

Alternative Dispute Resolution and Sustainability of Economic Development for the Consumer's Benefit: An Islamic Moral Economy Perspective

aHanna Ambaras Khan

School of Business and Economics, Universiti Putra Malaysia, Malaysia

hanna@upm.edu.my

ORCID iD: 0000-0002-4840-2098

(Corresponding author)

Foyasal Khan

foyasal.khan@gmail.com

ORCID iD: 0000-0001-5984-9744

Soura Jit Barua

School of Business and Economics, Universiti Putra Malaysia, Malaysia

200066@student.upm.edu.my

ORCID iD: 0000-0001-9926-8215

ABSTRACT

Islamic Moral Economy (IME) rests on the idea of justice, goodness and fairness, and the social interest within the community. It provides a basic framework and moral-oriented principles to ensure the sustainability of economic development. In economics when contracts are formulated and signed, they are subjected to unexpected changes. Some issues may lead to disputes. The concept of *Sulh* (amicable settlement) can be used as an alternative dispute resolution (ADR) mechanism to solve these disputes. The scholars interpret such as mediation, arbitration, and conciliation. This paper aims to examine the potential of the applicability of mediation as a tool for dispute resolution in encouraging sustainability of economic development from an IME perspective. Based on a desk review of academic, peer-reviewed literature and reports, the particular focus of this study is on how mediation could assist the consumers of Islamic Banking and Finance in getting justice by applying dispute settlement methods between the parties. This paper suggested that the consumer obtains



much benefit if the IME adopts ADR or mediation in resolving dispute and simultaneously maintains the sustainability of economic development.

Keywords: Alternative dispute resolution, Consumer, Islamic moral economy, Mediation, Sustainability

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1. Introduction

In Islam, sustainable economic development takes into account both material and spiritual needs on top of non-compromise the ability of future generations' needs. Economic development must be balanced between the needs of this world and the Hereafter. The development must ensure the animal and environment are not being harmed. Sustainable development must bring betterment and not deprive future generations.¹ In developing the Islamic economy, the scholars come out with Islamic Moral Economy (IME) rooted in Moral Economy (ME). The emergence of IME started in the 1960s in fulfilling the need for an alternative to the existing economic model. ME is seen as suitable due to the nature of looking at the economic practices through moral incentives and implications.

Further, ME proposes the activities of economic be limited within the moral value. IME later flourishes and contributes to be the basis of many economic policies and development in Islamic society. Based on this, the scholars developed the basic framework permitted (*halal*) financial and banking system known as Islamic Banking and Finance (IBF). Many countries offer the services of IBF. The IBF products are from time to time reviewed and improved. The ultimate goal of establishing IBF is to benefit the Muslims' consumer, i.e., *halal* (permissible) banking. However, not many countries offer grievance procedure or dispute resolution method that follows Islamic philosophy on amicable settlement which gives benefit to the society and not cause difficulties. The method offers normally is litigation or court system. In Islam, consumers' right, and protection is not limited to trading alone. It includes the rights between consumers and Allah and the the rights between the traders and consumers. The relationship between human (*hablu min an-nas*) is considered as important due to the accountability that each human will face in the day of judgment. It shows the faith of a person towards Allah and the Hereafter. Hence, the relationship with other human beings is important. Islam emphasises on the welfare of individual and the society at large. Due to this consumer protection also covers the protection of one's religion (*deen*) and property. In caring for rights of others, Malpractice in Islam is prohibited such as misrepresentation and fraudulent products. The consumer is given a 3-day return policy (*khiyar*). The price must be determined with justice and not to base on the demand and supply basis. In protection of the Muslim's consumer rights, it includes the protection or religion (*deen*) that the product must be permissible (*halal*), protection of human life and progeny which refers to right of consumer for safety and healthy environemnet, protection

¹ Patmawati Ibrahim, Asmak Ab Rahman and Siti Arni Basir, 'Sustainable Economic Development: Concept, Principles and Management from Islamic Perspective' (2011) 24 European Journal of Social Sciences 330.

of human honour or dignity which refers to right to conduct the business activities, travelling and others, protection of intellect that refer to right to be informed about the goods or product, the skills to choose goods and to be aware of their rights and responsibilities and protection of wealth or property which refer to prevention of malpractice from traders. Hence, consumers' right and protection covers all aspects.²

This paper aims to examine moral economy from a dispute resolution perspective concerning mediation in encouraging sustainability of economic development; and how mediation could assist the consumer in getting justice in resolving the dispute in cases involving IME represented by IBF. Alternative dispute resolution (ADR) is resolving disputes other than litigation. The disadvantages of litigation such as costly, destroying a relationship, and adversarial causes disputants to opt for ADR that is known for being cheaper, fast in resolving the dispute, and give the parties autonomy in coming into a resolution to the dispute. This paper is limited to the study of dispute resolution of IBF in Malaysia and Pakistan. It is important as there is no such research yet that looking at alternative dispute resolution and sustainability of economic development for the benefit of consumer from IME's perspective.

This paper adopts mainly a desk review of academic, peer-reviewed literature and reports published by international organizations and information provided online by governments and non-government organizations. Literature review refers to discussion and reference made to what has been published in the field. Desk research is non-empirical research. It refers to data collected without fieldwork or secondary data. The data may be collected from the literature review, which refers to discussion and reference made to published in the field.³ This research adopts external desk research involving data outside the organizational boundaries, involving government-published data from Malaysia and other countries. This paper seeks to explore the surface of the relation between IME, mediation as a dispute resolution method, and sustainability of economic development without going into depth research which must be done through qualitative. The objective of this paper is not to involve the expert in the industry as yet, but to look at how the consumer can be benefited from IME using mediation as the dispute resolution method while sustaining the economic development according to Islam. The limitation of this research is the literature on IBF in Pakistan and ADR is dearth. A similar method is available in Malaysia offered by a non-government organisation. Mediation as part of ADR supports economic development's sustainability through its efficiency, its nature of less cost in money and time, and maintaining relationship. Hence, it is suggested for the government to create a platform that offers mediation for IBF, like court-annexed mediation. The consumer will obtain many benefits from mediation.

² Hamidah Ayob, 'Consumer Protection in Islam: An Overview' (2017) 20 *Malaysian Journal of Consumer and Family Economics* 1.

³ Prachi Juneja, 'Desk Research: Methodology and Techniques' (*MSG Management Study Guide*) <<https://www.managementstudyguide.com/desk-research.htm>>.

2. Literature Review

Sustainability in Islam requires humans to give attention and deliberation to humanity and the spiritual side. Islam promotes sharing in the Islamic economic principles and places a responsibility on the shoulder of humans as a trustee in enjoying the resources. Indirectly, it requires the activities to be economically sustainable. Economic performance that gives the satisfaction of people's spiritual and non-material needs is considered the measure of economic sustainability.⁴ Islamic sustainable economic development is concerned with human welfare in line with Islamic jurisprudence. The system of economic and its development must not cause injustice to the people. The development must adhere to the Islamic principle to give benefit and not to cause harm to either humans or the environment, including the animals. The concept of sustainability basically considers the benefit of the development in this world and the Hereafter in line with Islamic teaching. Among the challenges of sustainable development in the Islamic world are poverty, degradation of economics and social conditions, accumulation of foreign debt, and others. Hence, among the activities that need to be taken are to eradicate poverty, grow the economy, develop population and urban and others.⁵

Moral economy refers to the system of judging and evaluating the moral incentives and implications of economic practices and the moral justifications of the operation and basic principles of economic institutions. It assumes these economic activities should be limited within a set of norms and moral values.⁶ The term originated from the delineation of historian EP Thompson in his article, 'The Moral Economy of the English Crowd in the Eighteenth Century', where the moral economy was employed to amplify his conception over the food riots in eighteenth-century Britain. Thompson disputed that the consensus of protecting their collective rights or customs crowds was embedded in the mind of the rioting crowds. Based on explanation and clarification in this essay, Thompson treated the moral economy as a historical component. He highlighted the notion of 'just price' of grain related to moral economies.⁷ Influenced by Thompson, the political scholar James C Scott underlined the significance of moral economy in the farmer rebellion of Southeast Asia that moral economies of the impoverished are prioritized in terms of the social root of rebellions and revolts. Here James C Scott treated the moral economy as a politician component. On the basis of their works, scholars in various fields researched and further developed the idea of moral economy in virtue of the case study of different countries and entities.⁸

⁴ Azila Ahmad Sarkawi, Alias Abdullah and Norimah Md Dali, 'The Concept of Sustainability from the Islamic Perspective' (2016) 9 *International Journal of Business, Economics and Law* 112.

⁵ Ibrahim (n 1).

⁶ Andrew Sayer, 'Moral Economy and Political Economy' (2000) 61 *Studies in Political Economy* 79. See Katarzyna Cieslik, 'Moral Economy Meets Social Enterprise Community-Based Green Energy Project in Rural Burundi' (2016) 83 *World Development* 12.

⁷ EP Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century' (1971) 50 *Past and Present* 76.

⁸ James C Scott, *The Moral Economy of the Peasant Rebellion and Subsistence in Southeast Asia* (Yale University Press 1966).

Therefore, the concept of moral economy is not limited in the historian and politician aspects and applied it in the modern society who regarded the moral economy as a set of criteria and ethical assumptions buttressing the social bonds inside the economic frame.⁹ Furthermore, the idea is reconceptualized by Thomas Clay Arnold in terms of social goods and is considered as contrary to the market economy;¹⁰ however, Andrew Sayer claimed that all economies can be considered as moral economies in some specific directions as per the type of economy possesses relatively ethical rationales in practices and structures.¹¹

Islamic economics also continued to evolve, and it was largely an important component of Islam's cohesive societal ideology till World War II. Most Muslim nations have gained their independence since the end of World War II. They have felt the need to build their economy according to Islamic principles, which has aided the growth of Islamic economics.¹² Islamic economics, a subset of which includes Islamic banking and finance, are based on several prohibitions, including *Ribah* (interest), *Gharar* (hazard, chance, stake, or uncertainty), *Maisir/Qimar* (Gambling), false swearing, deceiving, telling lies and concealing facts in any exchanges, false statement, distortion of the truth, and overstated product descriptions, and encouragements including transactions that adhere to certain ethical principles, integrity in transactions, generosity in bargaining, fair trade, encircling uprightness, honesty, straightforwardness, and free consent.¹³

In contrast with the capitalist and the socialist system, IME serves to be a unique system in terms of economy, society, and politics in Islam countries, whose formation is guided by the Qur'an and Sunnah.¹⁴ Similarly, Abdul Hami El-Ghazali remarked that IME is 'an intrinsically moral and ethical system, in which man occupies the central place as both the means and the goal.'¹⁵ The generation of IME can be traced back to the late-1960s for the sake of economic decline and the need of an innovative alternative over the prevailing economy model at that time in Muslim societies.¹⁶ In essence, IME rests on the idea of *A'dalah* (Justice), which is the realization of socio-economic justice, and *Haqq* (Right), which concerns that the 'right' of an individual is connected with the correlative 'obligation' of others and the social interest within the community.¹⁷

⁹ Sayer (n 6).

¹⁰ Thomas Clay Arnold, 'Rethinking of Moral Economy' (2001) 95 *The American Political Science Review* 85.

¹¹ Andrew Sayer, 'Time for Moral Economy?' (2015) 65 *Geoforum* 291.

¹² M Umer Chapra, *Islam and the Economic Challenge* (The Islamic Foundation and International Institute of Islamic Thoughts 1992).

¹³ Ayob (n 2).

¹⁴ Shafiel A Karim, *The Islamic Moral Economy: A Study of Islamic Money and Financial Instruments* (Brown Walker Press 2010).

¹⁵ Abdel Hamid El-Ghazali, 'Man is the Basis of the Islamic Strategy or Economic Development', *Islamic Economics Translation Series No 1* (Islamic Research and Training Institute-Islamic Development Bank 1994), 57.

¹⁶ Mehmet Asutay, 'Islamic Moral Economy as the Foundation of Islamic Finance' in Valentino Cattelan (ed), *Islamic Finance in Europe* (Edward Elgar 2013).

IME directs the spotlight towards the moral filter or screening mechanism during the process of economic decision-making. It involves three main aspects: primarily, it advocates individual moral filter mechanism which indicates that one should realize the self-interest with consideration of the general social interest; secondly, property rights that God entrusted to lead to '*Maqasid Shariah*' (the Islamic way) are contingent on the Islamic norms and doctrines; thirdly, the moral filter mechanism also plays an instrumental role in enhancing and governing the operation of market economy in views of the advent of market and government imperfections.¹⁸ Chapra shared that several additional IME strategies are of equivalent significance. First, the right motivation strategy that the individual is required to keep personal interest correlated with the social interest demonstrated by *khilafah* (Brotherhood) in the way of enjoying the resources endowed by God. Second, restructuring all socio-economic and financial aspects – the social and financial environment must follow the principles of property ownership and resource utilization to prevent excessive capital or resource concentration and the consequently expanding wealth gap. Third, the role of the state where government engagement must be relevant and beneficial to address the market failures and equal resource distribution. Lastly, a comprehensive approach where all the strategies should be in line with Islamic teachings.¹⁹

IME basically is filtering the economic process to adhere to Islamic teaching. One of the Islamic teachings is to protect the consumers. The right of a person to create wealth must be balanced with the right of the other party in the transaction, i.e. how the transaction would affect his welfare. Justice is one of the elements to be taken into consideration to determine the price of product, and not the demand and supply alone. Khan discusses the rights and obligations of the consumers under Islamic law so as not to waste resources for unnecessary items and consume *halal* products. Islam restricts unfair trade practices and disapproves of business activities that involve harm and injustice to the consumer.²⁰

In respect of IME's functions and objectives, it initially contributes to being the foundation and rationale of the economic development and policy constitution in Islam society. At the same time, it is the successful solution of the development failure in the 1960s. Besides, IME provides the basic framework and moral-oriented principles to Islamic banks and financial institutions which establishment is the main achievement among the reviving actions of the Islamic economy.

IBF is now widely recognized as a front-liner and sustainable finance method that is now coexisting successfully alongside traditional banks worldwide. Islamic banking serves a similar function to the regular banking system with the exception that it is aligned with Shariah and its application which is derived from the Holy Qur'an, Sunnah, Hadith, and Fatwas in practice. Islamic banks are defined as financial institutions that adopt shariah

¹⁷ Mohammad Hashim Kamali, 'Fundamental Rights of the Individual: An Analysis of Haqq (Right) in Islamic Law' (1993) 10 *The American Journal of Islamic Social Science* 340.

¹⁸ Asutay (n 16).

¹⁹ Chapra (n 12).

²⁰ Muhammad Akbar Khan, 'Consumer Protection in Islamic Law (Shariah): An Overview' (2016) 31 *Al-Azwa* 77.

principles in their operations and products, financial documents and 'maintain a balance of social and economic benefit'.²¹ Malaysia launched small-scale interest-free banking systems in the mid-1940s, and Pakistan soon followed in the late 1950s, despite both countries failing to sustain the attempt. Malaysia, therefore, established the practice of the Islamic Banking system that dates back to early 1960s.²²

In regards to disputes, litigation is the regular process adopted by disputants in getting justice. It is a process where a case is taken to the court of law so the judge can make a judgment. On top of litigation, alternative dispute resolution (ADR) exists to resolve the dispute. ADR comprises arbitration, conciliation, ombudsman, judicial mini-trial, early neutral evaluation, renting a judge and pre-trial conference, etc. In certain countries, the government supports ADR processes in resolving disputes, such as Singapore, Australia, and the United States. In certain situations, hybrid processes are created to ensure the parties' needs are met. The hybrid process also suits the nature of the disputes and situation faced by the parties. An example of a hybrid process is mediation and arbitration, known as 'med-arb'. The ADR is the alternative to the current justice system based on adjudication or litigation.²³ Litigation has several disadvantages such as excessive delay, expensive, and some issue technicalities. The result of litigation creates ill-will and hatred between parties and emotional stress in the personal life.²⁴ There are some other disadvantages of litigation like polarized positions, client losing his power in litigation process and leaving everything to be decided by the lawyer which causes the client to be a victim of legal take over, litigation damages the commercial relationships, expensive proceedings, and the judgment that is impossible to enforce.²⁵

On the other hand, ADR processes have the advantages that cause many people to adopt them rather than litigation. The advantages of ADR such as the process is faster than litigation, it is less expensive, it is less time-consuming and saves time, the mediator is the expert of the area, it is informal and flexible, the process recognizes the need of the parties, the parties empowered to make a solution to their problems or participate in the process, it retains the relationship between parties, and the result is a win-win situation.²⁶ Mediation is a process where a neutral third party facilitate negotiation between the disputants to assist them to achieve an amicable resolution. In most cases, the parties chose mediation due to the fast process and not being expensive. They are able to resolve the issue much earlier than going to court or tribunal. Further, the mediator in the mediation process explores the

²¹ Ahmad Alharbi, 'Development of the Islamic Banking System' (2015) 3 *Journal of Islamic Banking and Finance* 12.

²² Scheherazade S Rehman, 'Globalization of Islamic Finance Law' (2007–2008) 25 *Wisconsin International Law Journal* 625.

²³ Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish Publishing Limited 2004).

²⁴ Syed Khalid Rashid, 'The Importance of Teaching and Implementing ADR in Malaysia' (2000) *Industrial Law Report* 1.

²⁵ Paul Newman, *Alternative Dispute Resolution* (CLT Professional Publishing Ltd 1999).

²⁶ Fiadjoe (n 23).

possible solution and come with some options for the parties. However, the decision are decided by the parties, not the mediator.²⁷

In Islam, ADR mechanism, especially mediation, conciliation, and arbitration is provided in the Qur'an and Sunnah.²⁸ This is due to the scholars' interpretation of *sulh* as mediation, arbitration, and conciliation.²⁹ Whilst ombudsman in Islam is known as *Muhtasib* which derived from the Quranic in Chapter 3 verse 104, brings the meaning that the people are instructed to do what is right and to forbid what is wrong. *Muhtasib* covered a variety of activities of public interest. In Pakistan, the government introduces Mohtasib or Ombudsman at the federal and provincial level for citizen to seek an impartial, independent and cheap justice. Mohtasib Pakistan Bank is one of the Federal Ombudsman in Pakistan. Basically, Muhtasib covers taxation, insurance, banking and protection of women from harassment at the work place. The mohtasib is appointed by the head of state for four years. It is open for man and woman. The services provided by the mohtasib is free of charge and without any formalities and help for lawyers. The injured parties or the complainants represent themselves.³⁰

In Islam also, ADR is an integral part of the court system in Islamic jurisprudence. System *Qada* in Islam is resolving the dispute through a court in the Islamic system of administration of justice. In the countries that experienced British colonial rule, such as Malaysia, the English court system was introduced as the administration of justice prone to litigation. It is different from the Islamic justice system, where ADR mechanism or processes is being used to promote amicable settlement under the concept of *sulh* (negotiation, mediation/conciliation, and compromise of action). In Islam, in settling dispute, *muhtasib* use judicial and non judicial means, i.e. ADR processes. The disadvantages of litigation, such as high cost, consuming a long time to resolve cases, giving bad publicity etc., cause the revival of ADR in resolving the dispute.³¹

3. Discussion

Currently, the industry of IBF is increasing. However, there is no specific alternative platform agreed to be the dispute resolution method in the industry that is cheap, speedy,

²⁷ Hanna Ambaras Khan, 'Legal Framework and Structure of Community Mediation in Malaysia: A Proposal' (Doctor in Philosophy of Law thesis, International Islamic University Malaysia 2017).

²⁸ *ibid.*

²⁹ Hanna Ambaras Khan, 'Community Disputes' in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohamad Naquib Ishan Jan and Muhamad Hassan Ahmad (eds) *Alternative Dispute Resolution Law & Practice* (Current Law Journal Publication 2020).

³⁰ Safdar Hussain, Arsalan Rasool and Nouman Rasool, 'Federal Ombudsman (Wafaqi Mohtasib) in Pakistan: A Reappraisal of its Origin, Development and Functions' (2020) 17 Palarch's Journal of Archaeology of Egypt/Egyptology 62.

³¹ Abubakar Aminu Ahmad, 'Alternative Dispute Resolution in Islam' in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohamad Naquib Ishan Jan and Muhamad Hassan Ahmad (eds), *Alternative Dispute Resolution Law & Practice* (Current Law Journal Publication 2020).

and benefits the consumers provided by the government. The current adjudication or litigation system is expensive and time-consuming. The consumer needs to bear expensive costs to resolve the financial institution's disputes. This research study the dispute resolution method for Islamic Banking and Finance in Pakistan and Malaysia. Islamic banking in Pakistan adopts an ombudsman to efficiently resolve the dispute in handling consumers' complaints and grievances. Ombudsman is defined as an official, usually appointed by the government, who investigates complaints (usually lodged by private citizens) against businesses, financial institutions, government departments, or other public entities. He attempts to resolve the conflicts or concerns raised, either by mediation or by making recommendations. In some countries, ombudsmen may be called by different names, including public advocates or national defenders.³²

Banking Mohtasib Pakistan (BMP) is the platform offered to the consumers that work as an alternative dispute resolution centre if the bank fails to resolve the dispute.³³ The BMP, established in 2005, has been receiving cases either formal or informal. The percentage of cases resolved by BMP was 89% in 2016. The cases that cannot be resolved through BMP will be adjudicated through the formal system. The cases increased due to the trust gained from the people.³⁴ The importance of establishing BMP is to resolve the consumer's grievance amicably, speedily, and free of cost and ensure the bank applies the rules and regulations of the State Bank of Pakistan fairly and judiciously.³⁵ Banking Mohtasib in Pakistan has the jurisdiction over the complaints relating to all commercial banks operating such as delay or fraud in making payment or collection of cheques, drafts or other banking instruments, failure to adhered to banking laws and regulations, fraudulent withdrawal or debit entries in accounts, complaints from exporters or importers or holders of foreign current account or relating to remittance in relation to banking services, and complaints relating to payment of utility bills. It also has the jurisdiction over complaint against corruption by bank officer, dereliction of duty in dealing with customer and unnecessary delay in taking decisions.³⁶

³² Adam Hayes, 'Laws & Regulation' (*Investopedia*, 2 January 2022) <<https://www.investopedia.com/terms/o/ombudsman.asp>>.

³³ Consumer Protection, 'Complaint Resolution' (*State Bank of Pakistan*) <<https://www.sbp.org.pk/cpd/cpd-com.asp>>.

³⁴ Juwaid Bokhari, 'Banking Mohtasib Paves Way for Reconciliation' (*Dawn, The Business and Finance Weekly*, 2017) <<https://www.dawn.com/news/1370080/banking-mohtasib-paves-way-for-reconciliation>>.

³⁵ Banking Mohtasib Pakistan (2020) <<https://www.bankingmohtasib.gov.pk/Website/Index.aspx>>.

³⁶ Annual Report 2021 (*Banking Mohtasib Pakistan*, 2021) <<https://bankingmohtasib.gov.pk/Documents/AR%202021.pdf>>.

The following is the table (Figure 1) showing the number of complaints received and disposed from 2017 to 2021.³⁷

Year (Jan–Dec)	Brought Forward From Last year	Complaints Received	Total	Resolved Amicably through Reconciliation	Formal Order Passed after Hearing	Rejected	Carried Forward
2017	532	8,972	9,503	7,064	224	1,935	280
2018	280	10,319	10,599	6,651	126	2,770	1,052
2019	1,052	14,587	15,639	10,324	262	2,275	2,778
2020	2,778	22,750	25,528	16,123	166	5,071	4,168
2021	4,168	33,196	37,364	25,231	437	6,924	4,772

Figure 1: Complaints Received and Disposed in the year of 2017 to 2021

In 2017, 7,064 complaints was resolved by Banking Mohtasib amicably. There were 224 cases referred to court for formal hearing due to dissatisfaction with the amicable decision. One thousand nine hundred thirty five (1,935) complaints were rejected because those matters are not within the jurisdiction of Banking Mohtasib. In 2021, the complaints received increased 72% from 8,972 in 2017 to 33,196 complaints. The percentage of case resolved amicably decreased from 74% in 2017 to 67.5% in 2021. However, number of complaints resolved amicably is huge (25,231), and the percentage of complaints that sent for hearing is very low.³⁸ In 2017, the percentage for cases referred for hearing was 2.9%, it decreases to 1.6% in 2018. In 2020, the complaints send for hearing is 0.65% and increased to 1.4% in 2022. The percentage shows that most complaints are resolved amicably through reconciliation, which means the parties are happy and accepted the decision of the *Muhtasib*. The number of complaints sent for hearing is low which shows that the disputants who is unhappy and proceed the matters to court is not many. From Figure 1, it shows that cases are increasing and the cases sent for hearing is little. Hence, it may be said that that *Muhtasib* i.e. as a branch of ADR method adopted by Pakistan in resolving IBF disputes works well and is gaining trust from the people.

However, in Malaysia, dispute arises under IBF is decided by the civil court. Shariah court has no jurisdiction since it involves corporate body and not personal issues. This is pursuant to the judge's decision in the case of *Bank Islam Malaysia v Adnan Omar*,³⁹ where it was said that since a bank is a corporate body, it falls under Federal law and not Shariah court. Shariah court has jurisdiction over persons who profess the religion of Islam. Article 121(1A) of the Federal Constitution of Malaysia exclude civil court from encroaching

³⁷ *ibid.*

³⁸ In calculating the percentage, the number of complaints send for hearing is divide with the total number of complaints after deducted the number of rejected complaints and times 100 [(complaints send for hearing/ total complaints (total complaints – rejected complaints) × 100].

³⁹ *Bank Islam Malaysia v Adnan Omar* [1991] 3 Malaysian Current Law Journal 735.

towards the jurisdiction of Shariah Court. However, when it involves banking and corporate bodies, the matter fall under the jurisdiction of civil court. Hence, the most appropriate forum is the civil court. However, due to the decision, issues arise when in some cases the judge's decision in civil court does not align with the spirit of Islamic Banking. For example, in the case of *Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Berhad*,⁴⁰ the decision of the court stated that the *bay bithaman ajil* product is meant to facilitate the Islamic financing process made by the bank, and it is not a genuine and complete sale and purchase. Some judges are not expert in Shariah matters or IBF. Even though in certain cases, the matter referred to a specialist such as the Shariah Advisory Council of the Central Bank Malaysia to assist the judges in deciding by giving their expert opinion relating to the matter, still the judge has the choice either to listen or otherwise.⁴¹ Due to this issue, the consumers bear the disadvantages. Instead of getting a just decision that benefits consumers, the consumers have to bear the financial loss. Hence, it is suggested for the ADR mechanism to be adopted.

In Malaysia, the mechanism to resolve a dispute under IBF is provided by Section 56 of the Central Bank Act 2009. The parties are allowed to adopt litigation or arbitration. Mediation is not mentioned in the section but was mentioned in case law. Dahlan⁴² discusses the decision of the case of *Bank Islam Malaysia Berhad v Adnan Omar*, in which the parties have the choices to opt for mediation or arbitration as the method of dispute resolution as long as it is included in their agreement in pursuant to Section 24(4) of the Courts of Judicature Act 1964. Perhaps there is no awareness regarding this matter. Even if the IBF users have information, they might not be aware of mediation definition and nature. Hence, scholars keep writing and suggesting for mediation or ADR to be made available as the method of dispute resolution. Umar A Oseni and Abu Umar Faruq Ahmad discuss ADR from the Islamic perspective. They further discuss on-court annex-mediation in resolving the IBF issue, which is in line with *sulh*. They emphasized that IBF issues need to be mediated by the expert, not just any mediator. Then, it will be just to the mediation process and it brings benefit to the consumers.⁴³

Khairil Azmin Mokhtar and Sharifah Nadiah Syed shared concerns and findings from their research on mediation and IBF. According to them, each financial institution has a department or unit to cater to the complaints and inquiries. The methods adopted might be different but the purpose is similar, i.e. to resolve arising issues. They also shared that in getting the findings of their research, several surveys and interviews were conducted among

⁴⁰ *Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Berhad* [1998] 3 All Malaysia Report 2760.

⁴¹ Nur Khalidah Dahlan, 'Alternative Dispute Resolution for Islamic Finance in Malaysia' (Malaysia Technical Universities Conference on Engineering and Technology, MATEC Web of Conferences, 2018) <<https://doi.org/10.1051/matecconf/201815005077>>.

⁴² *ibid*.

⁴³ Umar A Oseni and Abu Umar Faruq Ahmad, 'Dispute resolution in Islamic Finance: A case analysis of Malaysia' in Hatem A El-Karanshawy, Azmi Omar, Tariqullah Khan, Salman Syed Ali, Hylmun Izhar, Wijdan Tariq, Karim Ginena and Bahnaz Al Quradaghi (eds), *Developing Inclusive and Sustainable Economic and Financial Systems: Ethics, Governance and Regulation in Islamic Finance* (Bloomsbury Qatar Foundation Journals 2015).

banking institutions to discover the dispute mechanism adopted by the bank in resolving disputes. They found that none of the banks has a proper mediation body within its institution. The most important finding is that the institutions give similar treatment to the disputes arising from the Islamic banking products and a conventional product. The resolution out of the mediation process is informed to the customer through a letter. The Islamic product and conventional product must not have similar treatment since the earlier involves different philosophy i.e. Islamic values. The customer who is not satisfied with the resolution or decision, may proceed to Ombudsman for Financial Services (OFS) previously known as Financial Mediation Bureau. OFS provides services to consumers who are not satisfied with the compensation offered by financial institutions or insurance companies (Islamic and non-Islamic products). The consumer may refer the case to OFS to be dealt with by the ombudsman.

Previously, the organization was offering mediation alone. The current services include an ombudsman. FMB was established in 2002 and started its operation in 2003. In 2013, the Central Bank Malaysia appointed FMB to be Ombudsman Financial Services under the Financial Service Act 2013 and Islamic Financial Service Act 2013. The Islamic Financial Service Act 2013 contains rules on corporate activities, restricted conducts, and the establishment of a financial ombudsman program, all of which are necessary to protect consumers' interests when it comes to Islamic finance. Launched in 2016, OFS is a non-profit organization where the members are license by the Central Bank of Malaysia. OFS also deals with both Islamic banking and finance as well as conventional.⁴⁴

OFS has seen a continuous rise in the number of disputes filed since 2016, and the organization processed 1,721 cases, including 1,285 newly filed cases and 436 cases brought forward in 2019. Approximately 60% of the newly filed complaints were against the traditional insurance and takaful sectors, with the banking and Islamic banking sectors accounting for 38% and payment systems accounting for 2% of the total. An overall total of 966 instances was successfully resolved, with 37% of those cases being resolved peacefully via a consensual settlement between the financial services providers and the complainants. In terms of timeliness, 57 percent of cases were settled within six months after registration, and 76 percent remained outstanding for less than six months. The cases were settle through mediation, conciliation and negotiation.⁴⁵

In Malaysia, there is no specific unit or centre for IBF offering alternative dispute resolution process in resolving disputes established by the authority, either a ministry or government agency. In Pakistan, the IBF issue is resolved by the *Muhtasib* under BMP. This process seems are getting more attention from the people and the complaints received by the *Muhtasib* increased. In fact, most cases are resolved through conciliation rather than being sent for hearing in court. The Government of Malaysia has yet to establish this kind of institution or centre to offer similar services for IBF's customers. All Islamic countries may

⁴⁴ Dispute Resolution Process (Ombudsman for Financial Services, 2020)
<https://www.ofs.org.my/en/dispute_resolution_process>.

⁴⁵ *ibid.*

come to a resolution of adopting ADR or mediation with a similar specific procedure as much as they agreed to the Islamic banking product. The customer or consumer must also be taken care of from the perspective of dispute resolution. The application of mediation benefits the customer/consumer in terms of money and time. The mediation process is faster and is not expensive. It is also part of the Islamic way of resolving the dispute. It gives many benefits to the consumer compared to the court process. Hence, mediation may be the solution in assisting the consumer/customer to get justice in a more affordable and faster way. Further, it is important to ensure the development of the economy is within the ambit of Islamic sustainability, which benefits the consumers and reduces their grievance towards the economic development, especially when it involves products under IME.

4. Conclusion

Mediation as part of the ADR process may be the best method to resolve IBF disputes. Expert in IBF need to be the one who listen to the issues arising from the area since it involves Islamic terms to ensure both parties can get justice. Mediation is an amicable way of resolving issues giving parties chances to have a friendly and open discussion. Hence, both parties would be able to understand their position and decide an amicable solution to the issue. The main purpose of having IBF is to assist the Muslims to have a *halal* system in banking and finance. Hence, the dispute resolution in resolving issues arises from the system provided must as well more friendly as Islam always care for the consumers. It is suggested that mediation or *sulh* will be more appropriate than civil court or litigation. Further, it give values to IME and benefit the consumers. The disadvantage of litigation deprives the goodness of IME. It is costly in time and money. It causes resentful or negative feelings for the party who lost the case. It may destroy the relationship. In contrast, mediation involves all parties in the procedure and results. At the same time, there is no pressure associated with cross-examination or other aspects of a trial, and withdrawing from an unacceptable offer is always an alternative. One of the most significant advantages of mediation is that resolving the dispute before trial may result in substantial cost benefits. If the IME brings goodness, the dispute resolution method is suggested to be an amicable way which benefits the consumer. It is recommended that thorough research be done to collect more data on this idea and study the real possibilities to materialize the idea.

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