International Journal of Business and Technopreneurship
Volume 7, No. 1, Feb 2017 [93-116]

Towards the Settlement of Civil and Criminal Disputes through Arbitration under Islamic Law

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ABSTRACT

Islam is not just a religion; it is an exhaustive way of life. Din-the Arabic word for religion, encompasses, theology, scripture, politics, morality, law, justice, and all other aspects of life relating to the thoughts or actions of men...it is not that religion dominates the life of a faithful Muslim, but that religion...is his life. The Shari'ah regulates all aspects of life, ethical and social, and to encompass criminal as well as civil jurisdiction. Every act of believers must conform to Islamic law and observe ethical standards derived from Islamic principles. Dispute settlement is one of the fundamental affairs of the Muslim as he was ordained to do so peacefully and this was declared as best way of resolving problems among them. Arbitration and amicable settlement (sulh) have a long history within Arab and Islamic societies and have their roots in pre-Islamic Arabia. Sulh is the preferred result and process in any form of dispute resolution. Further, arbitration is favoured to adjudication in Islamic jurisprudence. In tribal and Islamic cultures, the overarching objectives in conflict settlement are collectively. Sulh or reconciliation is becoming an alternative problem solver in many cases lately. It is a mutual agreement between the conflicting parties so that the dispute is solved amicably. Many people assume that sulh is only applicable in civil cases. Nevertheless, in Islamic law sulh is also applicable in criminal cases particularly in homicide and bodily injury cases.

Keywords: Arbitration, Islamic Law

1. INTRODUCTION

The Arabian Peninsula was populated by tribes who claimed descent from a Common ancestor. It was to the tribe as a whole that individual's owed allegiance and it was from the tribe that protection of interests was obtained. The tribe was bound by a body of unwritten rules, which had evolved along with the historical growth of the tribe itself as a manifestation of its spirit and character. No one had the legislative power to interfere with this system and there was an absence of any official organization for the administration of the law.

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Enforcement of the law was generally the responsibility of the private individual who had suffered injury. Tribal justice was administered by the chief of the tribe in a form adapted to their way of life which used arbitration and conciliation extensively. Tribal law is built upon two basic principles: (1) The principle of collective responsibility; and (2) The principle of retribution or compensation.

The objective of tribal law is not merely to punish the offender but to restore the equilibrium between the offending and the offended families and tribes. Sulh, or conciliation and peacemaking, is a practice that predated Islam. Within the framework of tribal Arab society, chieftains (sheikhs), soothsayers and healers (kuhhān), and influential noblemen played an indispensable role as arbiters in all disputes within the tribe or between rival tribes. The authority and stature of those men served as sanctions for their verdicts. It goes without saying that arbitration is a deeply-rooted historical means used to settle different disputes, and it predates the state judiciary, or even the state itself. The Arabs, before Islam, as well as several other ancient communities knew and used arbitration as a method for the settlement of disputes. Resort to arbitration in the pre-Islamic period was optional and left to the free choice of the parties. It relied on tribal justice administered by the chief of the tribe and trustworthy individuals instead of an organized judicial justice.

Likewise, arbitral awards were not legally binding unless there was an agreement between the parties to this extent. In that period there were no specific rules to limit the arbitrable subjects. The arbitral proceedings were simple and rudimentary. The arbitrator when hearing the dispute dose not abide by any certain procedures, except for a number of certain procedures such as the obligation to hear the disputing parties on equal bases and the respect of the customary rules when examining the proofs presented by the parties.

2. THE CONCEPT OF ARBITRATION IN ISLAMIC LAW

When Islam came, it recognized and confirmed the pre-Islamic method of settling disputes with some modification. The validity of arbitration has been recognized by the four sources of Sharia; the Koran; Sunnah (the acts and sayings of the Prophet Mohamed (peace be upon him); Ijma' (consensus of opinion) and Qiyas (reasoning by analogy). However, there was a debate between classical Muslim jurists over the concept of arbitration. According to one view, arbitration is a form of conciliation, close to 'amiable composition', which is not binding on the parties. Those favoring this view hold that the arbitrator's decision is neither binding nor final, unless it is accepted by the parties. Thus arbitration does not have any jurisdictional nature, but close to conciliation. Proponents of this view supported their view by the following verse form the Koran: "If you fear a breach between them twain (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. ”

The second view is that Sharia knew arbitration in its modern sense. This view is based on the following verse from the Koran: “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”. To them if one is authorized to judge, one is authorized to make judgments with a binding decision. It should be noted that one of the elements that participated in the confusion and Misunderstanding as to the difference between arbitration and conciliation in Islam between some scholars, is that Islamic Law used the word “Hakam” to define different meanings. The word refers in its strict sense to a person who is ‘authorized’ in a specific mission. Accordingly, the word can be used in its broad sense to refer to an authorized person to dispose of rights, to settle differences between the disputants by suggesting settlement or helping them to reach it, or by issuing a binding decision to settle their dispute. The agreement of the parties determines the type of the authorization in each case. As a result of the differences between scholars in understanding the meaning of the word in its terminological sense in Islamic Law, some writers thought that Islamic Law knew only two types of arbitrations, arbitration that leads to binding decisions, and arbitration leads to non-binding decisions. The careful and thorough study proves that Islamic law knew the difference between conciliation (that ends with a non binding decision) and arbitration that leads to binding decisions. Conciliation is permitted under Islamic Law in civil, commercial, family and other matters as long as they do not permit acts against God’s commands or the matter settled by conciliation falls in the ambit of rights of God, i.e., crimes and their sanctions.

The issue to be clarified here is that detailed arbitration rules are not to be sought in the express terms of the Koran. The Koran laid down the general rule as mentioned above and it is the duty of the qualified Muslim jurists to elaborate and develop it in accordance to the needs of the community within the general framework of Islam. It is important to note here that the area governed by strict, detailed and very clear rules in Sharia is relatively limited and mostly related to religious practices such as praying, fasting…etc. A great part of the area of relationship between the members of the society in different fields is governed by the so-called Ijtihad, i.e., interpretations, elaborations and deductions in accordance with need of the society within the general framework of Islam by the qualified jurists. This what Sharia scholars did in first centuries and what contemporary scholars should do.

3. DISPUTE RESOLUTION MODELS:

Classical Islamic law texts offer the following models for dispute resolution:

- ✓ Private settlement (Sulh),
- ✓ Settlement by an appointed judge (qada), and
- ✓ Arbitration (tahkim).
- ✓ Med-Arb (A combination of sulh and tahkim);
- ✓ Muhtasib (Ombudsman);
- ✓ Wali al-Mazalim (Informal Justice or Chancellor);
- ✓ Fatawa of Muftis (Expert Determination or non-binding evaluative assessment.

These models are well accepted amongst the classical schools. Each of these models will be introduced along with details relevant to the topic, drawing mainly from the Shāfi'ī school for reasons that will become clear during the discussion of arbitration or tahkim.

3.1 Private Settlement (Sulh)

In private settlement (Sulh), individual parties agree to settle a disputed matter among themselves without recourse to a third party. The linguistic meaning of "Sulh" is ending a dispute; its legal meaning is a contract through which this occurs. The textual basis for settlement comes from the Qur'an and Prophetic reports. Allah Most High says: "Settlement is best". The Prophet said: "Making a settlement between Muslims is permitted, except one which legalizes what is prohibited or prohibits what is legal." Scholars of hadith and fiqh observe that this hadith applies to Muslims and non-Muslims alike, but that the report only mentions Muslims since they are the ones most likely to adhere to Shari'ah judgments.

Islamic law recognizes several types of settlement based upon the relationship of the parties involved, and each type is treated individually. These include: settlement between a Muslim state and a non-Muslim state; between the Imam and renegades; between husband and wife, and between parties to a financial transaction. Each type of settlement is given separate treatment in different chapters in the legal texts: bab al-hudnah, bab al-bughat, bab al-qasamwa al-nushuz, and bab al-Sulh, respectively. Only the last two are relevant to Muslims residing in non-Muslim regions.

3.2 Settlement by an Appointed Judge (qada)

The most common and powerful means for dispute resolution is through an appointed judge. One of the primary linguistic meanings of "qada" is passing judgment; its legal meaning is resolving a dispute between two or more parties by applying Allah's judgment. Its textual basis comes from the Qur'an and Prophetic reports. Allah Most High says: "So judge between them by that which Allah hath revealed" , but if thou judges, judge between them with equity , and Lo! We reveal unto thee the Scripture with the truth that thou mayst judge

between mankind by that which Allah showeth thee" . The Prophet said: "When a judge gives a ruling having tried his best to decide correctly, and his verdict is wrong, he will have a single reward; if his verdict is correct, he will have two rewards." Imām al-Nawawī explains this narration in his commentary of Sahih Muslim:

The scholars hold that Muslims have reached a consensus that this report concerns a judge who is a scholar and qualified to judge. If he is correct, he receives two rewards: one for exercising juridical reasoning (ijtihād), and one for being correct; but if he errs, he receives one reward for exercising juridical reasoning…. As for someone who is not qualified to judge, it is not permissible for him to judge, and if he does he shall receive no reward indeed, he has sinned. His judgment is not effective, whether it agrees with the correct answer or not, because it does not originate from a legal basis in the Shari'ah and is only correct out of coincidence. Thus, he is disobedient in all of his judgments whether they agree with [the Shari'ah or not. All of his judgments are rejected, and he has no excuse in any of this. A report has been transmitted in the Sunan: "Judges are of three types: one is in Paradise and two are in the Fire. A judge who knew what was right and judged according to it will be in Paradise. A judge who knew what was right and judged contrary to it will be in the Fire. And a judge who judged while ignorant will also be in the Fire."

This text emphasizes that there are standards that must be met before a judge and his judgments can be considered valid.

The conditions for being an Islamic judge (qadi) are that one be (1) qualified to offer court testimony, (2) capable, and (3) a qualified mujtahid. Explanatory texts clarify these conditions. "Qualified to offer court testimony" means the individual is Muslim, legally responsible, free, male, upright, and possesses the faculties of hearing and sight. "A qualified mujtahid" is an individual who knows the judgments of the Qur'an, Sunnah, analogy, and the various categories within each, and who also knows the status of transmitters. The qualified mujtahid must also possess knowledge of the Arabic language as well as the opinions of the scholars of Sacred Law regarding matters of consensus and differences of opinion.

These are the conditions according to the Shafi'i school. While there is some variance among the schools of jurisprudence, there is agreement among them that it is essential that the individual be Muslim, adult, rational, and free. If no individual possesses the above-mentioned qualifications and a powerful ruler appoints a Muslim who is unfit, the unfit judge's decisions are implemented out of necessity so as not to vitiate people's concerns and interests.

3.3 Arbitration (tahkim)

In voluntary arbitration, disputing parties appoint an arbitrator to decide their case. The linguistic meaning of "takmim" is designating someone as a judge and appointing him to decide the matter. The textual basis for arbitration comes from the Qur'an, where Allah Most High says: And if ye fear a breach between them (the man and wife), appoint an arbitrator from his folk and an arbitrator from her folk . Concerning this verse, al-Qurtubi said: "This verse is proof that arbitration is established [in the religion]." It is also affirmed in the actions of the Prophet in that he was pleased by the arbitration performed by Sa'd bin Mu'adh (may Allah be pleased with him) in the matter of BaniQurayẓah.

Arbitration tends to be mentioned alongside settlement by an appointed judge qada. But arbitration is a lesser form of dispute resolution, inasmuch as it is undertaken pursuant to private authority, whereas settlement by an appointed judge is performed pursuant to public authority. All four extant classical schools of law include some form of arbitration, though the Shafi'i school offers the most universal solution.

According to the Shafi'i school, it is permissible for two or more people to select a qualified arbitrator to judge between them in a matter that involves rights or obligations owed to specific individuals. If the region already has an appointed judge, then the arbitrator must be qualified to serve as a judge; this prerequisite is waived if no appointed judge exists in the region.

Arbitration is limited to matters involving rights or obligations owed to specific individuals (Haqq al-adamiyyin), which includes financial matters and marriage. Although arbitration is an option for retaliatory punishments and accusations of fornication (qadhf) as each involves a right claimable by the accused against the accuser, the use of arbitration in such cases is limited to establishing rights and financial rewards: it does not justify physical punishment.

Furthermore, arbitration is not possible for other prescribed punishments (hudud) like drinking wine, or for disciplinary punishments (ta'zir), since that retribution is owed to society at large and not to a specific individual. The arbitrator's decision is not effective unless the appointing parties assent to it prior to its issuance. If one of the appointing parties is himself a judge, the arbitrator's decision is effective immediately since the arbitrator is considered here to have been appointed to serve as a judge. It is not permissible for an arbitrator to rely upon his own personal knowledge of the case. He must instead rely only upon the evidence which is presented to him.

3.4 Med-Arb

As the names implies, Med-Arb is an acronym of two previously discussed processes of dispute resolution Mediation and Arbitration. Within the context of Islamic law, Med-Arb is the hybrid of both the sulh and tahkim processes in order to arrive at an amicable resolution of the dispute. This hybrid process is well-known within the conventional practice of ADR. However, the Med-Arb process has been recognized and prescribed by the Qur'an and it was practiced in the Islamic legal history. The practice has been one of the main dispute resolution techniques in Islamic law since over 1,400 years ago. The basis of Med-Arb is given in the following legal text as contained in the Quran:

"If you fear a breach between them twain (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...."

The latter part of the text gives an indication to the effect that if during the proceedings any of the parties or both wish for reconciliation rather than an arbitral award through a compromise, then Allah will guide them to such reconciliation. Therefore, it is always emphasized that the arbitrator must begin with suggestions of possible moves towards reconciliation before embarking on the arbitral proceedings. The mechanism of the Med-Arb process within the context of Islamic law has been explained in a previous research thus:

The Med-Arb process is a mechanism for dispute resolution enmeshed within the general framework of Sulh (amicable settlement) in Islamic jurisprudence. Sulh is a broad term which literally means amicable settlement. Its juristic meaning is all-embracing as it includes good faith negotiation, mediation/conciliation, and compromise of action. In most cases during the Tahkim proceedings, both sulh and tahkim are combined to facilitate the process of dispute resolution. This is encouraged in most cases because employing the Med-Arb process is considered an obligation for the arbitrators in Islamic jurisprudence.

This hybrid process is now being recognized as a universal principle in dispute resolution across the world. Most arbitration laws of countries across the world have some elements of Med-Arb process. This is based on the fact that many countries have now patterned their Arbitration laws after the UNCITRAL Model Law on International Commercial Arbitration. It is hoped that the Islamic banking and finance industry will utilize and maximize the good qualities of the Med-Arb process for a quick and cost effective dispute resolution mechanism.

3.5 Muhtasib

In ensuring administrative justice, the institution of ombudsman has become a veritable tool for both the private and public sector to resolve disputes amicably

and ensure ongoing business relationships. Within the context of Islamic law, the institution of ombudsman is known as muhtasib though with certain variations in the duties of the latter compared to the former. Though the institution of ombudsman emerged in its present form in Sweden as established in 1809, there has been earlier practice of ombudsman with wider jurisdiction in the Islamic legal and political history in form of muhtasib. One of the main general functions of a muhtasib is to regulate commercial activity within the state by protecting the interest of the consumers and the entrepreneurs alike, and guard public interest with much emphasis on administrative justice.

Specific duties of a muhtasib include taking account (hisbah) of issues that relate to "weight and measures, quality of commodities on sale in markets, honesty in trade and commerce, observance of modesty in public places, and such other things both temporal and spiritual." The unique nature of the functions of a muhtasib can be seen in its two important elements of dispute avoidance and dispute resolution. The origin of muhtasib is found in the prime sources of the Shariah. There are numerous legal texts of the Qur'an that provide for the institution of muhtasib. It suffices to cite this:

"Let there arise out of you a group of people inviting to all that is good (Islam), enjoining what is right and forbidding what is wrong. And it is they who are the successful."

The above legal text from the Qur'an lays down the general law regulating the establishment of the institution of muhtasib in a State. The Prophet Muhammad practically carried out these divine enactments by appointing „Umar bin al-Khattab as the muhtasib of Madinah, while Sa'ad bin al-'As bin Ummayyah was delegated as a muhtasib to Makkah. The whole institution of muhtasib is to carry out the sacred duty of enjoining good and forbidding evil for the general benefit of all. This is however carried out through the processes of dispute resolution and dispute avoidance in line with the Shari'ah. From the foregoing, it is clear that the general powers vested in the office of a muhtasib are wider in scope than the modern ombudsman because the former's powers cover both spiritual and temporal affairs. A muhtasib has a great role to play in Islamic banking and finance disputes because of the informal nature of dispute resolution and avoidance and the friendly procedure adopted in the process.

4. ARBITRATION UNDER THE FOUR MAJOR ISLAMIC SCHOOLS

Although arbitration is recognized by all sources of Sharia, it did not receive close attention in the doctrinal writings of the four major Islamic Schools. This might be attributed to the fact that Islamic Judiciary was sufficient and developed enough to provide suitable solutions to all types of problems which arose from the social life of that time. Although arbitration is recognized by the four major

Islamic Schools as a substitute for the ordinary courts, every School insists on a certain theme on this subject. This part of this paper tries to focus briefly on what each School holds as to arbitration.

4.1 The Hanafi School

The scholars of this school emphasize the contractual nature of arbitration and hold that arbitration is legally close to agencies and conciliation. They hold that an arbitrator acts as an agent on behalf of a disputant who had appointed him. The Hanfi School stresses the close connection between arbitration and conciliation. Thus, to them an arbitral award which closer to conciliation than to a court judgment, is of lesser force than a court judgment. Nevertheless, under this school the disputing party cannot be relived from being obligated to abide by the award because the agreement to resort to arbitration binds the parties like any other contract.

4.2 The Shafi School

According to the Shafi School arbitration is a legal practice, whether or not there is a judge in the place where the dispute has arisen. However, according to this school, the position of arbitrators is inferior to that of judges since arbitrators under this School are liable to be revoked up to the time of the issuance of the award.

4.3 The Hanbali School

Under the Hanbali School, a decision made by the arbitrator has the same binding nature as a court's judgment. Thus the award made by an arbitrator (who must have the same qualifications as a judge) is imposed upon both of the parties who chose him.

4.4 The Maliki School

The Malikis have a great trust in arbitration that they accept that one of the parties can be chosen as an arbitrator by the other disputing party. This is explained by the fact that one relies upon the conscience of the other party. Unlike the other three schools, this School stresses that an arbitrator cannot be revoked after the commencement of the arbitration proceedings.

5. DEFINITION OF ARBITRATION OR SULH

The word al-sulh in Arabic means to reconcile and to make peace with the opponent. It is derived from the verb saluha or salaha "to be sound, righteous" denotes the idea of peace and reconciliation in Islamic law and practice. In

Arabic philology, the word "sulh" in the context of interpersonal relationship is from the generic word "salaha" which means "to make peace, become reconciled, make up, and reach a compromise or settlement". However, in the classical Islamic thought and tradition, sulh means the amicable settlement of disputes through good faith negotiation, conciliation/mediation, peacemaking, and even extends to compromise of action. This is an institutionalized method of dispute resolution recognized and prescribed by the primary sources of the Shari'ah.

According to Sayyid Sabiq, sulh literally means to settle any dispute. Technically, sulh means an agreement between two parties by relying on the prescribed conditions, which they have agreed earlier on in the process of settling their disputes.

According to IbnQudamah, sulh is an agreement between two disputed parties which would lead to peace. According to Ibn al-Hummam, Al Kasani, 'Ala' al Din Afandy and IbnNujaym, Sulh is defined as an agreement (aqad) to end dispute. In the Majallah Al Ahkam Al Adliyyah, the author added that it is an agreement to end dispute voluntarily. The School or Hanbali and Syafie agreed with the latter definition even though in different wordings. However, the School of Maliki defines sulh as an agreement to end dispute even though it is not yet happen.

Sulh is a settlement grounded upon compromise negotiated by the disputants themselves or with the help of a third party. In Islam, it is ethically and religiously the superior way for disputants faced with conflict. Sulh is also a duty on any person who is adjudicating between the conflicting parties, whether a judge (qadi) or an arbitrator (hakam). Sulh is a legal instrument intended not only for the purpose of private conciliation among individuals and groups in lieu of litigation; it is also the procedural option that could be resorted to by a qadi within the context of his courtroom or a hakam in his conference room. Thus, Sulh is part of every dispute resolution mechanism in Islam.

The main objective of these third parties was conciliation and the maintenance of harmony. Some arbitrators would go to a great extent to produce the necessary compensation or inducement out of their own pockets in order to persuade the feuding parties to agree to a sulh.

From the above definition, it can be understood that the purpose of sulh is to end conflict and hostility among the disputants so that they may conduct their relationships in peace and amity without any further interference from the court. Sulh is settlement grounded upon compromise negotiated by the parties in dispute themselves or with the help of a third party. Thus it requires consent of all parties involved. Sulh is a form of contract ('aqd) and once it is mutually

agreed by the parties, it becomes binding and all the legislative rules of contract apply.

In Islamic law, sulh can be applied in civil cases such as in matrimonial cases, inheritance, transaction etc. Sulh can also be applied in criminal cases. In the context of Islamic criminal law, what is meant by sulh is to come to an agreement to remove the punishment provided for the offence committed or to mitigate it. Sulh can be made between the offender and the victim or his relative particularly if the crime infringes the right of individual. It can also be made between the offender and the judge if the crime involves the right of Allah (i.e. the right of public). However, it should be noted that sulh cannot be applied in all criminal cases. Only certain types of crime that sulh can be applied.

6. APPLICATION OF SULH IN CRIMINAL LAW

Before we elaborate further on the application of sulh in Islamic criminal law, it would be necessary to discuss the classification of crime in order to understand the nature of crime in Islamic law and the extent of which sulh can be applied. Crimes and punishments in Islamic criminal law are divided into two categories, fixed and discretionary. The first category includes hadd and qisas punishments which are prescribed by Allah and thus unchangeable. The second category consists of all kinds of transgression where no specific punishment is prescribed but for which there may be ta'zir (i.e. discretionary punishment).

6.1 Hadd

Hadd (plural: hudud) signifies an unchangeable punishment prescribed by Divine law which is considered as the right of Allah. In the penal context, prescribed punishment means that both the quantity and the quality thereof are determined and that it does not admit of degree. What is meant by its being prescribed as the right of Allah is that it is prescribed for the public interest (maslahah 'ammah) and individuals as well as the community cannot annul it. It means that whenever a hadd crime is established on the offender the judge has no choice other than punishing him with a hadd punishment prescribed for it.

According to the majority of the jurists, hudud crimes are as follows:

1. zina (unlawful sexual intercourse),
2. theft, qazaf (false accusation of zina),
3. drinking intoxicants,
4. hirabah (highway robbery),
5. baghy (rebellion) and
6. riddah (apostasy).

It is worth mentioning that the question of sulh does not arise in hudud punishments since hudud are prescribed punishments. Sulh or other circumstances are not considered in inflicting hudud punishments. Once the offender is convicted with a hadd crime, the judge has no choice other than to impose the prescribed punishments neither more nor less. The judge cannot remove the punishment of hadd or mitigate it even if the victim consents to it. However, though sulh has no effect on hudud punishments, there is a strong tendency to narrow down the applicability of these punishments as much as possible based on the hadith of the Prophet which says: "Set aside the execution of hudud punishments in cases of doubt".

This is clearly reflected in the strict nature of proof required in establishing hudud offences, for instance, high demands are made of the witnesses as regard to their numbers, qualifications and the content of their statements. If there is doubt in proving the crime, even the slightest one, a hadd punishment may not be imposed.

When any reasonable doubt is found in the case of a hadd punishment, the benefit of doubt is given to the accused. A hadd punishment is not imposed and may instead be reduced to one of ta'zir. The members of the society are also discouraged from exposing the offence committed by any member of the society as far as they can, as advised by the Prophet s.a.w. who said:

"Avoid condemning a Muslim to a hadd punishment whenever you can, and when you can find a way out for a Muslim then release him for it. If the imam errs, it is better that he errs in favour of innocence (pardon) then in favour of guilt (punishment)."

The above hadith shows that in implementing hudud punishments there are no questions of sulh when a hadd crime has been committed and the offender has been found guilty and convicted. The prescribed punishments must be imposed on him regardless of his status or conditions. Nevertheless, the hadith also implies that if the case is not brought to the authority concerned, sulh can play its role in removing or mitigating the punishment.

It is worth to note that even though hudud are categorized as crimes that involve the right of Allah, there are some hudud offences that are considered infringing both the right of Allah and the right of individual, such as the crime of sariqah (theft), hirabah (robbery) and qazaf (false accusation of zina). Concerning sariqah and hirabah, both are crimes that involve taking away the property of another person which of course infringe the right of individual as the property belongs to the victim. Thus, sulh can be made between the offender and the victim as long as the crime is not brought to the court. This is mentioned in the hadith of the Prophet which says:

"Forgive each other among you for hudud offences (if committed). When an offence of hudud reaches (informed to or tried by) me, it becomes enforceable."

It has been related on the authority of Safwan ibn Umayyah who said that he was sleeping in the mosque and his sheet was under his head. A person took away his sheet while he was sleeping. When he got up he ran after the offender and caught him and then brought him before the Prophet s.a.w. The Prophet ordered to cut his hand. Safwan said to the Prophet, "I did not intend this (punishment), I give my sheet to him for free and I forgive him". The Prophet said, "Why did you not forgive him before bringing him to me".

The above hadith indicates that when the case of theft is referred to the court, the normal procedures apply and the victim has no right to interfere or to make sulh after that.

Regarding the admissibility of sulh for the crime of qazaf , Imam Malik in al-Mudawwanah al-Kubra states that whenever the case of qazaf is brought to the attention of people in authority including the police or enforcement officer, there is no more negotiation allowed and the prescribed punishment must be imposed. Conversely, if the victim keeps silent by not reporting the case to the authority, sulh can still play its role. Al-Mawardi and Judge Abu Ya'la mention that the prescribed punishment for qazaf is eighty lashes and it can neither be reduced nor increased. However, in terms of infliction of the punishment, it will not be executed unless with the victim's demand as it involves the right of individual. It means even after the offender of qazaf has been convicted, negotiation or sulh can still be made.

6.2 Qisas and Diyah

Qisas and diyah are method of crimes punishable with fixed punishments which are mentioned clearly in the text of the Quran and the Sunnah. The crimes include homicide and causing bodily harm to others. According to al-Mawardi, hadd covers qisas and diyah as they are also prescribed punishments. However, qisas and diyah differ from hadd in the context that they concern the individual right.

The punishment of qisas and diyah is fixed and thus the judge has no right to remove or mitigate the punishment based on his own discretion. However, since this type of offence involves the right of individual, the infliction of punishment depends on the demand of victim or his relatives. The victim or his relatives may want to demand the infliction of qisas or choose to reduce it to diyah or to pardon the offender. It also depends on them whether or not to consider any negotiation in determining their rights. Sulh can play its role in remitting or mitigating the punishment of qisas after the offender has been convicted or found guilty.

The validity of sulh in qisas and diyah crimes is supported by many Qur'anic verses and hadith of the Prophet s.a.w. For example in the case of murder, Allah says to the effect: "O ye who believe! The law of equality is prescribed to you in cases of murder...But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord.

In the above verse, the punishment prescribed for a murderer is qisas or retaliation, however, if the heir of the victim pardon the murderer then there should be compensation given to former. According to Ibn 'Abbas, the above verse indicates that sulh is one way to achieve justice and peace between two parties.

In the case of murder, the heir of the victim can forgive the murderer or can ask the court to reduce the punishment imposed. In one hadith, the Prophet s.a.w. is reported to have said: "He who causes intentionally the death of another, it is left to the family of the deceased to decide on qisas or the taking of diyah… and if they agree on sulh, it is for them."

There is a hadith reported by 'Alqamah Ibn Wa'il on the authority of his father who narrated that a man brought a murderer of his relative to the Prophet s.a.w. After the interrogation, the accused confessed. The Prophet s.a.w. then asked:

Do you have anything to pay blood-wit on your behalf? The accused said I do not have any property except this robe and axe of mine. The Prophet said: Do you think your people will pay ransom for you? He said: I am more insignificant among my people than this (that I would not be able to get this benefit from my tribe). The Prophet threw the strap towards the claimant of the blood-wit saying: Take this man away. As he left, the Prophet said: If he kills him, he will be the same. The man returned and said: God's Messenger, I have heard you saying that, `If I kill him, I would be like him'. Whereupon the Prophet said: Don't you like that he shoulder (the burden) of your sin and the sin of your brother? He said: Why not? The Prophet said: If it is so, then let it be. He threw away the strap (that tied the accused) and set him free."

All the jurists agree that sulh is allowed in all qisas and diyah crimes including causing injury, causing miscarriage and related offences as mentioned in the Qur'anic verse: The recompense for an injury is an injury equal thereto but if a person forgives and makes reconciliation, his reward is due from Allah, for Allah loves not those who do wrong.

From the above it can be said that sulh in the case of qisas and diyah is not only allowed but recommended since it has the force of calming the urge for blood feud and desire for revenge by the legal heirs. There are conditions required in a sulh, i.e. as follow:

1. The property in consideration must be lawful and valuable.
2. The property must be made known to the parties.
3. The amount of settlement should not exceed the amount of normal diyah.

This is held by the Shafi'is, as they regard any extra amount apart from its fixed amount is tantamount to riba. The Hanafis and the Malikis, however, hold that the amount of settlement depends on negotiation made by the parties and can even exceed the amount of normal diyah.

If the settlement is reached by the legal guardians on behalf of the incompetent heirs like infant or insane, the amount agreed must not be less than normal diyah according to the Shafi'is and Hanbalis. The Malikis and the Hanafis, on the other hand, maintain that it depends on negotiation and sulh is valid even if the amount of settlement is less that diyah as long as it is for best interests of child or insane.

6.3 Ta'zir

Ta'zir (plural: ta'azir or ta'zirat) is a crime punishable with penalties that are discretionary, i.e. it is left to the discretion of the judge to determine the suitable punishment to be imposed on the offender. It consists of all kinds of transgression where no specific and fixed punishment is prescribed. The Shari'ah gives the ruler or the judge considerable discretion in the infliction of ta'zir punishments, which range in gravity from a warning to death.

According to the jurists, ta'zir punishments can be inflicted on the offender for the commission of ta'zir crime whether commission of such crime infringes the right of Allah such as in the case of not performing daily prayer, or breaking the fast in the month of Ramadan without excuse or that infringes the right of individuals for example, in the case of insulting another person. It is to be noted that there is no crime which does not involve the right of Allah at all. In fact, in the case of ta'zir crimes which infringe totally the right of individuals, the criminal still infringes the right of Allah, since obeying the law and preventing the criminal from violating others, and keeping all people in right order are the rights of Allah.

As to the application of sulh in ta'zir crimes, all the jurists agree that it is allowed since the determination of ta'zir punishment depends on the discretion of the judge. However, in determining whether or not to pardon or mitigate the punishment, the judge must take into consideration the type of ta'zir crime. Ta'zir punishment which is due to the infringement of the right of Allah is obligatory. The authorities should enforce it and should not pardon it. However, they may not impose the punishment if, according to discretion on the basis of maslahah (public interest), the offender's crime can be deterred without his being punished. The ruler or judge can forgive the offender or mitigate the punishment

if, according to his discretion, the public interest necessitates it, or if the offender has rectified himself before the infliction of punishment.

On the other hand, if the ta‘zir crime is the infringement of the right of individuals, whether to forgive the offender or not depends on the victim's decision. The proceeding would only take place when it is brought to the court by the plaintiff who has the right. Therefore, whenever there is an allegation concerning this type of ta‘zir crime brought to the court, the judge cannot set it aside. It also cannot be waived by the ruler's pardon unless with the victim's permission. Thus sulh can be applied in this matter. It should be remembered that though ta‘zir punishment due to the infringement of the right of individuals can be remitted on account of sulh; the ruler can still punish the offender in order to reform him.

7. FORGIVENESS (‘AFW) AS ONE OF AMICABLE SETTLEMENT OF PUNISHMENT

Pardon means to relinquish the infliction of the merited punishment and it is considered the best method to settle criminal cases. The same principle is applied here as that of sulh. Pardon can remit a punishment whether it comes from the victim's side or the ruler's side. However, not all punishments can be remitted whenever pardon is granted. Some crimes are not affected by pardon, such as crimes which are punishable with a hadd punishment. This is because the hudud punishments are considered part of the right of Allah and are pre-determined and unchangeable. However, the jurists have a difference of opinion as to the effect of pardon in the case of qazaf. This difference results from their conflicts on whether qazaf infringes the right of Allah or that of individuals. According to Abu Hanifah, al-Thawri and Awza‘i, pardon in the case of qazaf is not considered since they hold that qazaf is an offence which merely infringes the right of Allah. The Shafi‘is, on the other hand, hold that qazaf is an offence which merely infringes the right of an individual and therefore, the pardon of the victim may remit the punishment. Another opinion states that pardon may remit the punishment of qazaf only if the case is not brought to the court. The Malikis, in this context, have two opinions; the first agrees with the Shafi‘is, and the second agrees with the opinion that pardon may remit the punishment of qazaf if the case is not brought to the court.

As to the crime of qisas and diyah, the jurists are unanimous that to pardon the offender gratuitously is the principal ground for remitting qisas. It is considered in remitting the punishment from an offender only if it is granted from the victim's side and not from the ruler's side. Thus, when the victim or his relatives forgive the offender, the prescribed punishment cannot be inflicted on him. However, the pardon of the victim and his relatives does not affect the right of the ruler to impose a ta‘zir punishment on the offender after that, if the public

interest necessitates it. The ruler, on the other hand, cannot remit the prescribed punishment of qisas on the offender by granting his pardon, if the victim does not allow him to do so. The right of the victim or his relatives to forgive the offender from the punishment of qisas is derived from the Qur'anic verses, one of which says:

"We ordained therein for them: a life for a life, an eye for an eye, nose for nose, ear for ear, tooth for tooth and for wounds retaliation. But if any one remits the retaliation by way of charity, it is an act of atonement for him.

Pardoning of qisas is, in fact encouraged by the Prophet s.a.w. who said: "No person is caused to suffer injury on his body and then he forgives him (who injured him) but Allah elevates him a degree on that account or expiates his sin."

Anas ibn Malik is reported to have said: "No case involving qisas was referred to the Prophet s.a.w. unless he exhorted it to be pardoned therefore."

As to what are the implication of pardon granted by the victim or his relatives, the jurists have differed. The Malikis and Hanafis are on the opinion that it will amount to free pardon while the Shafi 'is and Hanbalis maintain that the diyah would be due.

Regarding ta'zir crimes, the jurists unanimously agree that the ruler has the right to forgive the offender, either by overlooking the crime or letting him off the punishment.

This agreement is based on the hadiths of the Prophet which say: "Forgive or be lenient towards the faults of respectable persons (dhawialhai'at) except the ordained crimes." Let's accept their (the Ansar) good qualities and forget their bad ones.

They, however, dispute as to whether the right of granting pardon that the ruler has, covers all ta'zir crimes or only some of them. According to some jurists, the ruler has no right to forgive an offender of hudud and qisas crimes when the prescribed punishment for them has been reduced to a ta'zir punishment due to certain reasons. Apart from the above crimes, the ruler may, at his discretion, forgive an offender for a crime or a punishment if he thinks that the public interest necessitates it.

According to some other jurists, the ruler has full power to grant his pardon to an offender of any ta'zir crime whether it involves the right of Allah or the right of an individual as long as it conforms to the public interest.

Regarding crimes which involve the right of an individual, for example, beating or insulting others, the victim of such crimes can forgive the offender, but his

personal pardon cannot affect the right of the public to discipline an offender with a suitable ta'zir punishment. This means that in such a case the ruler can still use his discretion either to punish an offender or forgive him, according to the public interest. However, if the victim does not grant his pardon and demands the infliction of a punishment, the ruler has no right to forgive an offender but to inflict a suitable punishment on him.

8. CHARACTERISTICS OF ADR

ADR is part and parcel of Islamic Law since the last 1400 years. Its unique nature lies in the support that the Quran and Hadith give to it. Some of such characteristics of ADR which distinguish it form other legal systems are discussed in this paper. These include:

1. ADR in Islamic Law occupies a high religious status because of the Quranic origin of sulh (negotiation, mediation and compromise of action), tahkim (arbitration), a combination of sulh and tahkim (med-arb), and muhtasib (ombudsman).
2. Amicable settlement of dispute during arbitral proceedings is made the moral duty of the parties and arbitrator.
3. Fatawa given by Muftis is equivalent to Expert Determination.
4. Amicable settlement of every dispute be it family, neighborhood, business, political or so on is encouraged and allowed, except what may make a thing haram (prohibited) as halal (permitted) and a thing halal (permitted) as haram (prohibited). Even Qadis are required to go on striving for settlement during the entire course of judicial proceedings.
5. Equity, justice and fair play are integral parts of ADR. This is why Amiable Composition is an integral part of tahkim (arbitration), and is not dependant on parties' consent.
6. Revocability of arbitration agreement is a unique feature of tahkim (arbitration)
7. Arbitration agreement is not allowed to cover future disputes. Only past and present disputes are covered.

9. THE MAIN FEATURES OF ARBITRATION

Under Islamic Law In order to understand the concept of arbitration under Islamic Law, the main features of arbitration should be considered.

9.1 The Arbitration Agreement

According to the authorities of all Schools of Islamic Law the arbitration agreement is the Principal basis for conferring upon the arbitrators the power to

issue binding decisions. The use of arbitration as a method for the settlement of dispute under Islamic Law depends upon the full and valid consent of the parties. Whether the arbitration agreement should be in writing or oral is not discussed by any school in Sharia. However, in the leading case between the Caliph "Ali Ben AbiTaleb" (the fourth rightly guided Caliph) and "Muawya Bin AbiSofian", the two parties agreed to appoint two arbitrators in written deed which stated the names of the arbitrators, the time limit for making the award, the applicable law and the place of issue of the award. In this dispute the parties used arbitration to settle their dispute, but the arbitration clause was not effective. The question which may arise in this respect is whether arbitration clause, which refers future disputes to arbitration, is valid under Islamic Sharia.

The doctrinal writings of the four Sharia Schools deal with the use of arbitration in existing disputes. Therefore, the doctrinal writings of the scholars of the Sharia Schools are silent about arbitration clauses, which refer future dispute to arbitration. This issue has been a subject of controversy among some classical scholars of Sharia. Whatever the case is ignorance of Sharia in early time's does not mean that arbitration clauses are prohibited. According to the principle of freedom of contracts under Islamic Sharia, parties are free to include any clause in their contract as long as it does not permit acts against God's commands, such as the incorporation of 'interest' (Riba) clauses.

Arbitration clauses were ignored by the early Muslim scholars because of the fact that the commercial conditions at that time did not require the use of such clauses. It has to born in mind that the answers given by Islamic Law to arbitration problems have been given before the commercial and economic evolution had reached today's stage. However, they are not unalterable and do not constitute an exception to the universal rule that 'the law must change over the times'. Indeed, Sharia is not static and rigid and it is only bound by the Koran, Sunna, Ijma' and Qiyas (analogy). Arbitration clauses are necessary to the contract, especially in international contracts and they are beneficial to both parties as they enable the justice to be done more quickly. Furthermore, since arbitration clauses are not contrary to public policy; (namely do not permit acts against God's commands), they should be considered valid under Sharia.

A division of opinion between the authorities of Sharia prevails over whether the consent of the parties go to arbitration would be required only at the time of the agreement or should the consent continue until the issuance of the award by the arbitrator(s). Some classical Muslim jurists question the binding force of arbitration agreement. To them, arbitration agreements are revocable options rather than contractual undertakings. This idea was incorporated in Al-Majalla which some codification was including the rules of arbitration to be applied in the Ottoman Empire. This view has been challenged by contemporary Muslim scholars. According to them, this view is, obsolete, superficial and ill-founded. The modern trend in Islamic law is to consider the arbitration agreement binding

upon the parties once it has been entered into. Parties would also be bound by the decision of the arbitrators. Authorities on the subject proved that this view is the direct application of the general principles in Islamic Law. It is the direct application of the Koran when it states "…and fulfill every agreement, for every engagement…" This meaning was stressed by the Prophet Mohamed in a famous Saying; he said, "Believers should honour their engagements…" It may be concluded that the view that receives mostly full approval and application in the legal profession is that arbitration agreements are binding and no party is permitted to withdraw from any agreement he concluded with others by his own free and valid will.

Finally, as to the formalities of arbitration procedures relating to the place of arbitration as appointment of arbitrators the Koran is silent. Accordingly, they are within the discretionary powers of the parties.

9.2 Arbitrators

Once the disputing parties have agreed to resolve their dispute by arbitration, they should reach an agreement on the appointment of the arbitrators. The parties may specify the arbitrators by name or they may define the arbitrators by certain position without specifying the name. If the parties agree on arbitration but did not appoint the arbitrators, the arbitration may not take place. The four schools of Islamic Sharia are silent on the possibility of appointing arbitrators by a third party. However, there is nothing under the Sharia prohibits the appointment of the arbitrators by a third party. Thus it is left to the entire freedom of the contracting parties to decide whether they want the appointment to be made by a third party or not. According to the four Islamic Law Schools, there are no restrictions on the number of arbitrators. The matter is left to the parties to arbitration agreement to appoint one or more arbitrators and the number may be odd or even. However, if each party appoints an arbitrator, and the two arbitrators authorized to appoint a third arbitrator, the majority rule may be applied if the parties give their consent to that. As an arbitrator is deemed under the four Sharia Schools to exercise a judicial function, he must have the same qualifications as a judge. This qualification can be summarized as follows. The arbitrator must posse the foregoing qualifications continuously from the date of the commencement of the arbitration until the rendering the award.

As to the revocability of arbitrators by one of the parties, the Maliki School prohibits revocation after the procedure has started. The Shafi and Hanafi schools permit the revocation of arbitrators at any time before rendering the award. However, the view that receives mostly full approval and appreciation in the legal profession is the view of the Maliki School, which provides that the appointment of an arbitrator is irrevocable after the commencement of the procedure except by mutual agreement of the disputing parties. This view seems

to be the most appropriate because it meets the requirements of international business community.

9.3 The Applicable Law

In disputes where one party is a non-Muslim, choosing a non-Islamic legal system is recognized by the Maliki, Shafi and Hanbali Schools as valid. Furthermore, several Muslim countries became parties to the New York Convention and by doing so; they approve the delocalization of arbitration agreements. However, recourse to a non-Islamic legal system is valid as long as the rules to be applied on the contract do not violate express provisions of Koran or Sunnah.

9.4 Arbitrability According to Islamic Law

According to the four Schools of Islamic Sharia arbitration is not authorized in matters relating to the "Rights of God". The said area is quite large, covering criminal law as well as patrimonial rights. The Koran also excludes certain subjects such as guardianship on orphans, which must obligatorily be referred to courts of law. This area resembles the area of public policy in modern laws. Apart from the subjects excluded above, any other dispute should be just as cable of being resolved by arbitration as by a national court. Accordingly, disputes arising out of commercial transactions are arbitral.

9.5 The Arbitral Award and its Enforcement

According to the Maliki, Hanbali, Hanafi and the majority of the "Shafi'is" an arbitral award is as enforceable as a judge's judgment. However, the intervention of a judge is necessary, as the arbitrator has no authority with respect to enforcement of arbitral awards. The Maliki, Hanafi, Hanbali and the majority of Shafi'is stress that the judge who has been required to enforce an arbitral award, cannot deny the enforcement simply because it does not conform to his opinion. Thus according to Sharia Law an arbitral award has a jurisdictional character and it is binding and enforceable. Moreover, a judge when enforcing an arbitral award is not authorized to review the merits of the disputes or the arbitrator's reasoning. The judge's duty is limited to examining some formal matters, such as the existence of a valid arbitration agreement and whether the award deals with the disputes subject matter. However, a judge may set aside an arbitral award if it is inconsistent with Shari's public policy or if the award contains a flagrant error or injustice. It should be noted that the judge's power to set aside an arbitral award on the latter grounds is not a second level of jurisdiction but a form of supervision over the award. As to the enforcement of foreign arbitral awards, the attitude of Sharia is dependent on the bilateral and international conventions to which the party states are committed. Moreover, the Muslim judge may set

aside a foreign award or refuse enforcement if the award violates the general spirit of Sharia and/or its sources (Koran and Sunnah).

10. CONCLUDING REMARKS

One of the objectives of Shariah is protection of human life in the earth and this protestation is provided through a recognized judicial process. In assisting this judicial mechanism for settling the disputes, Islam prescribed an extraordinary way for resolving conflict among the disputant which is known as arbitration. If a case is filed in the formal court of law and the court is hear the case openly, the question of honour and social reputation of the concerned parties will definitely arise which will lose their social status. This is why Islam prescribes the arbitration process for resolution of the problem before filling a case in a formal court of law. Islam declared it as a best method of mitigating the dilemma as one of the verses stated in the Quran. In the case of arbitration the objective of arbitration must be kept in the mind of the arbitrator. The virtue of Impartiality and un-biasness of the process is also to strictly be maintained. In the present days it is seen that the arbitrator indulge himself in an offence of bribing and the total purpose of arbitration would become failure. Politics and political powers in many cases in destroy the objectives of arbitration and the remedy seeker fall a great danger. So the total process would be for its sole purpose and practiced in all civil and criminal cases. If it is practiced properly the burden of cases would definitely reduce and proper administration of justice will establish.

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