

ALTERNATIVE DISPUTE RESOLUTION PROCESSES IN ISLAM

*Abida Hassan, Assistant Professor (Department of Law) at University of South Asia, Lahore.
doctor.abidahassan@gmail.com*

*Dil Mohammad Malik, Dean, Department of Law at University of South Asia, Lahore.
dilmohammad@hotmail.com*

ABSTRACT

The research highlights the different modes of settlement of disputes in Islamic perspectives. Islam has also given a detailed system about the issue in question in the form of Tahkim, Sulah, and Wali-Al-Mzalim etc., which are being used till today in new and modern forms known as Alternative Dispute Resolution. The research has shown the benefits and importance of settlement of disputes in amicable way through informal justice system. The research has shown that the system is working successfully, therefore, it can be applied elsewhere in the world so the researcher is of the view that this system is more sustainable in any form than the formal system because it reflects the Islamic practices.

KEYWORDS: ADR, Dispute Resolution Processes, Sulh, Tehkim, Med-Arab

Introduction The term Islam, a verbal noun, itself implies, ‘the act of submitting one’s self’ to the wish of Allah relating to specific obligations.¹ Islam presented a rule of law to resolve the disagreements in a smooth way, it has also supported the dispute settlement in a peaceful way. Although, Islam has dissimilarities with western cultures in many aspects but there is a similarity in organizing relationships, resolving disputes, and the standing social consensus and achieving human relations. Islam prefers to establish relationships through negotiations or discussion in contrast to court litigation.²

Harmony in society is the main purpose of Islam and it has been termed as a blessing endowed by Allah Almighty. Islamic Jurisprudence permits settlement and it has provided comprehensive guidelines in matters relating to civil and criminal disputes. The law of equality (Qisas) is permitted in murder cases i.e. free for free, slave for slave and woman for woman. If any retardation is made by the brother of the murdered, then offer a proper demand and pay him with handsome appreciation, it is a mercy from Allah.³

Literature Review On Islamic provisions relating to Alternative Dispute Resolution (ADR), some useful material is available. Rashid provides the theoretical basis of Alternative Dispute Resolution (ADR) in Islam.⁴ Boheraoua has identified the Islamic concepts in comparison with modern western concepts of mediation, conciliation and arbitration.⁵ Kevashjee has given a detailed overview of Islamic mechanism for dispute resolution in Muslim community.⁶ Ann Blak, et.al. has dealt with the Islamic concepts relating to mediation and arbitration and suggests that the modern concept of Alternative Dispute Resolution (ADR) is based upon the Islamic practices,⁷ and Nuri also compares the Islamic and Western approaches to conflict resolution.⁸

Research Objectives The objectives of research, are to study the best use of available legal resources prevalent in Islam, analyze alternate solutions to court procedures and their validity in legal sense.

Research Methodology The methodology used for research is descriptive as well as explanatory. Both primary and secondary sources have been used which are suitable for this research.

Limitations of Study The research study is limited only to Islamic perspective of dispute resolution, a brief and all the research has been studied from English Literature Review. The article is in English version only which can be translated in any other language with the permission of author.

Dispute Resolution Processes in Islam The Islamic legal system provides for various methods of alternative methods of dispute resolution. Islam envisages the following Alternative Dispute Resolution (ADR) processes:

- Sullah (Conciliation)
- Wasaata (Mediation)
- Tahkim (Arbitration)
- Wasaata and Tahkim (Mediation cum Arbitration)
- Wali al-Mazalim (ombudsman)

Sullah (Conciliation) Simple meaning of Sulah is to bring peace with somebody either straight forwardly or with the support of an impartial person. It encompasses negotiation, mediation, conciliation and compromise and excludes Tahkim or arbitration. Out-of-court, dispute resolution is appreciated in Islam. We can find many Quranic verses and the customs of Prophet (Peace Be Upon Him) on the adoption of conciliation (Sulh) for dispute resolutions.⁹ Al-Jurjani writer of very famous book, ‘Khazain-al-Taarifat’ defines the word sullah as an agreement to finalize a dispute.¹⁰

Holy Quran, Sunnah of Rasullulah (SAW), his Companions, Muslim jurists and administrators also sustained peaceful dispute resolution within the Muslim society; between Muslim and non-Muslim societies; and between non-muslims also.¹¹

We can find many Quranic verses and practices of Prophet (Peace Be Upon Him) on the adoption of conciliation (Sulh) for dispute resolutions.¹² His Messenger (SAWS) said, ‘The best near to Allah are those who are more useful to others and amongst the best activities in Allah’s eyes are to create pleasure in the heart of a Muslim, or satisfying his hunger.’¹³ If two parties among the Believers are in a dispute, ye make harmony among them, but if any one of them misbehaves against the other, then ye fight against him until it fulfills with the Command of Allah.

In Quran, it has been very clearly mentioned that if two people among the believers quarrel with each other, then make peace (sulh) between them with justice, and equity; as

Allah loves those who are fair.¹⁴ ‘The believers are brothers, make harmony and Sulh between them.’ The application of sulh in the time of Prophet (Peace Be on Him) can be seen in the case of Treaty of Hudaibiyah, where Al-Bara Bin Azid stated that when Prophet (PBUH) entered into peace treaty with the people of Hudaibiyah, Ali Bin Abi Talib noted on the document and described in it, Muhammad, Allah’s Believer.¹⁵ The people asked not to write Muhammad, Allah’s Believer’, for if he is Believer, they would not fight with him. Prophet (peace be upon him) then asked Ali to eradicate the same, but Ali did not erase the same and the Prophet (PBH) himself deleted it and then entered into peace treaty with them. Numbers of instances of preference for conciliation are available in Islamic traditions and Islamic literatures. When a question was asked about debt or inheritance dispute, Imam Hussain, the son of Imam Ali, suggested to refer the matter only to qualified person, same teachings are founded in Imam Jaafir-al-Sadiq and Shia imam with the extending words as the most favorite charity near Allah is to maintain peace between the disputants. Fatmid law is also in favor of these views.¹⁶

The Holy Quran promotes dispute resolution in different perspectives, ‘Support ye one another in justice and piety but don’t help one another in sin and rancor’.¹⁷ His Messenger (SAWS) said, ‘The best near to Allah are those who are more useful to others and amongst the best activities in Allah’s eyes are to create pleasure in the heart of a Muslim, or paying his department, or satisfying his hunger.’

Qur'an also defines the punishment (Qisas) and revenge, ‘O believers! The law of fairness and impartiality is recommended to you in murder cases: The free for the free, the slave for the slave, woman for the woman and if any retardation is made by the brother of the murdered, then grant any reasonable request, and reward him with handsome gratitude. This is mercy from your Lord.’¹⁸ The inspiration for the conciliation and mediation of the dispute among the Muslims was to bear and strength the society through an accord.¹⁹ The Prophet nevertheless suggested a reconciliation whereby the defendant could have the use of any excess water not needed for irrigation of plaintiff’s land.²⁰ The Holy Prophet (Peace be upon Him) emphasized more on reconciliation by saying that if any one makes harmony (sulh) between the people by creating information and saying good is not a liar.’²¹

At the time of appointing Abu Moosa Al Ashari as Qazi, Caliph Umar enlightened him that all types of settlements and resolutions were allowed except conversion of halal into haram and haram into halal which is not permissible among Muslims. However, if Qazi fails in his efforts to resolve the dispute through settlement, then the dispute should be judicially decided in the appropriate way. In Islamic Law, the principle limiting Sulah is that no conciliation is possible in the province of Huquq Allah that embraces Islamic

punishments. However, if Qazi fails in his efforts to resolve the dispute through settlement, then the dispute should be judicially decided in the appropriate way.²²

Wassata (Mediation) The concept of mediation within Muslim culture is not new. Typically, it is viewed as the established manner of dispute resolution within the Muslim Community. It is religiously and legally prescribed and culturally followed by Muslims irrespective of how they may follow their religion.²³

In his book 'kitab al-wuzaraa,' Al Jahshiary (331 A.H-943 A.D), used the word 'Tawasut' which is very common in Islamic word. Muhammad Ibn Muslim also favored to finalize the hardship of land tax (Kharaj) payers.²⁴ Alshafaa, Al-jaryu and Husnu Al-Sifara also used the term mediation (wassata) for resolution of disputes between disputants which is non-binding and benevolent procedure.²⁵ The reason to give importance to mediation (wassatah) in Islam is to Islam's strong disliking to bind the third party dispute resolution such as arbitration and litigation.²⁶ The holy Quran contains several verses specifically advocating mediation.²⁷ The Holy Qur'an calls for justice in cases of retaliation and for mercy in cases of defense.²⁸

Sunnah of Prophet (PBUH) are very much clear about dispute resolution: 'Of three Judges, One is in heaven and two are in the fire;'²⁹ 'I am also a man and when both of you come to me, there is possibility that the arguments of both are equal and in such a matter if I give benefit to one of you by granting a thing which belongs to one of his rivals, he had better not take it as I would be giving him a share of hell.'³⁰

The Prophet experienced and applied mediation between Muslims and non-Muslims. The Companions of Prophet (PBUH) repeated the same practice in their times.³¹ Meccans always admired the wisdom and intelligence of Prophet (PBUH) and in critical situation, they would pursue the guidance for their disputes to be resolved and also accept his decision, because of this reason they called him as al-amin.³²

During his time in Medina, the Prophet (PBUH) mostly mediated and arbitrated the disputes between members of the community. The Prophet (PBUH) reconciled a dispute between a creditor and a debtor by giving suggestion that the creditor accept half money payable to him if the debtor would instantly pay in full instead of installments.³³

Mediator meets two main responsibilities for settling a disagreement. Firstly, the mediator encourages parties to mediate in such a way that there is a reasonable outcome. Secondly, he or she (mediator) should be neutral and empower of decision-making in the hands of the conflicting people.³⁴

Islam also appreciates and considers that law has some restrictions. But even then mediation has a noticeable place in Islamic law.³⁵

Mediation, must be lawful and wholesome. Basically, the subject matter of an agreement may not encounter with Islamic law or standards. Mediator meets two main

responsibilities for settling a disagreement. Firstly, the mediator encourages parties to mediate in such a way that there is a reasonable outcome. Secondly, he (mediator) should be neutral and power of decision making in the hands of the conflicting people.³⁶

Holy Quran does not describe mediator's qualifications, selection, or any procedure by which the mediator supports disputants to resolve their disputes. Anyone of any method may be an Islamic mediator provided they are respected as such and do not cause any offence of Islamic legal principles.³⁷

Reliability of arbitration and mediation is influenced by the capability of the arbitrator. Islam gives much importance to it. Honesty, justice are basic qualifications for a mediator. It is also evident from the letter written by Imam Ali to Malik al Ashtar.

According to Holy Quran, "O ye who consider! Behave confidently for Allah, deal honestly as witnesses, and do not hate others to make you an immoral or wrong and leave justice. Do justice and afraid from Allah, as Allah knows all.³⁸ Stand strongly against yourselves, your parents, or your relatives, and against rich or poor because Allah can best defend both."³⁹

Tahkim (Arbitration) Tehkim is an Arabic word used for arbitration and Hakam for an arbitrator, and in Islam, arbitration has a great importance, Islam takes it as a part of belief to resolve disagreements to an arbitrator. The disputants should settle their matters through negotiation, but if matter is not resolved in this way, then forward it to competent arbiter, according to Islamic values and the decision of the arbiter should be acknowledged unconditionally.⁴⁰ Hedaya is also in favor of arbitration between the parties. Sunnah has a strong provision for arbitration, and many times Prophet Muhammad (PBUH) himself performed as an arbiter in many differences. The Holy Prophet (Peace Be Upon Him) asked Bani Qarnata (Tribe) to choose an Arbitrator.⁴¹

The decisions of tribal chiefs in civil and business discords were implemented even in case parties did not agree to it.⁴² The awards pronounced in the fair of ukaz were obligatory on the parties.⁴³ According to Hanfies and Shafies, arbitration is similar to compromise and award is obligatory only in case of consent of parties.⁴⁴ Malkies and Hamblies are of the view that the award is mandatory unless it depicts shher wrong. Thus subsequent to approval by Qazi, the award becomes compulsory to be followed.

An arbitrator should possess the potentials and abilities for a Qadi as certain types of persons were prohibited from acting as arbitrators.⁴⁵ Hazrat Ali stated that a person who is appointed to make justice and resolve the disputes should be full of knowledge, mercy and goodness, and he will not be annoyed by opposite parties.⁴⁶ The benefits of informalism in Tehkim are unlimited due to the reason that it is a useful alternate to the western concept being based on swift, inexpensive, not complicated procedures and evidentiary principles. The parties are required to appoint arbitration by name in order to counter delaying tactics.

Wali-Al-Mazalim (Ombudsmen) Wali-Al-Mazalim / the pre cursor of present day ombudsman started during the period of second Caliph.⁴⁷ He entertains complaints against government servants, unfairness in public records and lands dedicated as waqaf, grievances regarding disbursement of stipends, misappropriation of property, public nuisance and against persons.⁴⁸ It is the Alternate Dispute Resolution with the mutual agreement of rival parties involving an impartial assessor to analyze the situation, know their responsibilities and rights and to act accordingly if found appealing to them. It is only of symptomatic nature and not mandatory.⁴⁹

Restrictions/Limitations under different School of Thoughts

Islamic forbids interest (riba), and riba is banned in Islamic Law. This prohibition has been prolonged by analogy to ban contractual 'insecurity'. It has been used to develop the concept of riba, that it bans any commercial contract in which a parti's attention is unclear as this could result in one party unpredictably receiving something of greater value than what they provided in interchange.⁵⁰ The Malikis, Hanbalis, and Shafis stated that any agreement connecting interest (riba) or gharar is not enforceable. Some Hanafis relate their policy of 'compensation' to riba and gharar agreements by which they are still enforceable less their usurious requirements. The schools decide that interest (riba) is a crime punishable up to forty strokes, separately.⁵¹ Hanafis restrict arbitration to commercial and proprietary matters excluding hadd, qisas and tazir but Malikis broaden the approach to qisas cases. Hanbalis and Shafi permit tahkim only in commercial cases.⁵²

Conclusion from above discussions, it is clear that Islam encompasses Alternatives Dispute Resolution processes which are Sulh, Tahkim, med-arab and Muhtasib. Complying with the arbitration can either be voluntary as in the case of Sulh or mandatory as in Tahkim. In other Islamic countries where shariah courts are operational, Sulh and Tahkim may be annexed with the judicial process. Whereas in countries with no Shariah Courts, the various Alternative Dispute Resolution processes in Islamic law may be employed by Muslims on entirely voluntary grounds for the resolution of disputes. Islam also imposes some restrictions on ADR in different forms and in different disputes.

REFERENCES

¹ Sevan Jones, An Introduction to the study of Islam with special reference to India

² Ghulam. H, RAAF Legal Officer. An Islamic Perspective

³ Surah Al-Baqarah (2). Ayat.178.

⁴ Rashid, S.K, Alternative Dispute Resolution in the Context of Islamic Law. https://www.researchgate.net/publication/256034892_Alternative_Dispute_Resolution_in_the_Context_of_Islamic_Law, & Rashid, S.K, Peculiarities & Religious Underlining of ADR in Islamic Law. http://www.asiapacificmediationforum.org/resources/2008/37-Syed_Khalid_Rashid.pdf

⁵ Boharaoua, Said, Foundation of Mediation In Islamic Law And Its Contemporary Application, www.asiapacificmediationforum.org/resources/2008/11-Said.pdf

⁶ Keshavjee, Muhammad, Islam, Shariah and ADR: Mechanism for Legal Redress in the Muslim Community, I.B. Taurus & Co Ltd, New York & London (2013); But see, Sammi, Almida Olalekan, Book Review, Oxford Journal of Islamic Studies, vol. 26, no. 1, Pp. 56-59

⁷ [Ann Black](#), [Hossein Esmaeili](#) and [Nadirsyah Hosen](#), Modern Perspective on Islamic Law; Chapter 6: Mediation, Arbitration and Islamic alternative dispute resolution, <http://www.elgaronline.com/view/9780857934468.00012.xml>

⁸ Nuri, Maqsudul hassan, Islamic and western approaches to conflict resolution, The Frontier Post, p. 4, Oct 19, 2013.

⁹ Dato Tan Yeak Hui, Chairman, Industrial Court of Malaysia. Mediation/Conciliation in the Malaysian Courts: With Emphasis on Settlement of Labor Disputes & Ali. A. M, Assistant Professor, (IIUM)

¹⁰ Bouheraoua. S, Foundation of mediation in Islamic law and its contemporary application & Ahmad Ibrahim Kulliyah of Law, (IIUM).

¹¹ *Ibid*

¹² Dato Tan Yeak Hui, Mediation/Conciliation in the Malaysian Courts: With Emphasis on Settlement of Labor Disputes & Ashgar Ali Mohamed, Assistant Professor, Ahmad Ibrahim Kulliyah of Laws, IIUM.

¹³ Al Hujurat, verse. 9

¹⁴ Al Hujurat, verse. 4

¹⁵ Sahih al-Bukhari, vol. 3, para 858 (English translation by Dr. Muhammad Muhsin Khan), (Lahore: Kazi Publications, 1986), p. 536

¹⁶ The Fatimids, a Shia Ismaili dynasty, ruled Egypt from 969-1171. In his book Compendium of Fatimid Law, the noted Shi'a legal scholar, Fyzee. A.A , quotes Imam Ali from the Da'a'im al -Islam

¹⁷ Al-Maidah verse: 2

¹⁸ Ali. Y.A, In the Holy Qur'an, Text, Translation and Commentary, New Revised Edition (Brentwood, MD: Amana Corporation, 1989).

¹⁹ Keshavjee. M, Arbitration and Mediation in the Shia, Imami, Ismaili Muslim Community

²⁰ Abu 'Abdullah Muhammad Ibn-e-Isma'il Al-Bukhart, Sahih Al-Bukhar, bk. XLIX, No. 871 (M. Khan Trans. 1979)

²¹ Sahih Al-Bukhaari, Vol 3 P.533, English translation by Muhammad Muhsin Khan (Dar-al-Arabia, Beirut.)

²² Margolith, D.S., Omae's Introduction to the Qadi, (1910)

²³ Walid Iqbal, Courts, Lawyering, and ADR: Glimpses into the Islamic Tradition, 28 FORDHAM URB. L.J. (2000) Pp.1035 & 1035-36

²⁴ Al-Jahshiyari. Kitab al-wuzaraa, Pp. 142 & 187

²⁵ Fathi Kemicha. The Approach to Mediation in the Arab World, paper presented in the international conference of Mediation Geneva Switzerland 1996.

²⁶ Karmali, the International Journal of Arbitration, Mediation and Dispute Management, p. 318

- ²⁷ Al-Quran 4:35, 59, 65, 49,9-10
- ²⁸ Islamic Mediation Techniques for Middle East Conflicts by George E. Irani
- ²⁹ Coulson, A History of Islamic Law, p.123
- ³⁰ Karmali, the International Journal of Arbitration, Mediation and Dispute Management, p. 318
- ³¹ Bouheraoua. S, Foundation of mediation in Islamic law and its contemporary application, Ahmad Ibrahim Kulliyah of Law International Islamic, IIUM
- ³² Arbitration, conciliation, and the Islamic legal tradition in Saudi Arabia by George Sayen
- ³³ **Karmali, International Journal of Arbitration, Mediation and Dispute Management, p. 317**
- ³⁴ Islamic Mediation Techniques for Middle East Conflicts by George E. Irani
- ³⁵ Ayla Karmali, Influence of Sharia Norms of Dispute Settlement and International Law: The International Court of Justice, Room for Accommodation? International Journal of Arbitration, Mediation and Dispute Management (August 2009), p. 317-319
- ³⁶ Islamic Mediation Techniques for Middle East Conflicts by George E. Irani
- ³⁷ Karmali, supra note 33, p. 323
- ³⁸ Al-Maida, Ayat No. 9
- ³⁹ Al-Nisa: 135
- ⁴⁰ Arbitration in Islam by Ayat. Muhammed Beheshti
- ⁴¹ Al Trabulsi, Al Hukkam, P. 32
- ⁴² Amin, S.H, Commercial Arbitration in Islamic and Iranian Law, p. 42(Tehran, n.d)
- ⁴³ Brown, H.J, and Marriot, A.L., ADR Principles and Practice, Chap-16, 2nd edition, Sweet & Maxwell, London, 1999, pp. 352-376
- ⁴⁴ El-Ahdab, A.H, Arbitration with the Arab countries, 2nd edition, Kluwee Law International, Hague, 1999, p. 17, New Straits Times, December 27, 2003
- ⁴⁵ O. P. Malhotra, 'The law and practice of Arbitration and Conciliation', 1st edn, (Lexix Nexis-Butter worths Publication: New Delhi 2002), p. 5
- ⁴⁶ Al-Qadi al-Numan, 1991, Da,aim al-Islam, vol. 1 and 2. edn. AAA Fyzee, Dar al-Adwa, Beirut. The Institute of Ismaili Studies.
- ⁴⁷ Ombudsman, An article by Dr.Dil Mohammad Malik
- ⁴⁸ Surah Al-Nisa (4), Ayat, 53
- ⁴⁹ Surah Al Imran (3), Verse.104
- ⁵⁰ Coulson, A History of Islamic Law, Pp.38-39 & 100
- ⁵¹ Lippman et al., Islamic Criminal Law and Procedure: An Introduction, p. 43
- ⁵² Surah Al-Nisa (4), Ayat. 58



This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/)