THE ORIGIN, DEVELOPMENT AND IMPORTANCE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN THE LIGHT OF ISLAMIC INTERPRETATION

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ABSTRACT: Islam is the religion of peace that gives prime importance to equality and justice. It is evident from the known human history that peace is the byproduct of these two concepts. Every culture and society has some laws and procedures to maintain peace within its fold. Litigation is the standard method to restore peace in any community but it is believed to be lengthy and costly mechanisms that most people avoid accept in cases where the state laws have been violated. The second easiest and viable method is arbitration to prevent violence at domestic level between the disputants. Islamic tradition has a long history of arbitration and amicable conflict resolution *(sulh)* which has also its roots in pre-Islamic Arabia. The Quran clearly directs in *surh-al-Hujraat* its adherers to make *sulh* between two sides when the groups of believers fall to fighting. If one of them outrages against the other, then the Muslims should fight against the one, who outrages till it complies with the command of Allah and then, make reconciliation between them justly. In this paper, general and Islamic historical background of Alternative Dispute Resolution (ADR) process is explored with the help of Islamic exegeses and the Prophet's ﷺ biography. Our findings reveal that ADR is a much easier and practical solution in disputes settlement for it takes less time, accessible to everyone and costs nothing than the traditional court procedure is required in litigation.

Keywords: *sulh, Arbitration, Alternative, Dispute, Resolution, Litigation, Compensation*

INTRODUCTION

Globalization and technology have greatly affected the people's life style and behavior at the same time. Due to poor health and economic conditions, influx of common masses has been relocating in cities from small towns and villages. As a result, these cities have been immensely populated with the inhabitants belong to different religious ideologies and cultures. Sometime their interaction in different

fields of life instigates conflicts. Usually it is not viable to take every issue to the court of justice and settle it there. There may be several social and economic reasons for not taking the rout of formal legal system, as it might be lengthy and costly. All those factors involved in formal judicial system have given rise to alternative dispute resolution (ADR).

ORIGIN OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

It is not a new phenomenon in the twentieth century but a very well know system from ancient times adopted by old civilizations. ADR is a type of arbitration between two individuals, groups or institutions. Mutual agreement of both the litigants is the prerequisite for employing this system in certain cases that do not come directly under the prescribed laws of the state. Alternative Dispute Resolution (ADR), also known as external dispute resolution in some quarters, is a dispute resolution procedure that works as a mechanism for the conflicting parties to come to an agreement without formal litigation[1]. It provides an opportunity to the disputants to solve their disagreements with the help of third party or without it. It is also described as an alternative course of action contrary to standard legal court procedure.

The conventional courts have already been burdened with rising numbers of cases, which has automatically triggered the popularity of ADR in the modern days. In another words, excessive delay of cases in the traditional courts have also confirmed the very fact that "justice delayed is justice denied". Due to a widespread perception that ADR requires less cost and time than traditional courts require, the involved parties prefer to have their trust in such individuals who will decide their disputes.2 It is not a novel phenomenon; during the recent years the ADR has gained a widespread acceptance among the common masses.

The main components of ADR are explained as:

- Arbitration
- Mediation
- Conciliation

- Negotiation

DEVELOPMETN AND IMPORTANCE OF ADR

The first known historical account of ADR could be traced back to China in the teachings of Confucians ethics. He says that adversarial proceedings are the reversal of natural harmony that should be protected to maintain peace in the society. Important thing is that Chinese form of mediation not only aims to resolve the conflict when it occurs but to prevent it from taking place. It is a quality management of conflict resolution and Chinese mediators treat a conflict as something evil or bad that must be solved. The similar phenomenon is seen in Chinese traditional term for a mediator *shuo he ze* who uses harmonious language to appease the disputants and to smooth the interpersonal relationship between them. He is like an educator and counselor in the Chinese culture[2].

Similar to Chinese culture, arbitration has also found in Greek and Roman civilizations. To settle disputes in ancient Greece, the only purpose was to avoid unsettling differences between the two parties. The reciprocity principle didn't make peaceful resolution of conflicts. The use of mandatory rational mediation written in Herodotus' report describes that the Persian Empire imposed arbitration procedures on the Ionian cities to settle their differences. Xenophon points out a case where Persians pushed the Armenians and Chaldeans to reach an agreement about unused land and thus creating win-win situation. Regarding another case Xenophon has reported that the cases of involuntary exchange aren't just[3].

THE CONCEPT OF ADR IN PRE-ISLAMIC ERA

Arbitration and dispute resolution (*sulh*) have a long history within pre-Islamic era in Arabian Peninsula. Largely the tribes who claimed to descend from common ancestor inhabited the peninsula. Every tribal individual owed allegiance to his relevant tribe as whole, which was responsible to protect the social and economic interests of that person. The tribes were bound by a set of unwritten rules, which had evolved alongside historical development of that tribe itself as an expression of its power and

influence. Nobody had the legislative authority to intervene in this system which also lacked official and legal organization. Law enforcement was generally, the responsibility of the parties which were involved in the disputes. The internal disputes of the tribe were administered by the chief of the tribe in a manner, which suited to tribal culture that rested widely on arbitration and conciliation[4]. The tribal justice system was based on two fundamental rules: (1) the principle of collective responsibility; and (2) the principle of retribution or compensation. The focus of tribal laws was dual simultaneously: to punish the aggressor and to restore the balance among the offender, the victim and the relevant tribes at the same time[5].

Reconciliation *(sulh)* or peacemaking has been an ancient practice started before the commencement of Islam. Within the Arab tribal society, the chiefs (*sheikhs*), soothsayers and prominent individuals used to settle disputes between the disputants within a tribe or between competing tribes. The influence and prestige of those men served as bounding force to implement their decisions on the conflicting parties[6]. Their decisions were thought to be final but legally to any standard. It was a reliable statement about customary law. The main objective of these third parties was to maintain peace and harmony in the tribal society. Some mediators *(hakam)* would even surrender themselves in front of the disputants that they produced the necessary compensation or incentive from their own pockets to persuade the conflicting parties and bring them to *sulh*[7].

From an early age, the tribesmen were socially oriented to seek help from their leaders to solve their mutual conflicts. There was existed a hierarchal system of arbitration. In a family, the father as the head of the family was thought to be the final authority to solve their internal and domestic issues. A youngster sought his father's arbitration to resolve issues between him and his family members or relatives. Thus, the father was the mediator *(wasta)* between his family member and other relatives. As a child grows, he also began referring to the elders of his family such as uncles or cousins, so everyone used to help each other. Similarly, in crises or critical situations,

they relied heavily on their fellow tribesmen. They knew the significance of arbitration very well. However, in more complex and serious conflicts they contacted to their sheikh who used to be an influential and wise person of that tribe.

The Arabic word *"wasta"* literally means "the middle" and it is associated with the verb *yatawassat*, which means to bring the two disputant parties to a middle point or reconciliation. The word "*wasta"* indicates both: a person who provides mediation and second, the act of mediation[8]. Since its inception, the use of *wasta* has been a basic institution and element of Arab society. Its tribal function centers on a mediator who tries to avoid reprisals in inter-personal or inter-group relationships[9].

Tribal customs and administrative procedures provide a unique mechanism to effectively contain and resolve conflicts within the tribal boundaries. The idea of collective responsibility extended from a tribal family to a clan that equally ensures the security of all its members[10]. However, the notion of collective responsibility works like a double-edged sword. A trivial fight between the two individuals can draw their families and relevant tribes into a bloody war or contrary to it, the fear of a serious clash would stop them to indulge in a dispute. At the same time, when a tribesman commits a crime, the phenomenon of collective responsibility facilitates the rapid settlement to the victims' family for the offender's tribe is responsible to pay the penalty. As the cash or other kind of compensation is the chief source of settlement in tribal disputes, the arbiters can gain a lot of prestige if their intervention and mediation result in the settlement of that dispute peacefully.

In tribal culture, an individual is like a microcosm of a collective life; hence, both are considered identical to each other. An aggression on any individual is deemed an attack on the entire clan and vice versa. Any revenge or compensation towards the victim against the offender is declared a demand against the tribe as a whole, not just against the offender alone. The wrongdoer's tribe pays the money to victim's family from their collective resources. The whole tribe is held responsible collectively for the punishment, revenge or penalty money.

The selection of a *hakam* or arbiter was based on his personal reputation, prestige or belonging to a family known for its decision-making skills or supernatural powers. A priest belonged to a pagan cult who claimed his allegiance with divine powers was their popular choice. Often the disputed parties tested arbiter's claim of being sacred beforehand. If the arbiter showed his willingness to settle their dispute, each side was required to provide a security bond in the form of goods or hostages. The disputant groups were also liable to provide guarantee that they would respect referee's judgment as final verdict and bound to accept the true declaration on the disputed issue[11]. The application of the arbitral judgment depends entirely on the credibility of the mediator and his status in the tribal society. Most referees used persuasive language to give the impression that the decision was rightly proposed under the given conditions and well-suited for both the parties[12].

To validate the process of arbitration, it was necessary for both the side to attend the hearing, which relied on the plaintiff who was to prove his case, and the accused was bound to take an oath in his defense [13]. If the applicant failed to prove his case then the arbitrator asked the accused to take an oath to dismiss the prosecution. Before the advent of Islam, the tribes of Makkah took their oath before the statue of Hubble (an idol) fixed in the *kaba* in Mecca.

Once before the assignment of messenger-ship the Prophet Muhammadﷺ was selected to settle the dispute on the fixing of Black stone in the wall of *kaba*. As famous for his truthfulness and reliability, sometimes he was also described as *kahin*. At that time, a sharp disagreement occurred among the tribes over the reinstatement of the Black stone in *kaba.* Every chieftain desired to honour this duty alone but failed to seek an agreeable solution. The Prophet ﷺ resolved the issue by placing the stone in the middle of his robe and asked all the chiefs to hold the corner of it. Then he himself placed the stone in the corner of the wall and everyone accepted his solution gladly.

In some parts of the Arab world, conflict settlement was relatively organized and durable. "The general picture of primitive martial traditions tribal law in the Arabian Peninsula required certain qualifications" [14]. For example, Mecca, was a thriving trade market with a rudimentary system of administration where public arbitrators were placed who applied some sort of commercial law to settle disputes among traders. On the other hand, Medina was an agricultural region with a basic administration of justice and some forms of land tenure. However, in both the cities customary practice was the only source of legal system[15]. Later Islam also permitted its adherers to continue the previous trends which ensured peaceful solution to different disputes. The custom or *urf* is also a verified rule and legitimate source of law in the Islamic jurisprudence which allows to exercise customary practices, as long as, they do not conflict with Islamic law and tradition[16].

Islam kept honored many of the rules of conduct, which practiced before the advent of Islam, especially customs related to personal honor, hospitality and courage. The Prophet ﷺ also supported values such as kindness, mercy and justice that cultivated the customs and practices of the ancient region. The Prophet's moral teachings are summed up in a tradition attributed to him; he stated that he was "sent to promote principles of good character"[17]. Many positive tribal customary practices have been incorporated into Islamic jurisprudence and culture.

MECHNISM OF "ADR" IN RELATION TO ISLAMIC INTERPRETATION

Throughout its history, Islam has always emphasized on the concept of *sulh* which is similar to the western idea of settlement and reconciliation[18]. Islam is the only religion that is closely interested in revealing the truth and providing justice with minimum procedural hurdles. It has always esteemed *sulh* over court proceedings.

The predilection for *sulh* over litigation in Islamic culture often reflects larger social and cultural concepts of conflict in general. In most of the Middle Eastern region, for example, generally the idea of conflict is thought to be something disapproving

overtone. It is seen as a "mess" and a "risk" to social cohesion, and it should be prevented. This suggests strong measures to limit all types of disputes, even those that may be deemed "constructive" in other societies. The said mentality disapproves the mechanism of litigation for given its inherent negative components.

In the Islamic legal system, *sulh* is the ultimate approach to resolve disputes. For example, in Saudi Arabia more than ninety-nine percent of domestic conflicts settled through the way of arbitration. It is the common method of mediation and reconciliation aided by a judge or a prominent individual of the local population. During the settlement 'procedure, the arbiter tries to persuade the disputants to agree on a voluntary solution. The arbiter has the authority to propose a settlement plan, but not destined to force his own agreement on both the conflicting sides. Once the disputants are agreed on a final settlement, both the parties are bound to accept the decision and act on it wholeheartedly. After the effective transfer of all the rights in a case, the subsequent attempts of either party to file a related case to another person for arbitration will be rejected by an Islamic court[19]. Thus, in several respects, the Islamic arbitration is quite identical to Western-style of mediation.

A careful examination of ADR discloses that the role of an arbiter during the process of reconciliation is multifaceted. He generally mediates more actively during the process of negotiation. Instead of simply observing as a neutral person, he investigates the primary cause of dispute and analyzes the arguments of both the parties actively to decipher a plausible solution of the given problem. In many cases, the facilitator must achieve the way out without any initial face-to-face interaction between the two parties; otherwise, it might embarrass the conflicting parties or disrupt the situation[20].

In Islamic culture, the process of *sulh* can be varied with regard to the overall goal. In other legal systems, mediators emphasize common interests and solve cooperative problems with the aim of "separating the disputants from the issue". The process of *sulh*, however, takes exactly the opposite mechanism. Rather, it focuses on all related

matters and bears in mind repairing fragile relationships (personal or commercial) which are necessary to restore "harmony and solidarity" between the rival groups.

Although the mechanism of *sulh* is usually employed to solve all sorts of civilian disagreements, its widespread use is common in the civil conflicts. The public orientation of the *sulh* proves to be attractive for those parties particularly that seek to resolve internal disputes. Indeed, *sulh* generally works as the main tool for solving marital disputes, precisely in the hostile status of Islamic law for the act of divorce. The *sulh* negotiations in the marital context may be slightly different from other domestic issues. In such cases, extended family members often serve as arbitrator to settle the conflict. This practice is clearly supported in a Quranic chapter that says:

"If you fear separation between the two, appoint two arbitrators, one from man's family and the other from women's relatives; if they want peace, God will award reconciliation ...."[21]

The rationale behind the approach of *sulh* stems from the idea that the institution of family is the centre of Islamic culture. Since the marriage is largely the unification of two families instead of a couple, in order to create harmony in the society both the families must negotiate to settle marital disputes. Thus, the arrangement of arbiter from relevant families should not consider as an attempt to receive personal benefits, but a way of resolving conflict while enhancing the importance of Islamic family system.

The *sulh* is the Best Solution for Dispute Resolution

In the Islamic jurisprudence, the will of God is represented through laws which symbolize the absolute truth and justice. However, Islamic legal tradition has never questioned the desirability of settling a dispute through ADR mechanism. The Qur'an explicitly encourages the use of other mechanisms - collectively called as *sulh*. At one place, for example, the Qur'an verifies the ADR method:

Believers are only one fraternity: therefore, make peace and reconciliation between your competing brothers ...[22]

Like several of other passages, this one indicates a preference for reconciliation rather than other forms of rivalry for governance in Islamic law. A close study of Islamic legal texts indicates that preference for *sulh* branches out both from the merits of *sulh* itself and from the perceived shortcomings in the formal process of litigation. In one of the hadiths, for example, the Prophet Muhammad ﷺ questioned the court process, given the potential persuasion of interested parties and the inherent error of human judges. Addressing the two conflicting sides, he warned that:

"I am only a human being and disputants contact me to solve their disputes, and one of them can present his case eloquently in a more convincing and impressive way than the 'other, and I rule in his favor believing he is sincere. So if I give the right of a Muslim to another person, then this property is a piece of fire, it is up to him to take it or leave it" [23].

This narration reflects a clear concern about the possibility of a miscarriage of justice which can result from the misleading tactics of the involved parties. Indeed, there exists such a doubt about litigation in the Islamic legal system. This is particularly true with regard to the use of lawyers, called agents. Islamic legal systems generally do not use professional advocates as they work in western legal systems. In many cases, the attorney can only appear as an agent or proxy of the absent side, not as their attorney. The reason for this prohibition is that professional lawyers "use mitigation techniques, add complexity to simple questions, distract the parties from their" moral obligations "and" spoil the moral mission of the trial court ". In such situations the Islamic mechanism assigns greater responsibility to the *qadies* who preside over disputes. The belief is that they can better verify the truth when the parties themselves represent, and at the same time remain available to guide and protect one or the other party during this process. However, the biggest advantage is that the Islamic jurisprudence gives greater discretionary powers to *qadies* in order to promote peace. "For example, if the judge felt that a settlement would lead to equitable results, he would aim - sometimes vigorously - to persuade the parties before him to reach an

agreement and settle their disputes in a friendly manner".[24] Thus, in many ways, the Islamic legal system embodies a marked tendency towards reconciliation. At least in part, preference stems from the fact that kindness compels the parties to resolve their differences and thereby avoids the concerns of miscarriage of justice inherent in prosecutions.

The Islamic tradition prefers the reconciliation process more than just condemning disputes. Indeed, the composition is qualified as "best judgment" because of its potential characteristics. As the Qur'anic verses at the starting of this discussion shows, it seems that Muslims have an essential duty to promote peace and solidarity with the Muslim community as a whole. Reconciliation or *sulh* plays an important role in achieving this commitment, as it avoids the compliments and misfortunes that often are attached with the beneficiary of dispute. Therefore, "the main purpose of conciliation and *sulh* is to put an end to conflicts and hostility between believers, so they can manage their relationships in peace and friendship[25].

Conclusion

In the domain of ADR, Islamic arbitration provides an easy and cheaper mechanism to settle civil disputes according to Islamic interpretations. Especially, in the Pakistani settings scours are mostly interested to resolve their issues under the Islamic principles. Historically Pakistan was founded on the Islamic ideology and 98% of its population is Muslim. In the Islamic jurisprudence, the role of arbiter and its responsibilities are clearly established so any individual expert in Islamic jurisprudence can offer his services to Islamic society to resolve their issue under the Islamic regulations and practices. The scope of ADR is not just restricted to Islamic countries but it can be extended to Muslim diaspora in foreign countries.

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