

## **AN ANALYSIS OF THE APPLICATION OF *SULH*, ITS PRACTICE AND PROCEDURE BY SHARIA COURTS IN MAIDUGURI METROPOLIS**

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### **Abstract**

Sulh is a mechanism for settling dispute in Islam. It has been in practice since the advent of Islam. It is applied as a process of settling disputes within families, community members, business partners, litigants and any other compoundable disputants. However, this practice has faded and parties are reluctant in applying it in settling disputes. This paper examines the concept of sulh in Islamic law and its application. The paper also analyzed practice and procedure of *sulh* by the Sharia Courts in Maiduguri Metropolis. The paper adopts doctrinal methods of research by analyzing the primary and secondary sources. This paper found that Sharia Courts in the study area, to a large extent, are influenced by the reminiscent of English style of mediation than that of Islamic law. The challenges associated with backlog of cases pending in the Sharia courts are predicated upon the neglect and non-referral to sulh by the courts. Therefore, Sharia Courts should facilitate *Sulh* by advising and counselling litigants to settle their cases by means of *sulh* out of court or through the sulh door facility of the Borno State Amicable Settlement Corridor (BASC).

**Keywords – *Sulh* (Conciliation), Islamic Law, Dispute, Maiduguri Metropolis**

### **Introduction**

It is natural that human beings interrelate regarding all aspects of their endeavours. Differences of opinions, perceptions and behaviors mostly lead to dispute. Islam as a religion and way of life preaches peaceful co-existence, has introduced *Sulh* to amicable settlement disputes. This

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ensure the smooth running of affairs and encouraged cordial relationship between disputants by facilitating peaceful dispute settlement. Where *sulh* fails, litigation (*al-qada'u*) is envisaged. *Shariah* has recognized and institutionalized *sulh* as a dispute settlement mechanism in addition to litigation. *Sulh* is the preferred result and process in any form of dispute settlement. *Sulh* has a long history within Arab and Islamic societies and have their roots in pre-Islamic Arabian period.<sup>1</sup> Maiduguri Metropolis being Local Government Area in Borno State of Nigeria has adopted and practice the principles of *Shariah* as its judicial process prior to the Colonial administration.<sup>2</sup> An attempt was made for formal reintroduction of Sharia justice system fully by the Area Courts. Area were renamed as Sharia Courts, conferred with jurisdiction to administer and implement the principles of *sulh* when hearing and determining matters. It is believed that, with these Courts fully coming into operation the principles of *Sharia* for determining disputes may be fully practiced by resorting to the requirements of *As-Sulh*. It may give judges ample opportunity to dispose backlog of cases by encouraging *sulh* easily with less cost. It may also result in the decline of lengthy and costly litigation process.

It poses challenges to the Judges and Lawyers who are mostly conversant and adhere to litigation instead of *sulh*. Mostly disputes in accordance with the principles of sharia are to consider *sulh* first before other processes. It is pertinent to note that, *sulh* process sustains homage, brotherhood, reservations, family tie, peace and harmony based on social norms and religious injunction. This paper appraises the general conception of *sulh*, the history of the application of *sulh* and the development of *sulh* in the *Sharia* Courts in Maiduguri Metropolis.

### **Meaning and Nature of *Sulh* under Islamic Law**

Islam encourages every Muslim to embrace *Sulh* (reconciliation) in order to restore peace, affection, harmony, and understanding. This is advocated to avoid antagonism between disputants. *Sulh* process is

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<sup>1</sup> Othman. A., "And Amicable Settlement Is Best": *Sulh* and Dispute Resolution in Islamic Law, Arab Law Quartely, Volume 21, No. 1 (2007), 64-65.

<sup>2</sup> Yadudu. A. H., Colonialism and the Transformation of Islamic Law, In the Northern States of Nigeria, Journal of Legal Pluralism (1992), P. 105 and Murtala. S., Sharia in Nigeria Before the Colonial Period: A Study of Yoruba Land, Islamic University Multidisciplinary Journal IUMJ, Volume 7 (2) (2020), P. 145.

guided with an overarching principle of collective interests of disputants, family members, community and country.<sup>3</sup> Some *Quranic* injunctions depict the preference for *sulh* of disputes.<sup>4</sup> Islamic law places collective interest as the highest principle in a hierarchy of values in dispute settlement and human dealings. Maintenance of relationships and restoration of harmony is a duty on all the disputants, stakeholders, whether he be a judge (*Qadi*), an arbitrator (*hakam*) or a conciliator. Therefore, collective interests and *sulh* are the cores of any dispute resolution. This is in order to maintain family ties, brotherhood and the community. It can be seen from the foregoing that; the ethical principle is to forgive and to forgive is actually a very noble thing to do. *Sulh* is a process of preserving, fostering human relationship and it establishes productive relation for the future with a sense of respect.

According to Haroon, *sulh* is an external dispute resolution process in some quarters, or a technique that acts as a means for disputants to come to an agreement short of litigation.<sup>5</sup> It also means termination of dispute. *Sulh* in essence is a contract between two parties, where each party waives part of his claim for the purpose of reaching a mutual and final settlement of a disputes.<sup>6</sup> In a legal parlance, *Sulh* is a settlement, conciliation and compromise of action by the disputants or with the help of a third party. It is the actual outcome of the reconciliatory processes undertaken to resolve a dispute, containing agreed private resolution out of court.<sup>7</sup> *Al-Nawawi*, opined that the word *sulh* originates from a verb *salaha* which means the process of restoring

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<sup>3</sup> Al-Ramahi. A, "Sulh: A Crucial Part of Islamic Arbitration", LSE Law, Society and Economy, Working Papers

<sup>4</sup> See the Quran Al-Nisa. 35 and 128

<sup>5</sup> Haroon. I.A., The Use of Alternative Dispute Resolution (*sulh*) in Sharia Cases, being a Paper Presented on Tuesday, 4<sup>th</sup> April 2017, at the National Workshop for Area/Sharia/Customary Court Judges/Directors and Inspectors of Area/Sharia/Customary Courts, 3<sup>rd</sup> – 5<sup>th</sup> April, 2017, P, 2.

<sup>6</sup> Sayyid Sabiq, *Fiqh al-Sunnah*, *op. cit.*, Vol. 3, p. 210; See also Al-Zailaie, Othman ibn Alī, *Tabyīn al-Haqā'iq Shar'h Kanzu ad-Daqā'iq*, Dār al-Mā'rifah, Beirut, 2nd edn., Vol. 5, p. 29; Ibn Qudamah, *Al-Mughni*, Dār al-Kitāb, Beirut, Vol. 4 p. 476.

<sup>7</sup> Keffi, S.U.D. *op cit.*, p.192; See also Aida Othman, *And Sulh is Best: Amicable Settlement and Dispute Resolution in Islamic Law*, Unpublished Ph.D. Thesis, Harvard University, (2005) p. 25

something.<sup>8</sup> It is collective term for process through which disputants may settle disputes by themselves or with help of a third party.

*Sulh* as a process is where disputants may abandon or relinquish their right or claim with a consideration for the purpose of terminating disputes or its avoidance altogether.<sup>9</sup> The term has been used to refer both to ritualized process of restorative justice and peacemaking.<sup>10</sup> Some Quranic verses strongly advocate for *sulh* on equitable and fair ground and gives divine blessing to those who do so.<sup>11</sup> The Quran said thus: “*If two parties among the believers fall into quarrel, make peace and conciliation between them and fear Allah, that you may receive mercy*”,<sup>12</sup> and “*If you fear a breach between them appoint two arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their conciliation...*”<sup>13</sup>. As a contract *sulh* can be entered by parties at the moment of their choice even if it is immediately, depending on the circumstances of any dispute it can also be nurtured over some periods of time in order for it to procure its fruits of justice and peace.<sup>14</sup> Notwithstanding the difficulty and arduousness of the *sulh* process, it is a process which is extolled in Islam and as such should be encouraged and supported by each and every conscientious believer. No *Sulh* process can be perfect but its contradictions must not be overlooked and they should be continually challenged.<sup>15</sup> But in order for a *sulh* process to be sustained it requires magnanimity on the part of all parties.<sup>16</sup>

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<sup>8</sup> Muhyi al Din Abu Zakaria Yahya al-Nawawi, *Tahrir Alfaz al-Tanbih*, Dar al-Qalam, 1408H at 201,

<sup>9</sup> Mohammed Abu-Nimer, *Conflict Resolution in an Islamic Context: Some Conceptual Questions*, Peace and -Change, Vol. 21, (1996), pp. 23, at p. 30.

<sup>10</sup> al-Kaafi, *Ihkamul Ahkam ala Tuhfah al-Hukkam*, *op. cit.*, p. 64; See also Sayyid Sabiq, *Fiqh al-Sunnah*, *op. cit.*, Vol. 3, p. 210; See also Sheikh U. D. Keffi, *op cit.*, p. 192

<sup>11</sup> Qur'an Sura 2:208, Surah 4 V35 and 128.

<sup>12</sup> Quran 49 Verse 9

<sup>13</sup> Quran 4 Verses 35

<sup>14</sup> Rashied Omar, A.khutuba 17 December, 2010. Reconciliation in islam. p1, see also Olufadi L A and Farah. S. M, The Concept of Reconciliation (*Sulh*) in Islamic Family Law and Matrimonial Dispute Settlement Practice in Nigeria, Proceeding of the Global Summit on Education GSE 2014, Kuala Lumpur, Malaysia. Organized by WorldConferences.net, 4-5 March 2014, P.648

<sup>15</sup> Ibid

<sup>16</sup> Quran 4 Verses 11

*Sulh* is very significant to form part of all rules of court as an alternative to litigation considering population growth couple with the pandemic crises across the globe. This and many other reasons mostly resulted in increasing caseloads, backlogs and delays which the courts may not entertain in timely manner. This may save as an option that could be resorted to by a *Qadi* within the context of the courtroom (i.e., *al-Qada''u bi al-Sulh*),<sup>17</sup> or a *Hakam* (arbitrator) in his conference room. Thus, *Sulh* is part of every-day dispute resolution mechanism in Islamic law.<sup>18</sup>

*Sulh* is attained through mediation, conciliation and negotiation to be facilitated by *Qadi* or family head and community leaders. This is done through the principles of counselling, advising and arbitration.<sup>19</sup> The facilitator assists in an attempt to reach a voluntary settlement by suggesting various settlement proposals, without enforcing a final agreement.<sup>20</sup> The actual method of accomplishing *Sulh* is quite distinct. A facilitator generally plays far more proactive role during *Sulh*, rather than to act as a mere neutral observer. The facilitator delves deep into the actual substance of the dispute, openly evaluates the arguments of both sides, and actively takes part in negotiating a solution.<sup>21</sup> In many instances, the facilitator must accomplish this without any initial face-to-face interaction with the parties, which raises the risk of embarrassing a party or antagonizing the situation.<sup>22</sup>

Because this contract is optional, the judge has no power to compel disputants to enter such a contract. The issues related to *Sulh* therefore fall under the general theory of contracts in *Shari''ah*, which requires

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<sup>17</sup> Ibn Farhun, *Tabsirat al-Hukkam*, op. cit., Vol. 2, pp. 54-56

<sup>18</sup> Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration*, London School of Economics and Political Science, Law, Society and Economy Working Papers 12/2008, p.3, available at: <http://ssrn.com/abstract=1153659> accessed on the 31/10/2019.

<sup>19</sup> Samir Saleh, *The Settlement of Disputes in the Arab World Arbitration and Other Methods—Trends in Legislation and Case Law*, Arab Law Quarterly (1985) vol. 1, P. 198.

<sup>20</sup> Ratno Lukito, *Religious ADR: Mediation in Islamic Family Law Tradition*, AL-JAMI''AH MAGAZINE (2006) Vol. 44, pp. 325, at p. 337.

<sup>21</sup> Mohammed Abu-Nimer, *Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities*, 55 American Journal of Economics and Society, Vol. 55, (1996), pp. 35, at p. 46

<sup>22</sup> Khan, Sahih. al-Bukhariyy.vol.3, p.533, Eng.tr.by Muhammad muhsin khan (Dar-Al Arabia, Beirut,n.d)

that disputants adhere to contracts they have concluded and remember that steadfastness to ones.<sup>23</sup>

### **Historical Evolution of the Concept *Sulh* Under Islamic Law**

In the pre-Islamic period, Arabian regions consist of tribes who claimed descent from a common ancestor. Individuals owed allegiance and loyalty to the where protection of interests was obtained. No codified rules and regulations with established institutions for the administration of justice system. Dispute settlement evolved from the spiritual practices of their great grand-parents which may not be apt as the revealed laws. The stakeholders in the dispensation of justice then were traditional institutions, soothsayers, healers and influential noblemen who act as arbiters in all disputes.<sup>24</sup> Disputes between rival tribes were settled on self-help processes such as negotiation and personal vengeance based on their tribal principles' of arbitration and conciliation.<sup>25</sup> This legal system is based on the principles of collective responsibility and the principle of retribution or compensation. It is not aimed as punishment but to restore the equilibrium between the offending, offended families and tribes.<sup>26</sup> It is right to say that *Sulh*, is a practice that predated Islam and is deeply rooted in historical means which applied to settle dispute. *Sulh* at the ancient time was for the maintenance of order within the family or tribes.<sup>27</sup> The decision of the arbiters was final based on what the customary practice ought to be, but not legally enforceable.<sup>28</sup> To maintain harmony, some arbiters

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<sup>23</sup> Othman. A., "And Amicable Settlement is Best", *Sulh* and Dispute Resolution in Islamic Law, Arab Law Quarterly 21, (2007), Pp, 65-66.

<sup>24</sup> Md. Shahadat. Md. H, "Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview, Journal of Philosophy, Culture and Religion", An Open Access International Journal Vol.1, (2013), P, 1.

<sup>25</sup> Mahassini. H, 'General Principles of Islamic Law relating to International commercial arbitration' (1992) 3(1) The ICC International Court of Arbitration Bulletin, Special Supplement, 21, 23.

<sup>26</sup> Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration*, London School of Economics and Political Science, Law, Society and Economy Working Papers 12/2008, p.3, available at: <http://ssrn.com/abstract=115> accessed on the 13/12/2021.

<sup>27</sup> Wahed. H., 'Sulh: Its Application in Malaysia' Journal of Humanities and Social Science, Volume 20, Issues 6, Ver, II, (June 2015), P, 73.

<sup>28</sup> M. Hamidullah, 'Administration of Justice in Early Islam' (1937) 11 Islamic Culture 163

volunteer to pay compensation or inducement personally in order to persuade the feuding parties to agree to *sulh*.<sup>29</sup>

From the early age, it was a socialized cultural practice built in the attitude of parents to refer disputes to elders who, as mediator, settled disputes in their family or among relatives. Usually, complex and serious disputes were referred to their Sheikh or Chieftains by the family members. Steering disputants towards a compromise (*sulh*) through an arbiter or mediator is an institution and a part of Arabian society.<sup>30</sup> It is centered around an intermediary role that is associated with prevention of retaliation in inter-personal or intergroup disputes as measures of protection.<sup>31</sup>

The Prophet (SAW) himself was once chosen as an arbitrator due to his honesty trustworthiness, this was during the famous disputes was over the placing of a black stone. There was fierce disagreement between the tribes as to who will have the honour of choosing the position of the stone. The Prophet (SAW) applied *sulh* by placing the black stone in the middle of his robe. Then, asked each tribal leader to hold the side of the robe and together placed the black stone collectively in an agreed position which resolved the dispute.<sup>32</sup>

Adherence to customary practices of *sulh* since its inception continued up to present day with varying applications. *Alurf waladah* refers to custom and practice established as a legitimate source of law.<sup>33</sup> Many of these custom and practices before the advent of Islam were continued to be honoured after the rise of Islam especially customs relating to personal honour, hospitality and courage. The Prophet (SAW) also encouraged such values like kindness, mercy and justice, which were the developed earlier customs and practices of the region. The Prophet's (SAW) moral teachings are summed up in a tradition

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<sup>29</sup> A. El-Tayib, 'The Ode (Qasidah)', in The Cambridge History of Arabic Literature: Arabic literature to the End of the Umayyad Period (Cambridge: Cambridge University Press, 1983).

<sup>30</sup> Othman. A., "And Amicable Settlement Is Best": *Ṣulḥ* and Dispute Resolution in Islamic Law Arab Law Quarterly Vol. 21, No. 1 (2007), pp. 77.

<sup>31</sup> A. Al-Ramahi, 'Wasta in Jordan: A Distinct Feature of (and Benefit for) Middle Eastern Society' (2008) Arab Law Quarterly 22(1) 35

<sup>32</sup> Ibn Ishaq, Muhammad Bin Yasar, The Life of Muhammad, trans. A. Guillaume, London, Oxford University Press, (1955), at 85

<sup>33</sup> M. C. Bassiouni and G. M. Badr, 'The Shari'ah: Sources, Interpretation, and Rule Making' 1 UCLA J. Islamic & Near E. L. 135.

ascribed to him, to further the principles of good character.<sup>34</sup> Thus, positive tribal customs were incorporated into Islamic teaching and jurisprudence. However, the Prophet (SAW) rejected the pagan elements that existed in pre-Islamic *sulh*, but not *sulh* as a process.<sup>35</sup>

*Sulh* (reconciliation) is continually applied, recognized and encouraged for its ability to settle disputes without affecting existing relationship.<sup>36</sup> As such the concept of *sulh* is not new in Islam, it is believed that it has emerged from the West and has existed for 1400 years ago. The Islamic legal system embodies a distinct preference for settlements, as reflected in the Islamic concept of *Sulh*. *Sulh* derives its foundation from the Glorious Quran, supplemented by *hadith* and further expounded through *Ijtihad*. During the Treaty of *Hudaibiyyah*, the word, “Muhammad, Allah’s Apostle” was written. The Pagans rejected it and the Prophet (SAW) erased the word to make peace.

The appointment of Mu’adh bin Jabal and Ali bin Abi Talib as a judge in Yemen were some of the examples where *sulh* also was practiced by judges. The judges acted not only as a mediator but also as conciliator because of no clear distinction between the functions of each role. After the demise of the Prophet (SAW) the *Khulafa’ al-Rashidun* (period of Caliphate), *Qadi’s* settle disputes not only as a judge, but also as a conciliator and mediator. The first Caliph, Abu Bakr, for example used mediation during the appointment of the successor of the Prophet (SAW). *Caliph Umar*, also had written a letter to *Abu Musa Al-Ash’ari* after his appointment as a judge on the rules regarding the administration of justice. It was stated that, ‘All types of compromise and conciliation among Muslims are permissible, except those which make *haram* a *halal*, and *halal* as *haram*.’<sup>37</sup> This was in accordance

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<sup>34</sup>Alam. M., Success in Prophet Muhammad’s (PBUH) Revolutionary System, accessed at <https://www.islamicity.org> on 10/02/2023, Prott. J., The Guiding Principles of Faith, Sincerity, Honesty and Good Will in Islam, accessed at <https://yaqeeninstitute.org/read/paper/the-guiding-principles-of-faith-sincerity-honesty-and-good-will-in-islam>, on 10/02/2023 and J.A. Bellamy, ‘The Makarim al-Akhlaq by Ibn Abi-Dunya’ (1963) LIII Muslim World 100, 119.

<sup>35</sup> Ahmed. S. B., *Sulh: An Alternative Dispute Resolution and Amicable Settlement of Family Dispute*, Umran Journal of Muslim Affairs, Vol. 1, No.1 (2015), P, 1.

<sup>36</sup> Abdul Hak. N, Ahmad. S and Oseni. U. A., ‘Alternative Dispute Resolution (ADR) in Islam’ (Kuala Lumpur: IIUM Press, (2011), P, 24.

<sup>37</sup> Md. Zahidul Islam., Provision of Alternative Dispute Resolution Process in Islam, IOSR Journal of Business and Management, Volume 6, Issue 3 (Nov. - Dec. 2012), PP 31-36



with another *hadith*, “If somebody innovates something which is not in harmony with the principles of our religion, that thing is rejected.”<sup>38</sup>

It has been noted that, *Sulh* has been in practice since before inception of Islam and it has formed the day to day practice of the people in most communities. However, *Sulh* is rarely being used nowadays in most courts as a result of the court litigation system and the influence of Western colonization.

### **The Contractual Nature of *Sulh***

*Sulh* as a contract may take various forms and it is usually manifest in the form of *al-Bay'* (Sale), *Ijara* (lease), *Hibah* (gift) and so on. In *Sulh*, the settlement may be effected in exchange for *maal* (wealth or property) which is confined to tangible assets to which Shariah gives monetary value, or in exchange for *manaafi* (usufruct/benefits). If the *Sulh* is *maal* for *maal*, then the rules of *Bay* will apply and the agreement will be assigned to the category of a sale contract.<sup>39</sup>

On the other hand, if the *Sulh* is related to *maal* in exchange for *manaafi* (benefits), then the rules of *Ijaarah* (leasing) will become applicable to the agreement. If the basis of the dispute is a *Haqq* (right), it should be a right which is established and is in the *milkiyyat* (ownership) of the claimant, that is, it must be a right vested in the claimant. A person cannot claim compensation for a right if he does not own the *mahal* (substratum) such as *Haqq-ul-Shuf'ah* (the pre-emptive right of buying the adjacent property). In this case, he has no *milkiyyat* (ownership) in the article of sale, that is, the building. On the other hand, *Sulh* can be effected in a right, if related to a *mahal* in which he has *milkiyyat*, such as *Qisas* (taking the life of a murderer). In this case, the heirs of the murdered person possess the *milkiyyat* (ownership) instead *Qisas* against the murderer.<sup>40</sup>

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<sup>38</sup> Sahih al-Buhari 2697.

<sup>39</sup> Rattu. M.U., Exploring Legal, Regulatory and *Shari'ah* Compliance Issues in Islamic Financial Instruments: Derivatives and Sukuk, Durham theses, Durham University (2013), available at Durham E-Theses Online: <http://etheses.dur.ac.uk/7349/>, accessed on 12/01/2022.

<sup>40</sup> Masuma. P., Law of Murder under Islamic Criminal Law: An Analysis, Journal of Law, Policy and Globalization, Vol. 53, (2016), P, 148.

## Application of *Sulh* by the Borno State Sharia Courts

Maiduguri is the capital of Borno State, which is one of the 36 state of the Federal Republic of Nigeria that practiced Sharia legal system by the Sharia Courts. By Sharia legal system it means Islamic law and practice pertaining *sulh* as prescribed by the Holy *Quran, Hadith*;<sup>41</sup> and Islamic Jurisprudence and interpretation adopted by Maliki School of thought.<sup>42</sup> The Nigerian constitution allowed the practice and application of Islamic personal law by the Sharia Courts of Appeal.<sup>43</sup> Islamic law as an independent legal system is a distinct body, structure and source from any other law. The Courts that administer this legal system in the state are the Courts established under Sharia Administration of Justice Law which are Sharia Courts and Upper Sharia Courts.<sup>44</sup> The Sharia Court is a lower Court with original jurisdiction, while the Upper Sharia Court has both original and appellate jurisdictions.<sup>45</sup> The Sharia Court of Appeal is appellate Court and maintain the position of superior Court of record.<sup>46</sup> It hears appeals emanating from the Upper Sharia Courts in civil matters.<sup>47</sup> These appeals involving questions of Islamic personal law regarding marriage, family relationship or the guardianship of an infant, *wakf*, (gift), will or succession of a deceased Muslim, infant, prodigal or person of unsound mind who is a Muslim, or the maintenance or the guardianship of a Muslim who is physically or mentally infirm.<sup>48</sup> These Courts give room to the institution of *sulh* and the laws to be applicable includes Sharia legislations enacted by the House of Assembly or may be enacted from time to time.<sup>49</sup> The practice of *sulh* is placed by the provision of Order 12 Rule 1,<sup>50</sup> and Order 8 Rule 1.<sup>51</sup> These provisions

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<sup>41</sup> Quran 4 v, 178, 182, 224, 228: Quran 2 v 35, 114, 128, 135 and Al-Buhuti, Mansur Ibn Yunus Idris, *Kashhaf al-Qina' an Matn al-Iqna*; Dar al-Fikr, 1982, P, 107-108.

<sup>42</sup> Section 2 An Interpretation section of Borno State Sharia Administration of Justice Law 2000.

<sup>43</sup> Section 272 of the 1999 Constitution of the Federal Republic of Nigeria (1999 as Amended).

<sup>44</sup> Section 3 (1) of the Sharia Administration of Justice Law 2000

<sup>45</sup> Section 4 (2, 3 and 4), Section 6 (1, 2 and 3) Ibid.

<sup>46</sup> Section 6 (5) Ibid.

<sup>47</sup> Section 8 (3) Ibid.

<sup>48</sup> Section 277 (1 and 2), (a. b, c, d and e) of the Constitution of the FRN 1999, (as amended)

<sup>49</sup> Section 7 Ibid.

<sup>50</sup> Area Court Civil Procedure Rules 1971.

<sup>51</sup> Borno State of Nigeria Sharia Court of Appeals Rules 2018.

served as the legal basis for the application and practice of *sulh* by the Sharia Courts and indicates that disputants are at liberty to consent for *sulh*. In a bid to facilitate and improve the practice of *sulh* in Maiduguri Metropolitan, the Borno State Judiciary established the Borno State Amicable Settlement Corridor (BASAC) with a *Sulhu* Door to resolve matters relating to Islamic personal laws.<sup>52</sup> It also provides for the legal basis and guidance on the conduct of *sulh* in Maiduguri Metropolis and to ensure the facilitation of *sulh* in the area.

### **Jurisdiction of the Sharia Courts on *sulh***

Jurisdiction is the general power to exercise authority over all persons and things within its territory.<sup>53</sup> In this context, it is the power or competence of a court to adjudicate or exercise judicial power over any subject matter. Accordingly, jurisdiction connotes the authority of a court to determine a dispute submitted to it by contending parties in any proceeding.<sup>54</sup> Any party may institute and prosecute any cause or matter in Sharia Court.<sup>55</sup> The courts have jurisdiction in all civil and criminal cases in which all parties are subject to its jurisdiction”.<sup>56</sup> The Court had the powers to decide matter in controversy and presupposes the existence of duly constituted court control over the subject matter and declare judgment.<sup>57</sup> Court without jurisdiction cannot adjudicate and if it does so no matter how well conducted is an exercise on futility.<sup>58</sup> In the exercise of its jurisdiction a Sharia Court will apply the Laws stipulated by the *Quran*, *Hadith*, *Qiyas*, *Ijima* and *Istihsaan*, *Maslaha Mursalah*, *Sadd-d-Daree'ah* and so on.<sup>59</sup> These sources were recommended as a means of resolving disputes. The *Quran* said:

*“The believer are but a single brotherhood, so make peace and conciliation between two (contending) brothers, and fear Allah, that ye*

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<sup>52</sup> Rule 2 of the Borno Amicable Settlement Corridor (BASAC) *Sulhu* Door Rules 2008, states that the *sulhu* door is designed to handle disputes which include inheritance, maintenance, custody, matrimonial, contract, land, criminal case which are compoundable, debt employer/employee, rent and other disputes.

<sup>53</sup> Garner. B. A, Black's Law Dictionary, Thomson West, USA, (2004), P, 867

<sup>54</sup> See NSCDC V. Oko (2020), 10 NWLR (Pt 1732), P.288 at 312 Para A-B.

<sup>55</sup> Section 14 (1) and 15 (1) Area Court Cap. 9, Laws of Borno State 1994.

<sup>56</sup> Section 18, 19 (1) (2) (b), (3) Ibid and Sections 6 (1), (2) and (3) of the Sharia Administration of Justice Law 2000.

<sup>57</sup> Gbeje V. Oke (2018), 10 NWLR (Pt. 1627), P, 382 at 393, Para B-C.

<sup>58</sup> See Mohammed Abatcha v. FRN (2014) 9 NWLR (Pt 1422), p. 102.

<sup>59</sup> Section 7 of the Sharia Administration of Justice Law 2000.

*may receive mercy.”<sup>60</sup> And “If two parties among the believers fall into a quarrel, make ye peace between...with justice and fair, for Allah loves those who are fair and just.”<sup>61</sup>*

These verses advocated strongly *sulh* on equitable and fair manner. The Prophet (SAW) further strengthened these verses by saying;

*“He who makes peace (sulh) between the people by inventing good information or saying good things (in his attempt to please the disputants) is not a liar.”<sup>62</sup>*

Reconciliation between the disputants can cause postponement of *salat* which is timely obligatory. This clarifies the significance of *sulh* under sharia. There is reward for the one who establishes reconciliation and justice among people.<sup>63</sup>

### **Analysis of Some Cases before the Sharia Courts in Maiduguri:**

To demonstrate the importance of *sulh*, it is necessary to examine some cases decided by the Sharia Courts in Maiduguri. This is because this will show the extent to which the principles of *sulh* are practiced before the Sharia Courts. Critical examination of some of these cases may reveal the nature, practice and the application of *sulh* before the courts.

In *Idris Ya’u Tahir & 1 Or v. Bala Ya’u Tahir & 1 Or*,<sup>64</sup> the plaintiffs on the 13<sup>th</sup> March 2017, sued before the Upper Sharia Court 3, Maiduguri, for the distribution of the estate of Late Alhaji Ya’u Tahir who died in 1992. He left behind 31 children. Among whom were 15 male and 16 female. The plaintiffs alleged that, the 1<sup>st</sup> defendant took into possession of the deceased’s valuable documents and the 2<sup>nd</sup> defendant took bank cheques. The 1<sup>st</sup> defendant in his reply claimed title to a house in Kano State, a house at Gidan Dambe and a Garage at Bolori Stores Maiduguri. However, the defendants denied converting documents into their possession. Although, the parties resort to *Sulh*, the disputants reported back to the Court on 10<sup>th</sup> October 2017 alleging

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<sup>60</sup> Quran 49 Verse 10

<sup>61</sup> Quran 49 Verse 9

<sup>62</sup> Muhammad Mushin Khan; Sahih al-Bukhari (English Translation), Vol, 3, Berruit, P, 533

<sup>63</sup> Ibid P, 536.

<sup>64</sup> (Unreported) Suit No. BUSC 3/CVF/56/2017

that the *sulh* failed. The matter was dismissed on the 9<sup>th</sup> February 2021, on a preliminary objection raised by the defendants on the grounds of res-judicata. The plaintiffs have appealed to the Sharia Court of Appeal, Maiduguri, where the appeal is still pending.

From the forgoing it can be seen that the parties on their own initiated resolution of the dispute between them, which the sole responsibility of the court. The Court ought to have further encouraged the parties to try *Sulh* as much as possible having been recommended by Islam. This my maintain peace and promote the practice and application of amicable resolution the inheritance disputes. A distribution already determined and shared by Allah in the *Quran* apportioning each heir his or her shares. If adhered to, this litigation that lasted for about 15 years after the deceased death might have been avoided.

In another case of *Amina Bukar Kolo v. Musa Alfaki*,<sup>65</sup> the claimant claimed maintenance and custody of their four children from the defendant, their father. The defendant denied the claims. The court advised the parties to resort to *sulh*, the parties inclined to the advice successfully amicably resolved the issue of maintenance. However, on the issues of custody, attempted reconciliation has failed. On the 6<sup>th</sup> November 2020, the court ordered custody in favour of the plaintiff and ordered the defendant to provide accommodation for the plaintiff in Lagos near her children where they are schooling. Dissatisfied, the defendant appealed to the Borno Upper Sharia Court, 1, Maiduguri.<sup>66</sup> On the 6/01/2021, the appellate court set aside the judgment of the trial court and ordered for retrial before Uje Sharia Court 1 on the ground that it was wrong for the trial court to order for the provision of accommodation for the respondent who had completed her *idda* period. The plaintiff also appealed to the Sharia Court of Appeal.<sup>67</sup> The court on hearing the appeal held that, the trial court was right in its decision which was based on the principles and procedures of Islamic law and the appeal was allowed on the 29/07/2021.

The trial Court's proposal of *sulh* may protect and maintain domestic relationship which was about to deteriorate. If the *sulh* was fully successful it may guarantee future of the children between the parents.

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<sup>65</sup> CV/330/2020

<sup>66</sup> CVA/10/2020

<sup>67</sup> BOS/SCA/CV/08/2021

However, the lower court despite its power to invoke *sulh* failed to attempt but instead set aside the whole proceedings including the amicable resolution reached by the parties. This may further deteriorate and worsen the situation with additional waste of time. Dispute. The appellate court also never attempted *sulh* but affirms the trial court's decision. It can be inferred from this case that most judges neglect the practice and application of *sulh* in cases before their court. This may be mostly because they lack such trainings or awareness but only that of litigation. Having amicably resolved the issue of maintenance before the trial Court, the two superior courts ought to have attempted and encouraged the parties to try *sulh*. These failure may be harmful and a disregard to the parties relationship, who are tired by blood relation and can never be separated through the children being part of them.

In *Alhaji Muhammad Bulumkutu v. Alhaji Bala Zangina and Hajia Rakiya*,<sup>68</sup> the petitioners sought for a declaration that the marriage between 2<sup>nd</sup> petitioner and the defendant was repudiated through *Khul* sometime in 1985. The defendant denied the claim. The petitioners called 3 witnesses and tendered a documentary evidence establishing that the defendant wrote to the 2<sup>nd</sup> petitioner, demanding for his properties expended during the marriage or its value. The defendant was not afforded the opportunity to call witness and to cross examine the petitioners' witnesses. Judgment was entered in favour of the petitioners that the act of the defendant amounts to *khul* divorce. Dissatisfied with the outcome, the defendant appealed to the Upper Area Court, 1, and subsequently to the Borno State Sharia Court of Appeal, Maiduguri. In both lower and the appellate Courts affirmed the trial Court's judgment.

The appellant further appealed to the Court of Appeal Jos. In allowing the appeal on Monday, 2<sup>nd</sup> June, 1997, the court held that exhibit "A" tendered before the trial Court does not say if the properties listed were returned to the appellant for a divorce by *Khul* to occur. There was no credible evidence as to what had transpired before making the exhibit to put life into it. The court added that; I cannot possibly order that the appellant's wife should, without her consent, go back to her matrimonial home and to stay forcibly with the appellant as husband and wife.

Unlike the previous cases herein above mentioned, the judges that heard and determined this case at different stages, never encouraged or advice

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<sup>68</sup> CA/J/37/S/95 Reported in the Selected Judgment of Justice S.M. Coomassie on Sharia, P, 131

the parties to attempt *sulh*. These judges are not helping matters and as stakeholders in the justice system and being a Sharia Courts there exist procedural failure. The *Quran*,<sup>69</sup> states that “the women are your dress..., this does not deprive the wife to ask for separation if sufficient grounds exist for it by *Khul*. *Khul* which is a right of a woman if she fears cruelty or desertion on the part of her husband.<sup>70</sup> The judges failed in their responsibilities of applying *sulh* by simply educating the parties on the implication of litigation which lasted for about 12 years. A part from the cost implication, time wasted and this may sore their relationship. Had the Court advice for all these may be avoided.

In *Lawan Mai Gana V. Ya Falmata Alhajiram*,<sup>71</sup> the appellant sued the respondent at the Maiduguri, Upper Area Court claiming 12 cows. That he once had litigated with the respondent’s father on the same cows before the Borno State High Court with a judgment in his favour. The respondent’s father died without adhering to the order, hence the appellant sued the respondent to take possession of the cows. The trial court gave judgment in favour of the appellant and the respondent appeal to the Borno State Sharia Court of Appeal, Maiduguri, which set aside the trial courts judgment. The respondent appealed to the Court of Appeal Jos. The Court of Appeal, held sometime in 1997, that the Borno State Sharia Court of Appeal, lacks the jurisdiction to entertain the appeal, since the claim of the plaintiff /appellant at the trial Court was an issue involving ownership of cows, it does not concern itself with any inheritable estate being withheld by anybody.

This matter went through three different courts and it had lasted for a long period of time, throughout the proceedings *Sulh* was never adhered to. Despite having the powers to invoke or advice the parties to resort to *sulh*, this was never done. This is a clear disregard to amicable resolution of disputes and giving preference to litigation by most judges in determining matters before the courts.

Mostly disputants as a result of selfishness or ignorance of the significance of *sulh*. ignore *sulh*, some are completely not aware of the entire process. Lack of adherence to culture, lack of proper upbringing and background may mostly succumb to the acts of disunity and disintegrating the oneness

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<sup>69</sup> Quran 2:187

<sup>70</sup> Quran 4:128

<sup>71</sup> CA/J/65/S/94

of an entire family; a situation that would have saved by *sulh*, if properly practice and applied by the courts.

From the cases considered, it is clear that most Courts do not adhere to the recommendation by the Quran and the requirement of practice directions to practice and apply *sulh* in resolving disputes. By giving preference and encouraging disputants to attempt *sulh*, no responsible family may neglect the process of *sulh* with his or her fellow family member. Most litigants may not be aware of the rewards involve for Sulh. Sulh requires perseverance and it succeed in preserving relationships, resources and time as opposed to litigation. Courts should as a duty in any case encourage Muslim disputant to resort to sulh in order to restore peace, affection, harmony, and understanding within the family and community.

### **Conclusion**

There is the need for collective effort and contribution of stakeholders in the administration of justice for the proper application of *sulh* in disputes. Considering the concept of *sulh* in Islamic law, it reveals that *sulh* is the better and required mechanism for dispute resolution among Muslim Ummah. The *Qadi* is charged by the Quran and the rules of Courts to encourage *sulh*. This can be done by requiring for the consent of the parties to agree to reconcile at the commencement of the proceedings as part of judicial responsibility. Unfortunately, from the cases analysed herein if affairs most judges are not incline to doing so. Most Muslim jurist aligned that dispute resolution process as the best alternative to a binding ruling by a judge. Lawyers can encourage and enlighten their clients on the benefits of *sulh* over litigation. Admonishing disputants on the merit *sulh* may assist by its adoption over litigation. The Muslim Ummah should encourage and practice *sulh*. It is recommended that *sulh* should be recognised as the first process for resolution of dispute by the Courts. The public should be educated and be acquainted about the needs, essence for *sulh* and the litigants right to settle their disputes.