

## Alternative Dispute Resolution from perspective of Islamic Law

Muhammad Naeem<sup>i</sup>

Muhammad Haroon Khan<sup>ii</sup>

### **Abstract**

*In Law rules are meant for peaceful co-existence within the society. It is enacted through a set procedure, enforced and interpreted by the legislature, executive and judiciary respectively. Each member of the society is equal before law and accountable for his actions. A society cannot exist without laws. In absence of laws, rule of jungle will be order of the day. Therefore, law is legitimate action for welfare. It can be deducted that without law, a society will be faced with unbearable problems in all walks of life. Therefore, laws are very important for not only survival but existence of a society.*

*Aw without the concept of "rule of law" is incomplete. Although it is a debatable subject, as rule of law is requirement for one and choice for another but it is also true that it has played a significant role in development of law, which in turned affected societies in one way or another. As they rightly tagged man as social animal and in order to keep check on society, the significances of rule of law is undeniable.*

*Psychologists are very true in saying that unanimity of minds do not exist. Disagreement exists between two minds in one way or another, which resultantly, gives birth to a dispute. To solve such disputes men have developed various techniques. Normally disputes are solved by two means:*

- 1. Adjudicative process for example judicial proceedings before a judge and jury.*
- 2. Alternative Dispute Resolutions/Consensual processes, for example collaborative law, mediation, conciliation, or negotiation, in which the parties mutually agreed to resolve a dispute.*

*Alternate Dispute Resolution is the best solution for resolving a dispute between parties, through which parties come to the conclusion without lingering into judicial proceedings.*

### **ADR under Islamic Law**

Islam is not only a set of laws but a complete of life, which guides a Muslim in all walks of life. These teachings are based on the Holy Quran-revealed Book; or Sunnah of the Prophet Muhammad (S.A.W.W), which includes his saying, doing or tacit approval). These two sources are not only primary in nature but also most sacred for all Muslims. Owing to their primacy, unquestionable compliance is the duty of every Muslim to be succeeded in this and hereafter world. It is such a unique system that is not available in other legal system of the world anywhere. If Muslims are taught that ADR is ordained by the Holy Quran and Sunnah, they will not follow it

---

<sup>i</sup> Assistant Professor of Shariah, Abdul Wali Khan University, Mardan

<sup>ii</sup> Lecturer of Law, I.C.P.

but will practice the same with rigorous enthusiasm, as an obligation and duty upon him.

It is clearly stated in the Quran that:

*“And this is a blessed Scripture which we have revealed. So follow it and ward off (evil), that ye may find mercy” (6: 155)1.*

A Muslim again comes across in the Quran such verses which tell him about objects and benefits of the divine revelations. For example, Quran says:

*“Lo! there is a plain statement for folk who are devout” 2.*

And describing the objective of Shariah, Quran declares:

*“O mankind! There hath come unto you an exhortation from your Lord, a balm for that which is in the breasts, a guidance and a mercy for believers” 3.*

Allah has Himself glorified the importance of the sayings of the Prophet Muhammad (S.A.W.W):

*“Nor doth he speaks of (his own) desire. It is naught save an inspiration that is inspired” 4.*

Sunnah of the Prophet has become a source of inspiration for every Muslim and a pillar,

second only to the Quran, on which rests faith and life of a Muslim. No wonder, a Muslim always turns to the Quran and Sunnah for answers to his every problem.

The path laid down in the Quran is to be followed by a Muslim, as commanded by Allah in the Quran:

*“And (He commandeth you, saying): This is My straight path, so follow it. Follow not other ways, lest ye be parted from His way. This hath He ordained for you, that ye may ward off (evil)”5.*

Numerous reference can be found in Islamic Literature regarding importance of the Quran and Sunnah. If a Muslim is convinced that to adopt and practice Alternative Dispute Resolution is like a religious obligation, he will follow it faithfully without even resorting to other ways and means.

***Islamic law contains the following ADR processes***

***Sulh***

It is an amicable mean of settlement of dispute in which resort is made to the solution of problem. It includes mediation, negotiation, conciliation and such other words of similar nature but not litigation.

Basic reason behind it is that it is not only cost effective but also saves time and other resources. Besides, it is the method which keeps the disputant parties at same page, families united and restrict further deterioration of society at large.

It is based on the Verses of the Quran and Sunnah of the Prophet Muhammad (S.A.W.W).

Following are the Verses from the Quran, which provides foundation for Sulh:  
Authority for Sulh:

*“The believers are naught else than brothers. Therefore make peace between your brethren and observe your duty to Allah that haply ye may obtain mercy”6*

*“And if two parties of believers fall to fighting, then make peace between them. And if one party of them doth wrong to the other, fight ye that which doth wrong till return unto the ordinance of Allah; then, if it return, make peace between them justly, and act equitably. Lo! Allah loveth the equitable”7.*

*“There is no good in much of their secret conferences save (in) him who enjoineeth almsgiving and kindness and peace-making among the people. Whose doth that, seeking the good pleasure of Allah, We shall bestow on him a vast reward”8.*

Prophet Muhammad (SAWW) reinforced importance of Sulh. He used to encourage people to resolve their dispute by it.

The Prophet Muhammad (SAWW) is reported to have said:

*“He who makes Peace (Sulh) between the people by inventing good information or saying good things, is not lair”. Sahih-al-Bukhari*

*“There is a sadaqah to be given for every joint of the human body and for every day on which the sun rises there is a reward for the sadaqah for the one who establishes Sulh and justice among the people”. Sahih-al-Bukhari*

Hazrat Umar (R.A) advised judges as:

*“Compromise is permissible among litigants unless it renders into halal (lawful) what is haram (forbidden) or forbids what is lawful”.*

An Ijma’ is also reported on the desirability of Sulh.

### **Tahkim**

Before advent of Islam, practice of Tahkim (Arbitration) was common and used for settlement of civil and commercial disputes prevailing at that time. In such case, trial chief was to enforce arbitration award. If chief was a weak person, he ought not to enforce his award. However, there were certain awards which were traditionally followed and enforced. Islamic Law has provided for peaceful settlement of dispute of the people, when they are unable to solve their problems. Such problems will be referred to an arbitrator, who will be bound to decide justly. The reference of matter to arbitrator for solution of an issue is based on the teaching of the Quran, Sunnah and Ijma.

The Quran says:

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

*“And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware”<sup>9</sup>*

*“Lo! Allah commanded you that ye restore deposits to their owners, and, if ye judge between mankind, that ye judge justly. Lo! comely is this which Allah admonisheth you. Lo! Allah is ever Hearer, Seer”.<sup>10</sup>*

The Last of the Prophets Muhammad SAWW not only recognised but also practiced arbitration. He used to appoint arbitrators and accept their decisions. He himself also acted as arbitrators on several occasions to solve issues among people and tribes. A very famous incident is that of lifting of Hajr e Aswad on the eve of rebuilding Kaaba, where all tribes wanted to be honoured by lifting it. However, it was the Prophet Muhammad (SAWW), who was destined to be blessed with this honour. However, he put the stone in a sheet of cloth and invited representatives from all tribes to carry and lift the stone, which is evidence of his sagacity and wise decision.

### **Med-Arb**

It is the combination of Mediation and Arbitration. Both of them overlap one another at certain points. Authority of this base on the teachings of the Holy Quran, which is mentioned below:

*“And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware”<sup>11</sup>*

It is evident from oft-mentioned Verse that arbitrator is duty bound to first mediate; if it does not work then only resort may be made to arbitration. This very idea is not only mentioned in Article 1851 of the Mejjelle but is also supporting the idea to opt for arbitration, in case mediation does not work.

It is clear that both (Mediation-Arbitration) are not only recognized but also practised under Islamic Law. This idea has gained such fame that it is now being used universally.

### **Mohtasib**

Mohtasib, according to Islamic Law, is equal to ombudsman. Followers of Islam are practising it since more than fourteen hundred years ago with advent of Islam and revelation of the Quran. Many verses of the Quran are addressing the Mohtasib. Main function of Mohtasib is taking account. Also, he is bound to observe religious duties like offering of prayers, maintenance of masajid and such other functions; public matters and conduct in the market, like accuracy of weight and measures; honesty in business dealing etc.; the community affairs e.g. to keep the roads and streets clean and set alight at night and thwart the building or factory or a house which might cause nuisance to the people at large and the surroundings.

The basis of a Mohtasib is found in the Quran:

*“Ye are the best community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency; and ye believe in Allah. And if the people of the Scripture had believed it had been better for them. Some of them are believers; but most of them are evil-livers”*<sup>12</sup>

*“They believe in Allah and the Last Day, and enjoin right conduct and forbid indecency; and vie one with other in good works. They are of righteous”.*<sup>13</sup>

*“And the believers, men and women, are protecting friends one of another; they enjoin the right and forbid the wrong, and they establish worship and they pay the poor due, and they obey Allah and His Messenger. As for these, Allah will have mercy on them. Lo! Allah is Mighty, Wise”.*<sup>14</sup>

*“O my dear son! Establish worship and enjoin kindness and forbid iniquity, and persevere whatever may befall thee. Lo! that is of the steadfast heart of things”.*<sup>15</sup>

### **Informal justice**

A “wali al-mazalim” is the combination of judge and Mohtasib. He is appointed by the Head of State and is delegated with certain authority to be exercised on behalf of the Head to ensure tranquillity in the society. Also, he has to exercise certain adjudicative functions as a judge to decide cases not only quickly; in a cost effective manner but also justly. This function has to be performed purely in an informal way.

### **Fatwa of muftis**

Under Islamic Law, Fatwa is a ruling/scholarly opinion about an issue which is not clearly mentioned. It is best example of Alternative Dispute Resolution in an Islamic State because in ADR-whether arbitration or mediation etc- case has to be referred to a third person. In case of Fatwa, an issue, which is not clear or needs further elaboration, has to be referred to a qualified person called Mufti.

Historically, it is evident that this medium was most effective way of settlement of disputes because Fatwa is usually issued based on Ijtihad. Ijtihad has to be done in turn by a qualified Mujtahid having certain requirements and qualifications. Issues could be settled through Fatwa in three ways; one is that it is to be decided on the basis of existing case laws; secondly to extend the law; and finally to formulate new principle, wherever is required/necessary.

### **Conclusion**

It is clear from above discussion that Alternative Dispute Resolution is not a new process for Islamic Law. It will not be wrong to say that Islamic ADR has provided base for existing Western ADR. Emergence of ADR was reactionary

because of the slow and lethargic system of adjudication, which created numerous problems instead of providing adequate remedies.

**References**

---

*1 Translated into English by Marmaduke Pickthall*

*2 21: 106*

*3 10: 57*

*4 53: 3-4*

*5 6: 153*

*6 49: 10*

*7 49: 9*

*8 4: 114*

*9 4: 35*

*10 4: 58*

*11 4: 35*

*12 3: 110*

*13 3: 114*

*14 9: 71*

*15 31: 17*