Arabic and Islamic schools and Colleges, conduct of examinations for Junior and Senior Arabic and Islamic Schools Certificate, standardization of examination for the award of certificates for Arabic and Islamic Schools and Colleges and advise Federal and State Ministries of Education on policies concerning Arabic and Islamic Education.[178]

With recent reform in the regulation of Arabic and Islamic studies education, this paper is optimistic that standardisation would be maintained in the sector. The challenge of old regime to wit; lack of standard that allow schools to operate without a standard curriculum. Difficulty of securing admission in colleges and universities to study other than Arabic and Islamic studies because of deficiency of curriculum. Lack of regular review of the curriculum that will make the students capable and fit to compete in the Nigerian environment and abroad; the earlier curriculum only teaches the students basic and Islamic studies subjects and thus, products of such system find it difficult if not impossible to study arts and social science courses in the university other than Arabic and Islamic studies.[179]

12.2.4 LLB and Shari'ah Curriculum

The LLB and *Shari'ah* curriculum in the law faculties of the Nigerian universities is not far from challenges, they are summarised hereunder as follows:

a. Lack of *Shari'ah* Knowledge; most of the products of LLB and *Shari'ah* programme are products of conventional secondary schools who have no background in Arabic and Islamic studies except those who were exposed to traditional *Shari'ah* education at personal level. Therefore, they graduate with little or no knowledge of *Shari'ah*. However, the *madrasah* products that have basic Arabic and Islamic studies knowledge do not possess English communication skills that can transport them through the five years of the LLB trip at the law faculty except few that went extra to learn. This is because; the

[178] Ibid.

[179] Ahmad, I.M. Interview with Isa G.A. Director, Baitul Izzah School, Maiduguri (Maiduguri, 2018)

language of instruction at the law faculties is English for both the common law and Islamic law courses.

b. Methodology; *Shari'ah* courses are patterned after common law courses[180] and thus the students were taught *Shari'ah* along common law orientation. The challenge here is; students perceive and analyse issues in common law perspectives than in Islamic law. This challenge extends to *Shari'ah* courts and practice in Nigeria. Lawyers employ common law style of practice and technicalities in *Shari'ah* courts or in *Shari'ah* appeals at the High Court, Court of Appeal and Supreme Court.

Content of the *Shari'ah* Curriculum; the curriculum is designed to teach basic knowledge of *Shari'ah* only. However, it needs to make students articulate *Shari'ah* principles to the realities of their daily life. The courses should train and make students *Shari'ah* oriented in their daily activities and entrepreneurial. Islamisation of knowledge is one of the objectives of introducing the combined LL.B and *Shari'ah* and therefore students at graduation are expected to be able to apply the courses to economic and commercial transactions they are confronted with. For instance, products of this programme are assumed eligible to serve as advisers or consultants of Islamic financial institutions that operate as financial intermediary or a *takaful* (Islamic insurance) company. Re-training of *Shari'ah* lectures in the law faculties in addition to the academic degrees they obtained may assist in the quality of knowledge they disseminate to students; this can be done through the establishment of relationship with *Shari'ah* departments in Arab countries to get the skills of Arabic language and direct exposure to the primary and secondary sources of *Shari'ah*. This type of relationship has been established between department of *Shari'ah*, Faculty of Law, University of Maiduguri with African International University through Memorandum of Understanding (MOU) signed by the two institutions.[181]

13. CONCLUSION

Dispute is a common phenomenon in human co-existence. Therefore, establishment of judicial institutions is indeed necessary for every society. Theories of *fiqh* are general concepts that consist of solutions to all legal matters upon which the theories of court system are established. They guide resolution of disputes in Islamic courts. The paper examines theory of Islamic courts and its practice in Nigeria. The applicable interpretation of Islamic law

[180] Oba, Lawyers, Legal Education and Shari'ah Courts in Nigeria P.13

[181] Ahmad, I.M. Conversation with Abbo-Jimeta, U.S. Professor of Law and Former Head, Department of *Shari'ah*, Faculty of Law, University of Maiduguri, (Maiduguri, 2018)

in the Sharia Courts and the challenge of a judge in making *ijtihad* in adopting a particular interpretation were also examined. The paper observes that Nigerian legal education and training does not avail one a considerable knowledge in Islamic law and thus leads to scarcity of talents in the practice and application of Islamic law in Nigeria. The paper recommends for the review curriculum of legal education and training in Nigeria. Arabic should be adopted as one of the media of instructions in *Shari'ah* education and training. Training and retraining of judges of Sharia Courts on Islamic law should be improved. This can be done by entering into bilateral agreement with some traditional Ulama and foreign universities.