

AN OVERVIEW OF DISPUTE RESOLUTION MECHANISMS UNDER ISLAMIC LAW

By

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1.1 Introduction

Islamic Law is the law regulating the conduct of lives of Muslims. Its origin is divine; human efforts helped in interpreting and developing it. The Law is called Sharia or the way of life. Literally Sharia is a path to a watering place. Islamic law is derived from mainly two sources; the Qur'an and the Sunnah. Analogy from these sources and interpretation of the texts of these sources expands the law and develops it to new and emerging areas and consensus of jurists has a strong juridical place in Islamic law.¹

Law or legal principle is referred to as *Fiqh* and the Jurisprudence of this law is referred to as *Usulul-fiqh*.² The branches of Islamic law include civil, criminal, constitutional and international.³ Substantive law is referred to as *fiqh nazari* (literally translated to mean theoretical *fiqh*) and procedural law is referred to as *fiqh tatbiqi* (literally translated to mean applied or practical *fiqh*).⁴ *Fiqh tatbiqi* provides legal principles on how to access rights and defend claims, it make provisions for government agencies that execute laws, the judiciary that resolves disputes and the lawful means of resolving disputes including the rules of pleadings, testimony of witnesses and how the verdicts will be observed or enforced.⁵ This is therefore a procedural law article.

Humans are social beings, therefore discord is inevitable in their interactions. Conflict is merely differences that exists among people, because one person's food may be another person's poison. As interests differ, resources are scarce and man is by nature inclined towards selfishness, greed and love for power, it became imperative that mechanisms should be put in place by law to guide how differences can be managed, otherwise people can scramble upon the limited resources and there will be competition⁶ as a result of breakdown of law and order.⁷ Humans are made to be subjected to control, law and order and not to be left just like that.⁸

The Qur'an pointed out that humans are made into various tribes, ethnic groups and races so that they distinguish one another and that none is superior to the other. Therefore, if humans are of different races, tribes, background, characters as

¹ See generally, Doi, A.I. *Shariah: The Islamic Law*, A.S. Noordeen, Kuala Lumpur (1984); Kamali, M.H. *Principles of Islamic Jurisprudence*, The Islamic Text Society, Cambridge, UK, (2003); Nyazee, I.A.K. *Theories of Islamic Law: The Methodology of Ijtihad*, The Other Press, Kuala Lumpur, (2002)

² Abal Khail, S.A. *Muqaddimah fil Fiqh*, Darul Asimah, Riyadh (1997)

³ Ibid

⁴ Ali, M.I. *Istilahul Mazhab indal Malikiyyah*. Darul Buhuth Lid-Dirasatil Islamiyyah wa Ihya'it-Turath., Dubai, (2000)

⁵ Ibid

⁶ Fodio, A. *Diya'ul Hukkam fima Lahum wa Alaihim Minal Ahkam*. Darul Arabiyyah, Cairo, (no date), p.25

⁷ Ibnu Taimiyyah, A. A. *Al-Hisba fil Islam*. Darul Kutubil Ilmiyyah, Beirut, (no date) pp. 1-2

⁸ Qur'an 75:36; *Adwa'ul Bayan* infra, vol. 5, p.514. The quotations of the Qur'an in both Arabic and English translations are emphasized with boldness or underlining the respective words relevant to dispute resolution.

well as beliefs, it is the singular wish of Allah to make them so different, if He had wanted, He would have made humans all of them the same, yet, they will still differ. The Qur'an pointed out this fact in the following verse:

﴿وَلَوْ شَاءَ رَبُّكَ لَجَعَلَ النَّاسَ أُمَّةً وَاحِدَةً وَلَا يَرَالُونَ مُخْتَلِفِينَ﴾

(And if your Lord had willed, He could have made mankind one community; but they will not cease to differ).⁹ This means that people will always differ in religions, creeds, beliefs, opinions and sects. In another verse, Allah in His infinite Wisdom created man as a most disputing being, to this the Qur'an says

﴿وَكَانَ الْإِنْسَانُ أَكْثَرَ شَيْءٍ جِدَلًا﴾

(... but man has ever been, most of anything prone to dispute)¹⁰ meaning that humans are the most disputing beings, sometimes despite clear evidence, they argue, dispute and litigate.¹¹

There is scarcity of literature where the methods of resolving dispute are all identified and itemized, which led some people to object or reject some of these methods as alien to Islamic law. Therefore this article seeks to:

- a) Highlight the Islamic perspectives of disputes and how they should be managed,
- b) Provide an overview of the lawful mechanisms of resolving disputes under that law.
- c) Highlight constitutional bodies empowered to hear grievances and resolve disputes during the classical Islamic period, and
- d) Marshall textual authorities from the Qur'an and Sunnah on the importance of amicable settlement of disputes under the Sharia in view of the current global trends of violence which are mostly perpetrated by Muslims with a view to satisfy and reinforce the conscience of advocates of peace and also to convince the misguided towards peace.

There is scarcity of literature on dispute resolution methods under Islamic law in English and as a result of this, students find it difficult to access Arabic literature on this area and some scholars reject certain dispute resolution mechanisms under the Sharia, therefore, this article tries to fill in the gap.

The methodology of citing Qur'anic provisions is to provide the Arabic text of verses in addition to the English Translation from Sahih International,¹² the Arabic texts add a lot of meaning and satisfaction to readers of Islamic law and conveys more meanings than the translated versions.

1.2 Prevention of Conflicts

The Qur'an enjoins humans not to dispute despite their conflicting interests but to be patient and have understanding so that everybody will be happy. They should be forgiving, otherwise they will fail and their courage will be lost. The Qur'an enjoins Muslims as follows:

﴿وَأَطِيعُوا اللَّهَ وَرَسُولَهُ وَلَا تَنَازَعُوا فَتَفْشَلُوا وَتَذْهَبَ رِيحُكُمْ وَاصْبِرُوا إِنَّ اللَّهَ مَعَ الصَّابِرِينَ﴾

⁹ Qur'an 11:118. See also Qur'an 10:19 and Qur'an 10:99

¹⁰ Qur'an 18:54

¹¹ Adwa'ul bayan, infra, vol. 2, pp.404-405

¹² *The Qur'an. Arabic Text with Corresponding English Meanings*. Abulqasim Publishing House (Al-Muntada Alislami), London, (1997)

(And obey Allah and His Messenger, and do not dispute and thus lose your courage and then your strength would depart; and be patient. Indeed, Allah is with the patient.)¹³ Jurists say that this is an appeal to the personality of Muslims not to dispute and to the forgiving, non-aggressive and patient.¹⁴

The position of Islamic law is that where there is a conflict that is likely to generate into a dispute, the parties, particularly the victim or the owner of the right should be patient, forgiving and condoning either part or all if possible of his right in favour of the party at fault.

At this stage, it is only the parties that are involved, or at least some other people (third parties) may talk to one or both parties in order to see the dispute prevented or to either abate the dispute or to remedy it through restoration, righting of the wrong or compensation.

Therefore, the party at fault is required to do the following:

- a) Seek the forgiveness of the victim of his fault and repent to Allah for having offended another person and offended Allah. This requirement never ceases until discharged;
- b) Make right the wrong he committed through any of the following ways:
 - i) Restoring what the other party was wrongfully deprived;
 - ii) Compensating the other party if the deprived item cannot be restored;
 - iii) Correcting the damage made if it is emotional or touches on dignity;
- c) Not to repeat the wrong, because repentance and making good a dispute necessitate remorse.¹⁵

The party wronged on the other hand is expected to:

- a) Be patient and take wrongs done to him as mistakes because human nature is full of mistakes and imperfections, humans offend even the Almighty Allah, Who is Omnipotent, yet He forgives sins.
- b) Be forgiving to those who wrong him. Although the law allows him to seek for compensation, retaliation or restoration, the law makes pardon better than these and Allah loves those who are forgiving and one of His names is the Forgiver of sins.
- c) May seek for the restoration of his right or retaliation, depending on the nature of the wrong done him. He is however allowed by law compensation or retaliation equal or commensurate to the one he is deprived of otherwise it amounts to injustice and transgression¹⁶;
- d) May claim compensation or restoration lower or less than what he is actually entitled to.

Both parties as well as Muslims generally as a community are required by the law to observe the following:

- a) Cooperate with one another in the promotion of good deeds and piety and forbidden from conspiring or joining hands in the perpetration of sins and transgression of people's rights¹⁷;

¹³ Qur'an 8:46

¹⁴ Ibnul-Arabi, A.M.A. *Ahkamul Qur'an*. Darul Kutubil Ilmiyyah, Beirut (no date) vol.2, pp.418-419

¹⁵ Abdul-Mun'im, H. *Diwanul Mazalim*, Darus-Shuruq, Beirut, (1983) pp. 5-38

¹⁶ Qur'an 16:126; 42:40

¹⁷ Qur'an 5:2

- b) Create and maintain a community that encourages kindness, reconciliation, patience, mercy, forgiveness, the promotion of whatever is good or right and the prevention of whatever is evil or bad;¹⁸
- c) Never to allow injustice among people, for Allah has prohibited injustice upon Himself and made it prohibited among humans¹⁹;

Once these qualities are found in a society and individuals act or are bound by these qualities, there will be less conflict and even if they occur, they are less likely to generate into disputes let alone crisis. An erring person has responsibilities to amend through restoring rights and remorse and most importantly repentance to Allah the Almighty; the party wronged on the other hand is encouraged to restrain his anger and to pardon, for Allah loves those who do good.²⁰ Regarding this, the Qur'an says:

﴿وَالْكَاظِمِينَ الْغَيْظَ وَالْعَافِينَ عَنِ النَّاسِ وَاللَّهُ يُحِبُّ الْمُحْسِنِينَ﴾

(...who repress anger, and who pardon men...). The Qur'an in this verse commends those who hold their angers and forgive those who wronged them because holding anger and forgiving people are commendable qualities and are acts attracting reward.

²¹

1.3 What is Required of Muslims When There is a Dispute

Despite the express instructions of the Qur'an against disputing and in favour of managing disputes in positive ways, disputes are bound to happen because humans have freewill as they are neither angels nor machines. In maintaining disputes, Muslims are asked to handle disputes and arguments in best ways and with wisdom.

The community is addressed by the Qur'an regarding disputing parties as to keep their duty to Allah and promote reconciliation whenever a dispute erupts among them or whenever stinginess (*shuhh*/شح) manifests among them, then reconciliation is imperative²² by the following verse :

﴿فَاتَّقُوا اللَّهَ وَأَطِيعُوا اللَّهَ وَرَسُولَهُ إِنْ كُنْتُمْ مُؤْمِنِينَ﴾

"... and keep your duty to Allah and **reconcile the disputing parties among you**, and obey Allah and His Messenger if at all you are believers."²³ The above verse enjoins Muslims to fear God in all their affairs and to settle issues of difference and dispute among themselves, not to differ and not to dispute.²⁴

The address in the above verse refers to the political authorities in Muslim communities including heads of families and clans, rulers or leaders of political units and the government, the verse below exemplifies such address:

﴿يَا أَيُّهَا الَّذِينَ ءَامَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِيَ الْأَمْرِ مِنْكُمْ فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا﴾

*O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you **disagree** over anything, **refer***

¹⁸ Qur'an 3: 104

¹⁹ Hajjaj, M. *Sahih Muslim*. Darul Fikr, Beirut (2000), p.1275, Hadith No.2577 (by the numbering of Sidqi Jamil Al-Addar). See also Zubaidi, A.A. *At-Tajridus Sarih li Ahadithil Jami'is Sahih*, Mu'assasatul Mukhtar, Cairo, (2004), pp. 320-324 for detail of Sunan provisions on injustice (*zulm*).

²⁰ Qur'an 3:134

²¹ Al-Jassas, A.A.R. *Ahkamul Qur'an*. Darul Fikr, Beirut, (2001) vol.2, p.57

²² Al-Qurtubi *infra*, vol. 4, p.237

²³ Qur'an 9:1

²⁴ Mubarakpuri, S.R. (ed) *Tafsir Ibn Kathir (Abridged)*, DarusSalam Publishers and Distributors, Riyadh, (2000) vol.4, p.254

*it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result.*²⁵

The above verse is more specific on how to handle disputes by providing the appropriate institution to which grievance may be taken. ‘Allah’ and ‘His Messenger’ in the verse refer to the Qur’an and Sunnah which are the primary sources of Islamic law. Where there is a dispute, the dispute should be resolved based on the Wish of Allah and His Messenger which are contained in the Qur’an and Sunnah as interpreted by Mujahid, Qatadah and Maimun b. Mihran.²⁶ “Those in authority” means those holding political authority like leaders or rulers and judges. It also means jurists who have the capability of interpreting laws for the ordinary man, especially *Muftis* and the verse does not refer to the common man.²⁷ According to Ibnul-Arabi, both jurists and political authorities serve the law, because jurists interpret the law and the political authorities implement or execute it.²⁸ It is a matter of common knowledge that whosoever has Islamic faith by implication believes in subjecting his dispute to the Sharia for resolution.²⁹ This point is reiterated in the following verse:

(وَمَا اخْتَلَفْتُمْ فِيهِ مِنْ شَيْءٍ فَحُكِّمُوهُ إِلَى اللَّهِ)

(And in anything over which you disagree, its ruling is [to be referred] to Allah).³⁰ Therefore, a Muslim has no option but to submit to the Wish of Allah and His Messenger where there is a dispute. Another verse :

(فَلَا وَرَبِّكَ لَا يُؤْمِنُونَ حَتَّى يُحَكِّمُوكَ فِي مَا شَجَرَ بَيْنَهُمْ ثُمَّ لَا يَجِدُوا فِي أَنْفُسِهِمْ حَزْبًا مِمَّا قَضَيْتَ وَيُسَلِّمُوا تَسْلِيمًا)

*But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission*³¹

By the above verse, Islamic faith is incomplete without total submission to Allah in everything including submission to adjudication that is based on the Sharia and the disputing parties must accommodate contentment from the outcome of such adjudication. Therefore, for Muslims, resolving disputes through the modes sanctioned by the Sharia is not an option, but a necessity.³² Total submission means without any reservation, doubt or partial or selective invocation of the Sharia in the resolution of the dispute.³³

The application of the above verse is not restricted to the time of the Prophet SAW but extends to all times and places. It means that disputes should be resolved in the light of the Traditions of the Prophet SAW (Sunnah).

Political authorities deserve obedience when they obey Allah and the Messenger³⁴ and the political authorities in turn must render trust to their rightful owners and to govern justly and adjudicate with fairness.³⁵ Once they do this, it is unlawful for any Muslim to rebel against them in any form, be it mutiny, riot,

²⁵ Qur’an 4:59

²⁶ Al-Jassas, vol. 2 p.300;

²⁷ Ibid ²⁷

²⁸ Ibnul-Arabi, vol.1, p.574

²⁹ Jassas, ibid

³⁰ Qur’an 42:10

³¹ Qur’an 4: 65

³² Zaidan, A. *Nizamul Qada’ Fish-Shari’atil Islamiyyah*. Mu’assasatur-Risalah, Beirut, (1989) p.5

³³ Al-Jassas, vol.3 p.320

³⁴ Qur’an 4:59

³⁵ Qur’an 4:58

insurrection or even to go out of their authority or declare that he is no longer under their domain or jurisdiction or to become a renegade.³⁶

Political authorities also have coercive powers to unite the community even by force if need be. Disputing parties or warring factions will be reconciled by the authorities so that their relationships will be better; if the warring factions refuse to reconcile or reconciliation fails, then the government may use coercive force to bring the faction at fault to justice and then made to reconcile.³⁷ In this regard, the Qur'an provides as follows:

﴿وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلَحُوا بَيْنَهُمَا فَإِنْ بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَىٰ فَفُتِّلُوا إِلَىٰ اللَّهِ فَإِنْ فَاءَتْ فَأَصْلَحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ﴾

*And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly*³⁸

By the above verse, when a dispute does not reach a state of a physical fight, then the parties have options on how to take their grievances to the authorities or even as will be seen later in this article, to some individuals with a view to resolve the dispute and to get redress from the grievance. The verse refers to 'factions' which also include individuals and not necessarily groups, hence if two people are fighting, the verse is operational, so also if the groups rebel.³⁹

Likewise, the constitutional bodies of the office of the head of State (*Amirul-Mu'minin*), governors (*hukkam*), the *Hisbah*, the *Mazalim* and the judicature (*qada'*) are all empowered to resolve disputes and utilize *Sulh* in so doing.⁴⁰ As an example, the Emirates under the Sokoto Caliphate comprises emirs, district heads, village and ward heads (Traditional Rulers) resolve disputes and are in Muslim areas⁴¹ and engage in reconciliation of disputing parties. They derive their authority from the Emirates under the Sokoto Caliphate and now they work under the local

³⁶ Ibnul-Arabi, vol.4 pp.148-152; Mubarakpuri, vol.2, pp.495-498

³⁷ Ibid

³⁸ Qur'an 49:9

³⁹ Ibid p.149

⁴⁰ Al-Mawardi, A.A., *Al-Ahkamus-Sultaniyyah wal-Wilayatid-Diniyyah*. Mustapha Babi Press, Cairo. (1973) chapter one on *Imamah* or the contract of leadership, the chapter on *Hisbah* and that of *Wilayatul-Mazalim*. See also Mawardi, AM.H. *Ar-Rutbah fi Talabil-Hisba*, Darur-Risalah, Cairo, (2002); Kamali, M.H. "Siyasah Shar'iyah or Policies of Islamic Government" *The American Journal of Islamic Social Sciences*. Vol. 6, No.1, 1989; Qaradawi, Y. *As-Siyasatush Shar'iyah fi Daw'i Nususish Shari'ati wa Maqasidiha*. Maktabatu Wahbah, Cairo, (1998) pp.117-121; Ibnu Qayyimil Jauziyyah, M.A. *At-Turuqul Hukmiyyah fis Siyasatish Shar'iyah*. Darul Fikr, Beirut, (n.d.)

⁴¹ *Kyautata Tsarin Sulhu da Sasantawa ta Hanyar Masarautun Gargajiya a Jihar Jigawa*. A training manual (in Hausa Language) developed by Green Horizon (Law and Development Consult), Kano, for the training of Traditional Rulers on Sulh/ADR in Jigawa State. Unpublished, 2009

governments⁴². Reconciliations made or facilitated by them are deeply rooted in Islamic law and sanctioned by it.⁴³

Either party may take the matter to court so that the judge may consider the matter and pass a verdict at the end on who is right and who is wrong and who owns what. They may likewise refer the matter to a third party who, though not a government-appointed judge (arbitrator), yet he has both the capacity and willingness to look into the dispute and give his verdict just like the way judges do, just that it is the parties who chose him to do that.⁴⁴

The parties or either of them may likewise consult a juriconsult who is versed in legal matters for his legal advice on the matter. Even though a *fatwa* is not binding, it is of utmost importance in the lives of Muslims and the public or ordinary men rely on their legal advice.⁴⁵

Third parties may also go in between two persons to resolve a dispute (mediation), they may talk to both parties either at the same time or at different times to try and arrive at an understanding where one or both parties concede some rights or interest in favour of the other. No party is coerced or unduly influenced in anyway.⁴⁶

Even without other people going in between, the two parties may themselves arrive at an understanding or agreement through negotiation or settlement, it just involves a party conceding something in favour of the other.

1.4 Dispute Resolution Mechanisms under the Sharia

In the following parts of this article, the writer will give an overview of the ways open to Muslims for resolving their disputes as briefly pointed out previously in this article. The ways to be discussed include lawful self-help and the traditional dispute resolution mechanisms of litigation, sulh including mediation, arbitration, fatwa, *Raddul Mazalim*, *afw* (condonation) and matrimonial arbitration.

1.4.1 Lawful Self-help

It is important to note that the Sharia does not generally compel a person to claim for his right. An owner of right may forgive and overlook his right. There are circumstances however where an owner of right comes across his item, he can resort to lawful self help to recover his item.

If a person's moveable property is stolen and he came about it, he should just take it back without waiting for the government to do it for him, thereby saving the

⁴² An example is the *Jigawa State Local Government Law* CAP L3, LJS 2012 contains a chapter in PART X- on the establishment of Emirate Councils in the State; sections 63-66 thereof establishes Emirate Councils for the State with functions to inter-alia determine religious matters, customary law and help in maintaining law and order (s.64). See also the *Jigawa State Council of Chiefs Law* CAP S16 LJS 2012.

⁴³ Barkindo, I. Sulh in Islamic Constitutional Law: The Role of Emirates in Dispute Resolution. in Aliyu, I.A.(ed) *Alternative Dispute Resolution and Some Contemporary Issues: Legal Essays in Honour of Justice Ibrahim Tanko Muhammad*. M.O. Publishers, Zaria, (2010) Pp.217-242

⁴⁴ Imam Malik, *Al-Mudawwanatul Kubra*. Almaktabatul Asriyyah, Beirut (2003), vol. 6,p.1927-1931 (book of judgments); Al-Abideen, B.H. *Al-Ujalah fi Sharhir Risalah*. Darul Imam Malik, Algiers, (2011), vol. 4 pp.440-442; *Diya'ul Hukkam*, pp.69-75

⁴⁵ Qur'an 1:43; Mubarakpuri, vol.5,pp.467-470; Ash-Shahrzauri, U. *Adabul Fatwa*, Ash-Sharikatud Dauliyyah Littiba'ah, Cairo (2009).

⁴⁶ Keshavjee, M. "Alternative Dispute Resolution: Its Resonance in Muslim Thought and Future Directions". Speech given at the "Isma'ili Centre Lecture Series" April 2, 2002, London, available at www.iis.ac.uk last visited 20/11/2009

time of all. This is called the principle of *zafra*⁴⁷ (ظفر) or *Taqaa*s (تقاص).⁴⁸ Similarly, if somebody else owes him money and the debtor's money or property gets into creditor's hands, the creditor can appropriate the money or detain the property till he is paid or in lieu of the money as counter-claim,⁴⁹ this is akin to *stoppage in transitu* under English law. The creditor can equally follow (harass) his debtor till the credit is defrayed⁵⁰, this principle is called *Mulazamah* (ملازمة).

It has been reported from Ibnu Sirin⁵¹ that "if somebody tries to take your property by force, stop him if you can, if it was taken however, recover it if you can".⁵² According to Imam Shafi'i,

*If anybody's property, his life or premises is threatened, he may talk to the assailant or seek help (from people or authorities), if the assailant stops, then he shouldn't be fought, otherwise, he can stop the assailant from encroaching on such property, life or premises, even to the extent that involves loss of the life of the assailant, and the defender is not liable to any diyyah or kaffarah, but the defender should not intentionally kill the assailant*⁵³

A modern jurist, Sayyid Sabiq observed in *Fiqhus-Sunnah* that litigation is a burden, costs money and a waste of time, for these, jurists say that whenever a person comes upon his item (that was taken away), he is allowed by law to take it back, even if it involves breaking the door where it is kept or breaking a wall and he is not liable in tort for such destruction.⁵⁴

By these three dicta, if a person sees his car that was stolen in someone else's backyard, he can break into the backyard and recover it and no action for trespass can be entertained. Likewise, if somebody's livestock or any other item got lost, stolen or taken through extortion, he can take once he comes upon it and should not wait and inform the police or institute a case before a court of law.

1.4.2 Traditional Dispute Resolution Mechanisms

An individual has in addition to the lawful 'self-help' highlighted above, the following options:

⁴⁷ Ash-Shanqeety, M.M. *Adwa'ul Bayan fi Idahil Qur'ani bil Qur'an*. Dar Ihya'it Turathil Arabi, Beirut (1996) vol.2, pp.206-208. The principle got its name from the incident of *Uhud* where Meccan pagans mutilated the body of Hamza (AS), whereupon Muslims vowed to do the same to the pagans once they've come upon them (لَنَنْظُرَنَّ اللَّهُ بِهِمْ لَنَمْتَلَنَ بِهِمْ) at p.207, Allah therefore revealed Qur'an 16:126 (And if you punish [an enemy O believers], punish with an equivalent of that with which you were harmed. But if you are patient- it is better for those who are patient). The verse legalizes commensurate retaliation but made a guidance on the superiority of forgiveness. P.207

⁴⁸ Al-Asqalani, A.A.H. *Fathul Bari fi Sharhi Sahihil Bukhari*. Darul-Ghad al-Jadid, Al-Mansourah, Egypt (2012) vol. 5, pp.139-184, on the interpretation of Hadith number 2360 (where Hind bint Utbah took from her husband's money for her and her child's maintenance).

⁴⁹ Ibid

⁵⁰ Ziadeh, F.J. "Mulazamah or Harassment of Recalcitrant Debtors in Islamic Law" *Islamic Law and Society*, Vol. 7, No. 3, (2000), pp. 289-299

⁵¹ Al-Asqalani, p.160, Ibnu Sirin is one of the noblest Tabi'in (Successors to the Companions of the Prophet SAW), some even repute him to be the best of the Tabi'in. He is equally one of the highest jurists among the Tabi'in.

⁵² Ibid p. 156

⁵³ Ibid

⁵⁴ Sabiq, S. *Fiqhus-Sunnah*. Darul Fikr, Beirut (1992), vol.3, pp.324-325

- 1) Going to court or Litigation⁵⁵ also called *Taqaad* (تقاضى): This seems to be the original rule, because a party may insist on it and when alternatives fail, it can be resorted to. Alternatives to litigation are used to end a dispute (*munaza'ah*) or litigation (*khusumah*). According to Shaikh Abdullahi b. Fodio, judging between litigants is the function of the judge. The judge determines the dispute and judges equally among people. This duty is a deputation from the governor or the head of state.⁵⁶ Shaikh Abdullahi b. Fodio further states that the objectives of the judiciary are preventing quarrel and competition over rights, countering injustice and oppression, aiding the oppressed/victims of injustice, determining disputes, promoting virtues and eradicating vices.⁵⁷ Court judgments are binding upon the parties and the judgment creditor has no option but to comply with the tenor of the judgment.

Judicial Powers and the Advantages and Disadvantages of Litigation

Ibnu Taimiyyah in his *Majmu'atul Fatawa*⁵⁸ explained the objectives of the judicature with more precision. According to him, resolving a dispute involves eradicating evil and promoting virtue. The objective of the judiciary is to end disputes (evil) and foster/further good relations among people (virtue). Whenever sulh is reached, the dispute is determined and good human relations continue but when a determining judgment ends the dispute, evil/harm is removed but good human relations may be destroyed, therefore sulh is preferred. Where however, there is neither sulh nor judgment, then it is contrary to the objectives of the Sharia because evil/harm was not removed and virtue was not promoted.⁵⁹

The objective of the judiciary is to accord rights to those entitled and to bring an end to litigation. Providing rights to their owners is welfare or benefit, likewise, litigation is a harm because it harms mutual relationships of the litigants. Therefore, the objective of the judiciary is to facilitate that benefit and prevent or eradicate that harm.⁶⁰ Providing rights to those entitled (access to justice) is a component of "justice" (*adl*) upon which the heavens and earth stand; similarly, ending litigation is a component of prevention and eradication of injustice. Preserving an existing right or avoiding an existing/future evil or injustice are both objectives of the Sharia. Through Sulh, existing rights are protected and the evil of injustice, deprivation and bad-blood among Muslims are prevented. Litigation has abated.⁶¹

The main objective is access to justice (*wusulul huquq* وصول الحقوق). When there is sulh, then one of the objectives is achieved. It is imperative upon Muslim leaders (government) to prevent, stop and end injustice.⁶² (و على ولاية المسلمين ان يمنعوا (التظالم)). These are parts of the advantages of litigation.

Ibnu Taimiyyah however noted that some court cases do not require defendants (proceedings *in rem*) like *waqf* (trust) and administration of estates case. In these, rights and public rights are protected by the judicature despite the fact that there are no defendants. Therefore, there is a presumed defendant in these cases who denies the rights of the claimants.

⁵⁵ Called *Khusumah* in Arabic

⁵⁶ *Diya'ul Hukkam* p.19

⁵⁷ Loc cit p.25

⁵⁸ Ibnu Taimiyyah, A.A. *Majmu'atul Fatawa*. Darul Wafa', al-Mansouah, Egypt, vol.18, pp.209-226 (35/355 in the citation of the old layout of the book)

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid, p. 222

Disadvantages of Litigation (*Khusumah*)

Going to court is highly discouraged and disliked by Muslim jurists because of its consequences which include difficulties encountered, waste of time and resources and the resultant damage of human relations.⁶³ The letter of Umar b. Al-Khattab⁶⁴ to his judge, Abu Musa al-Ash'ari includes directives to utilize Sulh⁶⁵:

Use your own understanding and judgment when disputes are placed before you...Let all men be equal in your sight, in your court and in your judgment, so that the strong may not hope to sway you into injustice, nor is the weak led to despair in your justice. The burden of proof lies on the shoulders of the plaintiff and the oath is upon the denying party. Compromise is permissible among litigants unless it renders into Halal (lawful) what is haram (forbidden) or forbids what is lawful. And let not a judgement that you rendered yesterday, and then upon reflection and reconsideration you find that it was incorrect, deter you from returning to the truth. For truth is timeless and returning to truth is better than continuing in falsehood

He was also reported to have said that "...litigation nurtures grudges..."

"بين الناس ردو الخصوم حتى يصطلحوا فإن فصل القاضي يورث الضغائن"⁶⁶

- 2) **Sulh:** This is any Settlement, negotiation, concession or conciliation that ends a dispute. It is any agreement or settlement to end a dispute, whether initiated by the parties, the court or a third party.⁶⁷ The important element in it is that it does not involve adversarial means and it is not binding. The Qur'an enjoins reconciling Muslims whenever they are in dispute because they are all brothers and should make good the relationships among in the brotherhood as "The believers are but a brotherhood. So make reconciliation between your brothers, and have fear of Allah that you may receive mercy"

(إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلَحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ)

Sulh is allowed in Property matters (commerce), in Family matters which includes matrimonial issues as well as rights and obligations of parents and children and even in Criminal Matters.⁶⁸ It is also available in other disputes like the disputes between neighbors which are outside property matters, certain family disputes that are neither matrimonial nor rights and duties within a family (e.g. where parents refuse to talk to their children or where the children become delinquent), communal disputes

⁶³ *Fiqhus-Sunnah*, vol.3 pp. 324

⁶⁴ The second Caliph after Prophet Muhammad. He is famous for his piety, probity and sense of justice.

⁶⁵ The letter is still preserved. For its authenticity, which is established with carbon dating process, see, D. D. Margolith, "Omar's Instructions to the Qadi", *Journal of Royal Asiatic Society*, (1910), p. 307 at 311-312; Asif A. A. Fyze, *A Modern Approach to Islam*, (Lahore, 1978 ed. Of the original Indian Edition), pp. 41-46; Mahmood A. Ghazi, *Adab al Qadi*, (Urdu) 2nd ed. Islamabad, Islamic Research Institute, (1993), p. 164

⁶⁶ Ibnu-AbdilBarr vol. 6 p.102

⁶⁷ Rahmani, A. *Sulh: A Crucial Part of Islamic Arbitration*. New York Law School, Islamic Law and Law of the Muslim World Research Paper Series. Available at <http://ssrn.com/abstract=1153659> last visited 20/11/2009. See also Al-Fasi, M.A. *Sharh Mayyarah alat-Tuhfah*. Darul Ma'rifah, . Chapter on Sulh; *Mawahibul Jaleel* vol.5, pp.85-96; *Al-Mawsu'atul Fiqhiyyah*, (electronic encyclopedia) compiled and published by the Kuwaiti Ministry of Environment, word "sulh".

⁶⁸ Hussin, N. and Muhammad, R.W. *Sulh in Islamic Criminal Law: Its Application in Muslim Countries*. Unpublished, Ahmad Ibrahim Kuliyah of Laws, International Islamic University of Malaysia.

(which are rampant in Nigeria, and some are seasonal) which may even amount to armed conflicts.

Sulh is recognized in the Sharia as a dispute resolution mechanism via the Qur'an, Sunnah and *Ijma'*⁶⁹, for the objective of facilitating harmony in the *Ummah*. Without it, there will be division grudge among people.⁷⁰ In the Qur'an, Allah commends reconciling people as part of the good that people do and attracts reward from Him, the verse reads

﴿لَا خَيْرَ فِي كَثِيرٍ مِّنْ نَّجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ بَيْنَ النَّاسِ وَمَن يَفْعَلْ ذَلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا﴾

"No good is there in much of the private conversation, except for those who enjoin charity or that which is right or conciliation between people. And whoever does that seeking means to the approval of Allah, then we are going to give him a great reward".⁷¹ By this verse, conciliation or sulh is allowed in property disputes, in *qisas* (*dima'*) and in affecting dignity like paternity and slander. It has been said that sulh is allowed by this verse on any sort of dispute.⁷² According to jurists, a lie may be excused if used in order to reconcile people.⁷³

The Prophet (SAW) was reported to have said "There will be disputes after me, so if you have a way to end them in peace, then do so".⁷⁴ This instruction if observed will bring peace, harmony and let-live among people. Sulh is strongly recommended as a means of managing conflicts and disputes; even the judge should recommend parties to Sulh but he should not insist so as to make it like an order, and whenever the right or liability becomes evident to the judge, he should deliver his verdict and not sulh.⁷⁵

- 3) Mediation (*Wasaatah*) also forms part of *Sulh*, which is the common term for mediation, and is used in Islamic law. As for the definition of mediation (*Wasaatah*), it is a benevolent and non binding procedure to end a dispute. It is characterized by one or more persons intervening in a dispute either of their own initiative or at the request of one of the parties.⁷⁶ The writer opines that this method is not prominent in classical Islamic law literature and has only gained prominence recently as a reaction to the ADR movements around the world.

4) Arbitration (*Tahkim*)

This method is the closest to litigation and it gives the disputants leverage to choose arbiters who are more or less 'judges' to consider the matter and issue an award. A judicial review will only look at the procedure. It is defined as appointing a person to look into a matter and give an award at the end which is binding. The *Mejelle* in section 1790 defined *Tahkim* as "*Tahkim* consists of two litigating parties employing another person as judge by the consent of both, to decide their litigation and claims in

⁶⁹ See Sabiq, S. *Fiqhus-Sunnah*. Darul Fikr, Beirut (1992), vol.3, p 306.

⁷⁰ *ibid*, p. 305

⁷¹ Qur'an 4: 114

⁷² Al-Qurtubi, M.A. *Al-jami' li Ahkamil Qur'an*. Al-Maktabatul Asriyyah, Beirut (2011), vol. 3, pp. 255-257

⁷³ Mubarakpuri, vol. 2, p.579

⁷⁴ (إِنَّهُ سَيَكُونُ بَعْضُهُمْ يَخْتَلِفُ أَوْ أَمْرٌ فَإِنْ اسْتَطَعْتَ أَنْ يَكُونَ السَّلْمُ فَافْعَلْ). Mubarakpuri, vol.9 p.194

⁷⁵ Ibnu-Juzayy, M.A. *Al-Qawawinul Fiqhiyyah*. Darul Fikr, Beirut (no date) p.289

⁷⁶ Lutiko, R. "Religious ADR: Mediation in Islamic Family Law Tradition" *Al-Jami'ah*, vol.44, No.2, 2006 m/1427 H, pp.326-346

court”.⁷⁷ The parties may appoint an arbiter or arbiters to look into their matter, the court may also appoint an arbiter or arbiters in a case and the areas open to the appointment of arbiters are property disputes and do not include criminal matters.⁷⁸

Even in civil matters, certain areas are outside the scope of arbitration, like paternity or lineage and also mutual deprecation (*Li'an*) in matrimonial discords. These issues require court judgments therefore litigation is necessary in them.⁷⁹

Procedurally, if the parties appoint an arbiter or two, once the arbiter starts hearing the matter, the parties may not remove him/them and his/their award stands and shall not be set aside except if manifest injustice is occasioned thereby.⁸⁰

An arbiter must be a qualified person (the qualification of a judge) or a specialist in the field he looks into. If he is not qualified but upright, he must seek the opinion of jurists or specialists in the field. Strict requirements in the qualification of judges are somewhat relaxed by some jurists regarding arbiters.⁸¹

Arbitration as a dispute resolution mechanism is firmly rooted in the Sharia. The Qur'an in a number of verses refers to arbitration as distinct from the judiciary (litigation). In the Sunnah however, the Prophet (SAW) himself acted as an arbiter, people freely appointed arbiters who resolved their disputes and the Prophet (SAW) approved such processes. During the period of the Sahabah, arbitration was often resorted to for the resolution of disputes. Caliph Umar appointed Mu'awuyah b. Abi Sufyan and Ibnu Abbas as matrimonial arbiters in the dispute between Aqil b. Abi Talib and his wife Atiqah bint Utbah b. Rabi'ah. The famous arbitration at the Battle of *Siffin* exemplifies the understanding of the Sahabah of Sharia options in resolving disputes. The Companions of Prophet Muhammad (SAW) reached a consensus that arbitration is allowed under Islamic law.⁸²

Fiqh books overwhelmingly provide for arbitration as part of the chapter on the judicature and distinguish it from litigation.⁸³ It should be noted that arbitral awards have the force of judgment and are enforceable.⁸⁴

The fiqh books also differentiate the various types of arbitration under Islamic law as Matrimonial arbitration and Arbitration proper. In the same chapter of the judicature, Sulh or settlement is treated. These issues prove difficult to understand by some people who then conclude that arbitration is not recognized under Islamic law or that it is Sulh.⁸⁵ Some however never read any fiqh book and speak 'authoritatively' about Sharia.

⁷⁷ *The Mejelle: being an English Translation of Majallah el-Ahkam-l-Adliya*. Translated by Tyser, C.R., et al. The Other Press, Kuala Lumpur, (2001) p. 317. See sections 1844 and 1877 of the *Mejelle*

⁷⁸ Mahdi, Z. and Hak, N.A. "Tahkim (Arbitration) in Islamic Law within the Context of Family Disputes" *Arab Law Quarterly*, Vol. 20 No.1 (2006) pp.2-42

⁷⁹ See generally, Al-Jarba, M.A.H. *Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context*. (Unpublished) Ph.D Thesis, University of Wales, Aberystwyth, (2001).

⁸⁰ Ibid

⁸¹ Ibnu Farhun, I.S.M. *Tabsiratul Hukkam fi Usulil Aqdiyati wa Manahijil Ahkam*. Darul Kutubil Ilmiyyah, Beirut (2001), vol.1 pp.50-51; *Mawahibil Jalil*, vol.6, p.122 and 126-127; Dasuqi, M.A. *Hashiyatud Dasuqi Alalsh-Sharhil Kabir*. Darul Fikr (no date) vol.4, p.140

⁸² ⁸² Zuhaili, W. *Al-Fiqhul Islami wa Adillatuh*. Darul Fikr, Damascus. (2008) vol. 6, pp. 660-661, Zuhayli reported the *Ijma'* from Abu Shuraih.

⁸³ *Diya'ul Hukkam*, p.31; Ibnul Arabi, vol.2 p.622

⁸⁴ *Al-Mudawwanah* vol.6, pp.1927

⁸⁵ For example, see Abideen, B.H. *Al-Ujalah fi Sharhir Risalah*. Darul-Imam Malik, Algiers (2011) vol.4, pp.440-442

Matrimonial arbitration is arbitration on marital disputes where the court is empowered to appoint two arbiters, once each from the spouses' families who will then investigate, negotiate and try to save the marriage. Whatever award they make will be adopted by the judge. The Qur'an provided for this procedure in the following: (وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا)

"If you fear a breach between a man and his wife, appoint an arbiter from his people and another from hers. If they wish to be reconciled God will bring them together again. God is all-knowing and wise."⁸⁶ This procedure gives the family of the spouses leverage to save the marriages of their wards.

It should be noted that Matrimonial Arbitration⁸⁷ is the most widely used by Sharia/Area courts in Nigeria, where arbiters are appointed from the two families to negotiate and then give an arbitral award.⁸⁸

- 5) **Fatwa**: an aggrieved person may ask for the opinion of a Juriconsult (*Mufti*) regarding his right, duty or that of the others in a matter. The *Mufti* then gives his legal opinion which is not binding⁸⁹ but may guide the party or both regarding their behavior on the dispute.⁹⁰
- 6) Restorative Justice or *Raddul Mazalim*: an ombudsman institution that oversees and protects the rights of the weak and vulnerable in the society as well as protects public property from abuse by those in power. This institution can act *suo motu* and have wide investigative powers and it is better structured for inquisitorial modes of grievance remedy than the judiciary. It acts where the hands of the judiciary are tied and acts faster.⁹¹
- 7) *Afw* (pardon)

This is where a person overlooks his right in favour of the offender or tortfeasor or convict and his right in any contract or family right. To forgive is noble and the act is kindness which is the embellishment (*tahsiniyyat*) or the third phase of *maqasid* as *makarimul-akhlaq*. As noted earlier, nobody is under a duty to go after or request his right and nobody has a duty to litigate over his right and that in sulh, there is an element of relinquishment of a right which is forgiving that portion. Allah asks Muslims to pardon whosoever wronged them and overlook the harm done to them; wouldn't Muslims want Allah (SWT) to also pardon them? Allah is Forgiving and Merciful.⁹²

Allah in several places in the Qur'an enjoins Muslims to "And hasten to forgiveness... and paradise...for those who... and who restrain their anger and who

⁸⁶ Qur'an 4:35

⁸⁷ See Usman, A.M. 'Matrimonial Arbitration under Islamic Law: An Overview of Procedure and Practice in Area Courts' In Aliyu, I.A.(ed) *Alternative Dispute Resolution and Some Contemporary Issues: Legal Essays in Honour of Justice Ibrahim Tanko Muhammad*. M.O. Publishers, Zaria, (2010) pp.128-150

⁸⁸ See Order 12 of The Sharia Courts (Civil Procedure) Rules of the Jigawa State of Nigeria 2006. Published in the Jigawa State of Nigeria Gazette of 14th February, 2006, pp.1-44

⁸⁹ Al-Qarafi, A.I.A. *Anwarul Buruq fi Anwa'il-Furuq*. Al-Maktabatul Asriyyah, Beirut (2007) vol. 4, pp.49-53 where he distinguishes fatwa from judgment

⁹⁰ Ash-Shahrzauri, op cit

⁹¹ Mawardi, pp. 146-174; Farra', pp. 73-89 ; Abdul-Mun'im, pp. 5-38

⁹² Qur'an 24:22;

pardon people”,⁹³ “or you pardon and offence- indeed Allah is ever pardoning”,⁹⁴ “so, forgive with gracious forgiveness”,⁹⁵ etc.⁹⁶

There are however parameters for forgiving. A wronged person has a right to retribution or have the wrong righted and may forgive, in proceeding against the person at fault, the wronged person does nothing wrong in the eyes of the law. The Qur'an in the following verses lays down options for the wronged person to choose how to manage the harm done to him:

And whoever avenges himself after having being wronged, those have not upon them any cause [for blame]. The cause is only against the ones who wrong the people and tyrannize upon the earth without right. Those will have a painful punishment. And whoever is patient and forgives, indeed, that is of the matters [requiring] determination⁹⁷

For the above verses, Imam Malik was reported to have said:

If someone wrongfully appropriates your property, it is better for you to leave it with him (thereby legitimizing the property for him), however if the assailant is a usurper/oppressor (zalim), then it is better to proceed against him to recover your property because allowing him begets impunity⁹⁸

Pardon is available in civil as well as criminal cases, including *Hudud* cases before a formal complaint is laid to the government. In Qisas, the victim or his family has three options; to retaliate, to accept diyyah or to forgive and the verses of Qisas⁹⁹ prefers forgiving and makes it an expiation of sins of the forgiving party(ies) and a form of charity from them.

- 8) Intercession (*Shafa'ah*): this is a process whereby a third party intercedes on behalf of an offender and pleads for dropping the charges, commuting the sentence or pardoning the offender from the sentence. Generally, it is allowed with the exception of fixed offences (*Hudud*). Even in *Hudud*, the victim may be prevailed upon not to report to the authorities, it is only when the matter is formally laid with the authorities that such a plea is not allowed. The textual authority for intercession is:

*Whosoever **intercedes** for a good cause will have the reward thereof, and whosoever intercedes for an evil cause will have a share in its burden. And Allah is Ever All-Able to do (and also an All-Witness to) everything¹⁰⁰*

﴿مَنْ يَشْفَعْ شَفْعَةً حَسَنَةً يَكُنْ لَهُ نَصِيبٌ مِنْهَا وَمَنْ يَشْفَعْ شَفْعَةً سَيِّئَةً يَكُنْ لَهُ كِفْلٌ مِنْهَا وَكَانَ اللَّهُ عَلَى كُلِّ شَيْءٍ مُقْتِنًا﴾

⁹³ Qur'an 3:133-134

⁹⁴ Qur'an 4:149

⁹⁵ Qur'an 15:85

⁹⁶ Adwa'ul Bayan, vol.2, p.83

⁹⁷ Qur'an 42:41-43

⁹⁸ Ibnul-Arabi, vol. 4 p.94

⁹⁹ Qur'an 2:178; Qur'an 5:45 and 16:126

¹⁰⁰ Qur'an 4: 85

The above verse encourages intercession and even promises a reward for such an act if commendable, the verse at the same time discourages a condemnable intercession and threatens a punishment for an evil intercession.

1.5 Conclusion

Litigation and Alternative Dispute Resolution processes are recognized under Islamic law, particularly Negotiation, Settlement, Mediation and Arbitration. These processes form part of traditional dispute resolution mechanisms from inception. Matrimonial Arbitration is the most widely used by Sharia/Area courts in Nigeria, where arbiters are appointed from the two families to negotiate and then give an arbitral award. Traditional Rulers of Muslim areas in Northern Nigeria resolve many disputes through the medium of Sulh which are effective and efficient.

At personal levels, concessions, condonation, settlement and negotiations are utilized to resolve disputes which impact on personal relations of people and also on the figures on litigation in areas where they are practised.

The writer recommends that Islamic methods of settling or resolving disputes should be taught to the general public with a view to fostering amicable settlement of disputes and mutual coexistence. The departments of Islamic law in Nigerian universities should embark on teaching and effective public enlightenment projects on Sulhu towards promoting Islamic ways of resolving disputes.

Groups and bodies should study these methods with a view to adopting some of them for managing any dispute that may arise and stakeholders in Islamic law should partner with the Federal Government towards a project of preventing radicalization of Muslims in Nigeria as witnessed by the Boko-Haram menace, and engendering the Islamic spirit of peaceful coexistence, patience, forgiveness and accommodating one another.

Justice sector reforms and codification in Muslim areas should take into consideration such Islamic principles to guide the reforms.