

## Provision of Alternative Dispute Resolution Process in Islam

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**Abstract:** *Alternative Dispute Resolution includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. There has been strong growth in Alternative Dispute Resolution (ADR) in recent year. ADR is very popular now. The main objective of this article is to prove that modern ADR is shadow of Islamic dispute resolution Process and it is not unfamiliar with Islamic Law. In Islam, civil and petty criminal disputes are strongly recommended to be settled through negotiation, mediation, conciliation, arbitration or compromise, as these are nearer to norms laid down in the Holy Quran and Hadith. It is qualitative research. I use secondary sources. Basically, I discuss based on Quran and Hadith of the Prophet Mohammad (SWA).*

**Keywords:** *Alternative Dispute Resolution, Islamic Law, Sulh, Tahkim, Muhtasib, Fatwa of Muftis.*

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### I. Introduction:

What is ADR? Put very simple, ADR is when there is a conflict between two people or among people or between institutions, they, themselves, should be able to negotiate their difference with a view to achieving an equitable settlement and they, themselves, should ensure its enforcement through mutual agreement. This may be an over simplification, because the ADR toolkit has a number of tool and while some, e.g. mediation, allow a greater autonomy to the litigants, others, e.g. arbitration, may grant less control of them.

ADR processes are not newly created, but the truth is that it has been rediscovered again. It is a well known fact that people of early civilisations, like Muslims, Chinese and Hindus have been using the ADR processes to settle their disputes and it is today that the human civilisation has realised the merits of these processes and has decided to adopt them once again. Over 1,400 years ago, ADR methods have been used by Muslims to settle their differences amicably and these methods have been mentioned and encouraged in the sources of Islamic law. This is because Islam is a religion which adores peace rather than fighting and loves compromise rather than confrontation.

### II. Adr Processes In Islamic Law

Islam encourages people to solve their matters amicably rather than in an enmity creating manner. Hence, in Islam, we are encouraged to use the ADR processes to resolve disputes.

Islamic law contains the following ADR processes:

- ❖ *sulh* (negotiation, mediation/conciliation, compromise of action);
- ❖ *tahkim* (arbitration);
- ❖ *med-arb* (a combination of *sulh* and *tahkim*);
- ❖ *muhtasib* (ombudsman);
- ❖ informal justice by the *wali al-mazalim* or chancellor; and
- ❖ *fatwa* of muftis (expert determination).

This paper briefly examines the above ADR process in the Islamic law and also justifies the inclusion of 'compromise of action' in ADR, as rightly done by including it in *sulh*.

#### A.Sulh (negotiation, mediation/conciliation, compromise of action):

1. Sulh literally means 'to cut off a dispute' or 'to finish a dispute' either directly or with the help of a neutral third party. Arbitration is governed by different regulations; therefore arbitration does not come under *sulh*. Sulh includes negotiation, mediation or conciliation and also compromise of action which easily fits within the definition of ADR.

The origin of *sulh* is found from the following two verses of the Holy Quran:

1. "The believers are but a single Brotherhood: So make peace and reconciliation between your two (contending) brothers: And fear Allah that ye may receive Mercy".<sup>1</sup>
2. "If two parties among the Believers fall into a quarrel make ye peace between them: but if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until it

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<sup>1</sup> Surah al-Hujurat (49):10 (English translation by Abu Yusuf Ali).

complies with the command of Allah; but if it complies then make peace between them with justice and be fair: for Allah loves those who are fair (and just)".<sup>2</sup>

Another Quranic verse strappingly supports amicable settlement of dispute on equitable and fair. In the word of the Quran:

*"In most of their secret talks there is no good: but if one exhorts to a deed of charity or justice or conciliation between men (secrecy is permissible): to him who does this seeking the good pleasure of Allah We shall soon give a reward of the highest (value)".<sup>3</sup>*

Prophet Mohammad (SWA) supported sulh. He encouraged people to settle their dispute by sulh. In one of the hadith reported in *Sahih Al Bukhari* he is reported to have said:

*"He who makes Peace (Sulh) between the people by inventing good information or saying good things, is not lair".<sup>4</sup>*

*"There is a sadaqah to be given for every joint of the human body and for every day on which the sun rises there is a reward for the sadaqah for the one who establishes sulh and justice among the people"<sup>5</sup>*

The Prophet also upheld the cause of *sulh* even when certain derogatory remarks were made against him. It is narrated by al-Bara bin Azib that when Allah's apostle concluded a peace treaty with the people of Hudaibiya, Ali bin Abu Talib wrote the document and he mentioned in it, 'Muhammad, Allah's Apostle'.<sup>6</sup> The pagans said, 'Don't write: 'Muhammad, Allah's apostle', for if you were an apostle we would not fight with you. Allah's apostle asked Ali to rub it out, but Ali said, I will not be the person to rub it out'. Allah's apostle rubbed it out and made peace with them on the condition that the Prophet and his companions would enter Makkah and stay there for three days, and that they would enter with their weapons in cases.<sup>7</sup>

There are at least two recorded incidents in which the Prophet mediated between two warring parties.

*"Narrated Sahl bin Sa'ad: There was dispute amongst the people of the tribe of Bani Amr bin 'Auf. The Prophet went to them ..... in order to make Sulh (Peace) between them."<sup>8</sup>*

*"Narrated Sahl bin Sa'ad: Once the people of Quba fought with each other till they threw stones on each other. When Allah's Apostle was informed about it, he said: 'Let us go to bring about reconciliation between them."<sup>9</sup>*

The companions of the Prophet SAW also encouraged *sulh*. For example, in the famous letter written by Umar bin al-Khattab to Abu Musa al-Asharion, the latter's appointment as a judge contained several principles relating to *sulh*:

*"All types of compromise and conciliation are permissible except those which makes haram anything which is halal and a halal is haram".<sup>10</sup>*

In the above letter, the part relating to *haram* and *halal* in compromise is based on a hadith of the Prophet: it is narrated by Aisha that Allah's apostle said, 'If somebody innovates something which is not in harmony with the principles of our religion, that thing is rejected'.<sup>11</sup> Mediation and conciliation under Islamic law are conducted in an informal manner without being governed by any formal rule, as is the ever increasing trend in the modern institutional mediations. Informalism is found to be a useful thing which helps the process of settlement. Countries like China, Korea, Japan and Vietnam conducted mediation without adhering to any formal rules.<sup>12</sup>

The only rule which governs Sulh in Islamic law is that no compromise is possible in the domain of huquq Allah (i.e. Rights of Allah) which include hudud punishment, zakat, kaffarah, etc. Any effort circumvents the provisions prescribed for this through mutual settlement is sinful and avoid. In huquq il 'abad' (rights of human being) however compromise and conciliation is not only possible but preferable, so long it is equitable and just and does not violate any provision of shariah. If the matter is already before the court, it has been made

<sup>2</sup> Surah al-Hujurat (49):9.

<sup>3</sup> Surah *al-Nisa* (4):114.

<sup>4</sup> Sahih Al Bukhari, vol.3, pp.533, Eng. Tr. By Muhammad Muhsin Khan (Dar Al Arabia, Beirut, n.d).

<sup>5</sup> Sahih *al-Bukhari* hadith No 3.857.

<sup>6</sup> Aishath Muneeza, *Is Conventional Alternative Dispute Resolution to Islamic Law*, 4 MLJ xcvi (2010).

<sup>7</sup> Sahih *al-Bukhari* hadith No 3.862.

<sup>8</sup> Sahih Al Bukhari, Vol.3, pp.531, Eng.tr. By Muhammad Muhsin Khan (Dar Al Arabia, Beirut, n.d.).

<sup>9</sup> *Id.* At 534.

<sup>10</sup> The authenticity of this letter is universally accepted and it has been extensively quoted by Muslim and non-Muslim scholars. See, for example, Margolith, D.S., 'Omar's Instruction to the Qadi', (1910) journal of Royal Asiatic Society, 307, at pp. 311-312.

<sup>11</sup> Sahih *al-Bukhari* hadith No 3.861.

<sup>12</sup> Syed Khalid Rashid, *Alternative Dispute Resolution in the Context of Islamic Law*, in 2<sup>nd</sup> International Conference on Law and Commerce-Law, Commerce and Ethics, 8-10 December 2003, School of Law, Victoria University, Melbourne, Australia.

the duty of the qadi to bring about settlement through compromise is lawful and preferable as it settles dispute. However, if the qadi fails in this effort to bring compromise, then the dispute should be judicially determined in a proper matter.<sup>13</sup>

Furthermore, *Mejelle*<sup>14</sup> has formulated 40 articles to deal with *sulh* (from Articles 1531–1571). This proves that in Islam (not only the *sulh*), the word exists, but the procedures which are in a codified form exist as well as.

### B. Tahkim (Arbitration):

In pre-Islamic Arabia, the concept of *tahkim* (arbitration) was known and it was practiced to settle various types of civil and commercial disputes. The arbitration award was not enforceable if parties contested it, unless the trial chief was in a position to get it enforced.<sup>15</sup> However, according to a writer, awards of the arbitrators appointed in *theukaz*, a fair held periodically in Mecca, were customarily regarded as binding on the parties.<sup>16</sup> Islamic law allows people to seek the aid of arbitrators when they fall into quarrels and when they are unable to resolve private matters between themselves. This can be proven from the *Quran*, *Sunnah*, *Ijma'* and *Qiyas*.

It should be noted here that the position of an arbitrator is similar to the position of a *qadi* (judge) in the formal court in the sense that under Islamic law, the same jurisdiction would be given to the arbitrator as a judge in terms of solving the dispute and giving an award in a dispute. However from the beginning, it must be known that neither arbitration nor a compromise can be made to disputes of a Hudud nature. Furthermore, matters concerning *li'an* (mutual imprecation), *talaq* (divorce), *nasab* (paternity), *fasakh nikah* (judicial abrogation of marriage), emancipation of slaves, *rushd* (adolescence), *safih* (spendthrift), *mafqud al-khabar* (a person whose whereabouts are unknown), *waqf* (endowments) and revenue matters cannot be arbitrated, as the judge alone has the discretion to decide these matters (Rashid, 2006).<sup>17</sup>

The most remarkable verse with regard to arbitration in the Quran is the following:

*“If you fear a breach between them (the man and his wife), appoint (two) arbitrators, one from his family and the other from her’s; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things”*.<sup>18</sup>

As observed by Rashid (2006), the use of word ‘reconciliation’ in the above verse indicates that an arbitral award is not binding and Imam Shafie also held that arbitral awards are binding if parties mutually agree to enforce it.<sup>19</sup>

Prophet Mohamed SAW also recognised and practiced arbitration. He appointed arbitrators and accepted their decisions. He also acted as arbitrators in several occasions to resolve disputes arising between individuals and tribes. He acted as an arbitrator in the dispute between several Arab tribes regarding which of them will have the honour of lifting and placing the black stone after rebuilding the Kaaba. He put the Black Stone in his outer garment and judged that every tribe chooses a representative and that all representatives carry the garment together to the place of the stone. He also chose arbitration to settle the dispute between himself and Bani Anbar.<sup>20</sup>

The leading case where arbitration was used by the companions of the Prophet (peace be up on him) was the famous political case between the Caliph ‘Ali bin Abi Taleb’ (the fourth rightly guided Caliph) and ‘Muawya bin Abi Sofian’ (the governor of Assham which is Syria, Lebanon, Palestine and Jordan). Muawya had refused to recognise Ali bin Abi Taleb’s right to the Caliphate. The dispute led to a civil war between the two parties. During the fighting, Muawya bin Abi Sofian demanded the settlement of their dispute through arbitration. Ali bin Abi Taleb accepted that and each party appointed his arbitrator. The two arbitrators were to decide on who would be the Caliph. The two arbitrators were nominated in the arbitration agreement document and drafted an arbitration agreement specifying the dispute. The procedure, duration of the arbitration, place of arbitration and the applicable law were fixed in the arbitration document.<sup>21</sup>

The second view is that Shariah knew arbitration in its modern sense. This view is based on the following verse from the Quran:

<sup>13</sup> *Id*

<sup>14</sup> The Ottoman Code Majallah al-Ahkam al-Adliyah.

<sup>15</sup> Amin, S.H., Commercial Arbitration in Islam and Iranian Law, at p.42 (Tehran, n.d.).

<sup>16</sup> *Id*, at pp.7-8

<sup>17</sup> Aishath Muneeza, *Is Conventional Alternative Dispute Resolution to Islamic Law*, 4 MLJ xcvi (2010).

<sup>18</sup> Surah *al-Nisa* (4):35.

<sup>19</sup> Aishath Muneeza, *Is Conventional Alternative Dispute Resolution to Islamic Law*, 4 MLJ xcvi (2010).

<sup>20</sup> *Id*.

<sup>21</sup> *Id*.

“Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice”.<sup>22</sup>

According to Hanafi School, The nature of arbitration is contractual in nature and they are close to agencies and conciliation. An arbitrator acts as an agent on behalf of the disputed parties who appointed him. For this school, arbitration is closer to conciliation and hence the arbitral award has a lower level of abidingness than that of a court judgment. However, the contractual nature of the agreement would ultimately force the parties to agree to the decision of the arbitrators. According to Maliki School, arbitrators can be chosen by any one of the parties and the arbitrator cannot be revoked in the middle of the proceedings. Shafie says that arbitration is not like a formal court proceeding and the arbitrators can be changed before they issue an arbitral award. Hambali narrates opposite opinion with Shafie. They says arbitration has the same effect as a court proceeding. Hence, the arbitrator shall have the same qualification as a judge and the award given by him is bound by the parties who chose him.

In the *Mejelle*, arbitration is considered as an effort in reconciliation (Article 1850). According to *Mejelle*, each party has the right to dismiss and change the arbitrator unless and until they find themselves in situation where two parties have appointed the arbitrators, and a judge was appointed by the *Sultan* (king or ruler) and authorised to appoint a representative, has also given him permission and by reason of the judge having appointed him, he is in a position of representative of judge (Article 1847). Thus, the decision of an arbitrator would be binding (Article 1848).<sup>23</sup>

It is now universally accepted that the western law of arbitration has become too technical, formal, costly and protracted. Compared to this, *tahkim* offers informal, far less technical, cheap and speedy process. Each party has a right to withdraw from the arbitration before award is given. There are numerous Islamic rules and procedures with regard to arbitration and one separate book can be written on discussing these procedures. The above discussion is sufficient to prove that arbitration is not a new kind of ADR to Muslims, but it is just a mere renaissance of the Islamic *tahkim* principles with a fresh coat of paint.

### **C.Med-Arb (a combination of sulh and tahkim):**

Verse 35 of Surah *al-Nisa* of the Quran mentions conciliation along with arbitration:

“If ye fear a breach between them twain appoint (two) arbiters one from his family and the other from hers; if they wish for peace Allah will cause their reconciliation: for Allah hath full knowledge and is acquainted with all things.”

From the above mentioned verse, it is clear that the job of the arbitrator is first to mediate; only when it fails should he start arbitrating. Article 1851 of the *Mejelle* supports the idea of going for arbitration when mediation attempts fail. This proves that in Islam, med-arb is also recognised and used.

Combining Mediation and arbitration is arbitration is an idea which is now being universally accepted. In China, Japan, Korea, Vietnam and Malaysia, for example, mediation and arbitration are combined. According to Art.18 of the Rules of the Korean Commercial Arbitration Broad, conciliation may be possible even after the start of arbitration proceedings. If conciliation fails, arbitration starts; if it succeeds, it is incorporated into the arbitral award. Similarly, Art.28 of the Rules of Maritime Arbitration of the Japan Shipping Exchange, revised in 1996 allows mediation at every stage of the arbitration proceedings. Article 35 of the Arbitration Rules of the Vietnam International Arbitration Center allows the parties to arbitration to go mediation on their own and if they succeed, the settlement is recorded as the arbitration award. Article 34(1) of the (revised) Kuala Lumpur Regional Center for arbitration Rules, 2001 is also to the same effect.

### **D.Muhtasib (ombudsman):**

The institution of ombudsman engaged in its present form in Sweden in 1809. England had its ombudsman under the Parliamentary Commission Act, 1967. According to Islamic Law, muhtasib is equivalent to ombudsman. Muslims are practicing this from more than fourteen hundred years before when Al-Quran Came from Allah. Holy Quran is the origin of ombudsman. Many verses of Holy Quran focus about Ombudsman. The main purpose of ombudsman under Islamic law is account taking (*hisbah*). The function of the muhtasib covered religious activities of people such as offering a salat (prayers), maintenance of mosques, etc. He also regulated community affairs and behaviour in the market, such as accuracy of weight and measures and honesty in business dealing. Also the municipal affairs like keeping the roads and streets clean and lit at night and prevent the building of a factory or a house which could clash with the community interests.<sup>24</sup>

The basis of a muhtasib is found in the Quran:

<sup>22</sup> Surah *al-Nisa* (4):58.

<sup>23</sup> Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia*, at pp.36, Kulliyah of Laws, IIUM (2000).

<sup>24</sup> *Id* at pp.51.

“Let there arise out of you a band of people inviting to all that is good enjoining what is right and forbidding what is wrong; they are the ones to attain felicity.”<sup>25</sup>

“Ye are the best of peoples evolved for mankind enjoining what is right forbidding what is wrong and believing in Allah. If only the People of the Book had faith it were best for them; among them are some who have faith but most of them are perverted transgressors.”<sup>26</sup>

“They believe in Allah and the Last Day; they enjoin what is right and forbid what is wrong; and they (hasten in emulation) in (all) good works; they are in the ranks of the righteous.”<sup>27</sup>

“The believers men and women are protectors one of another: they enjoin what is just and forbid what is evil: they observe regular prayers practice regular charity and obey Allah and His apostle. On them will Allah pour His mercy: for Allah is exalted in power Wise.”<sup>28</sup>

“O my son! Establish regular prayer enjoin what is just and forbid what is wrong: and bear with patient constancy whatever betide thee; for this is firmness (of purpose) in (the conduct of) affairs.”<sup>29</sup>

Moreover, The Prophet Mohammad (SWA) himself appointed Sa’ad ibn Al’aas Ibn Umayyah as muhtasib of Mecca and Umar bin al-Khattab as that of Madina. Abd Allah ibn Utbah al-Mas’ud was the muhtasib of Madina during Umar Ibn al-Khattab’s time.<sup>30</sup>

#### **E. Informal justice by the wali al-mazalim or chancellor:**

A *wali al-mazalim* is considered as a fusion of a judge and an ombudsman. He is a public officer appointed by the king to set into motion the coercive authority of the ruler and the adjudicative function of a judge at large in order to bring about quicker, cheaper and just settlement of disputes. The settlement of disputes by Wali Al Mazalim was done in a purely informal manner. The procedure differed from that of ordinary Courts in several respects. For example: a *wali al-mazalim* could admit evidence which a court might declare inadmissible and at the same time, he could also call persons as witnesses who were not qualified to act as such before a court. A *wali al-mazalim* may also rely on his own personal knowledge while deciding a case compel litigants to arbitrate, and dispense away with the requirement of proving matters which require strict proof before a court plus many other things.

Ibn Khaldun and J’far Ibn Yahya were appointed by Caliph Harun al-Rashid to the office of *wali al-mazalim*. The jurisdiction of *wali al-mazalim* included the following types of cases:

- ❖ complaints about the misappropriation of property;
- ❖ complaints lodged by stipend holders;
- ❖ complaints against misdeed in administering lands given as private or public endowments;
- ❖ complaints against the indiscretion in public records kept by registrars, accountants and clerks;
- ❖ complaints against the corruption of government;
- ❖ complaints against things which normally fell in the jurisdiction of a *muhtasib*; and complaints against individuals.<sup>31</sup>

#### **F. Fatwa of Muftis (Expert determination):**

A fatwa is an Islamic religious ruling, a scholarly opinion on a matter of Islamic law. Now the question which arises is, how does a fatwa of mufti become an ADR process? ADR methods like evaluative mediation or conciliation, mini trial (executive Tribunal) and expert determination allows an impartial third party, chosen by the parties to make a non-binding evaluation assessment on a dispute based on the merit and on his own expertise. The reason promoting the parties to submit their dispute to a neutral evaluator for giving his non-binding assessment is desire to know their rights and duties, and if satisfied, to comply with the assessment on a purely voluntary basis.

In history, *fatwa* of muftis has proven to be an effective mechanism to solve disputes between the parties. Normally, the *fatwa* issued would be based on the use of *ijthihad* or reasoning. What muftis normally do is that they either settle the disputes in the light of the existing cases or extend the law, if necessary, from the prevalent general principles of Islamic law or alternatively, they formulate a new principle provided that the new principle formulated will meet the conditions laid down by the jurists.<sup>32</sup>

<sup>25</sup> *Id* at pp.51.

<sup>26</sup> Surah Ali Imran (3):110.

<sup>27</sup> Surah Ali Imran (3):114.

<sup>28</sup> Surah al-Tawbah (9):71.

<sup>29</sup> Surah Luqman (31):17.

<sup>30</sup> Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia*, at pp.36, Kulliyah of Laws, IIUM (2000).

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### **III. Conclusion:**

According to the above discussion it is clear that, ADR process is not new for Islam. Basically, western ADR is the transcript of Islamic ADR. The emergence of ADR was a reaction against and response to the inadequacies of the litigation process and the resultant heavy backlog of case that choked the courts from the lowest to the highest levels. Everyone can see the glaring demerits of litigation: that it is grossly invasive of privacy and destructive of reputation; it is acrimonious, furthering resentment between people who might otherwise find occasion to co-operate; it paralyses productive activities; it corrupts the litigants by tempting them to harass each other and to twist, stretch and hides facts; it is costly and wasteful.

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