

SULH: TOWARDS A MORE COMPREHENSIVE UNDERSTANDING OF THE PROCESS

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ABSTRACT

Alternative Dispute Resolution includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. There has been strong growth in Alternative Dispute Resolution (ADR) in recent year. Sulh is one of the main processes of alternative dispute resolution under Islamic law. This paper aims to discuss, analyse and scrutinise the process of sulh. In order to do so, it is proposed that the following issues are examined in more depth: (a) An in-depth examination of the word sulh, including its elements. (a) Legality and advantages of sulh. It is qualitative research. The information has been taken from many readings, articles, books, newspapers. The Holy Quran and Hadith of the Prophet Mohammad (SWA) has also been used as a source by the researcher.

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INTRODUCTION

Sulh is one of the main processes of alternative dispute resolution under Islamic law. “Sulh literally means ‘to cut off a dispute’ or ‘to finish a dispute’ either directly or with the help of a neutral third party.” “Sulh, or amicable settlement, is a different process than arbitration but is important to understanding the Islamic viewpoint on dispute resolution. The goal of sulh is to end conflict and encourage peace among both individuals and the community.”

Given the non-exhaustive nature of the information that can be covered in a paper of this nature, every effort will be made to present the information contained in this paper as concisely as practically possible. Hence, note must be taken of the fact that different perspectives and views on the content covered in this paper may further enrich a paper of this nature; which it itself is limited in terms of the information that is presented. For the sake of clarity and ease in understanding, each of the above areas will be considered below separately.

SULH; AN IN-DEPTH EXAMINATION OF THE WORD SULH, INCLUDING ITS ELEMENTS TYPES AND CLASSIFICATIONS.

Islam is a way of life based on peace. It encourages the settlement of disputes in an amicable manner; for the benefit of, and in the best interests of, both parties to a dispute. “The word al-sulh in Arabic means to reconcile and to make peace with the opponent. It is derived from the verb saluha or salaha “to be sound, righteous” denotes the idea of peace and reconciliation in Islamic law and practice. In Arabic philology, the word “sulh” in the context of interpersonal relationship is from the generic word “salaha” which means “to make peace, become reconciled, make up, and reach a compromise or settlement”. However, in the classical Islamic thought and tradition, sulh means the amicable settlement of disputes through good faith negotiation, conciliation/mediation, peace-making, and even extends to compromise of action.”

Sulh as a process of alternative dispute resolution under Islamic law, encourages both parties to compromise and come to a negotiated settlement; as a result of dialogue on their own initiative or with the help of a third party. “Historically, Islam has accentuated the importance of sulh as a form of dispute resolution. This embodies the Western concepts of “compromise, settlement, reconciliation, and agreement” (Saleh, 1985). This focuses on ascertaining the truth and dispensing justice with least procedural distractions. Islamic tradition has always preferred sulh over formal litigation. The preference for sulh in Islam is often a reflection of larger social and cultural perceptions of conflicts generally. In most Middle Eastern countries, for example, the notion of conflict typically carries a highly negative connotation (ibid). Viewed as “disorderly” and “unsafe” to social structure, disputes represent something to be avoided (ibid). This creates strong motivation to minimise all forms of disputes, even those that might be considered “constructive” in other cultures. Thus, this mindset makes formal litigation an unpopular dispute resolution mechanism, given its inherent adversarial elements.”

“Undoubtedly, sulh is the preferred method of dispute resolution in the Islamic law (Iqbal, 2000; Sambo et al, 2012). For example, in the Saudi Arabian legal system over ninety-nine percent of civil disputes end in some form of sulh. The most common form of sulh involves mediation

and conciliation; facilitated by either a kadi or prominent member of the community. During the process, the facilitator assists the parties as they attempt to reach a voluntary settlement (Iqbal, *ibid*). The facilitator can suggest various settlement proposals, but cannot force a final agreement on the parties. Once the parties ultimately reach a settlement, however, it acts with the same force as a binding judgment (*ibid*). Having effectively surrendered all rights to claims on the matter, subsequent attempts by either party to initiate a related suit will be summarily rejected by an Islamic court (*ibid*). Thus, in many respects, the process on the surface appears no different than western-style mediations.”

“There are three principles that must exist in sulh: the disclosure of the truth; there must be the victim(s) (or the heirs of the victim) and the offender(s) as the conflicting parties, while the other is neutral third party to help the conflicting parties communicating to each other and lower the tension; and then sulh is a voluntary process without coercion, promoting the balance of rights and obligations. Also, sulh or conciliation is conceptually not necessarily erase mistakes that the offender has committed, but the nature is to give the offender commutation.” “In sulh or conciliation, the conflicting parties (the victim(s) and the offender(s)) arrange a mutual agreement so that the case is solved amicably. The other point is that the victim or the heirs of the victim will then get fair compensation for the harm that caused by the offender. This is different from the general criminal cases settlement in which the offender has no right to settle the case amicably once he got arrested. So then, this case will be between the state (represented by the prosecutor) and the accused (the offender). Simply to say, the offender has no chance to negotiate with the victim or the heirs of the victim. For some cases that rely on the report made by the victim, the victim is also unable to conciliate with the offender unless he revokes the report. The point is that by the settlement through litigation, the victim or the heirs of the victim might lose the chance on getting compensation from the offender in which the victim or the heirs of the victim will possibly get if using ‘out-court settlement.’”

An important distinction has to be made between sulh as a process of alternative dispute resolution in Islamic law and arbitration in Islam. This distinction can be stated as follows: “It differs from Islamic theories of arbitration in three respects: 1) conciliation in sulh may be reached with or without the involvement of other parties, 2) the agreement of sulh is not binding before a court, and 3) sulh cannot be used to address future disputes, but only those that have already occurred.”

Given the inherent virtues of Sulh as a process, it is commonly referred to as “the best of judgments”. Muslims have an overarching duty to foster peace and solidarity with the greater Islamic community. To achieve this objective, sulh is of critical importance as a process of dispute settlement. Sulh paves the way to an amicable solution to all disputes; helping to create a civilized society. In order to gain a comprehensive understanding of the process of sulh, it is also important that the elements of the process of sulh be examined.

In the eyes of the Muslim jurists, the process of sulh essentially entails a contract. Thus, in order for the process of sulh to be considered valid, there are four main elements that have to be present in the process. They may be stated and elaborated on as follows:

- a) Parties (*aqidan*)
- b) Pronouncement of Offer and Acceptance (*sighah*)
- c) Matter in dispute (*musalah 'anhu- mahal al- niza'*)
- d) Alternatives to the matter in dispute (*musalah 'alaihi- badal al sulh*)

(a) Parties (aqidan).

In any dispute to be resolved through sulh, there have to be parties. Thus, in the case of marital disputes, the parties are husband and wife and in the case of business transactions, the parties are ordinarily the buyer and the seller.

(b) Pronouncement of Offer and Acceptance (sighah).

There has to be a positive pronouncement of offer and acceptance at the settlement proceedings in order for a sulh process to be valid. During the settlement proceedings, it is incumbent on the parties to be ready to negotiate or mediate in good faith.

(c) Matter in dispute (musalah 'anhu- mahal al- niza').

The subject matter of the sulh proceedings must be a dispute involving the rights of mankind (*Huquq al Ibad*). It is important to note that disputes involving the right of Allah (*Huquq Allah*) such as the fixed punishment (*hudud*) cannot form the subject matter of sulh. Private issues that arise between individuals are therefore legally considered to be the valid subject matter of sulh proceedings. Matters of this nature include debt and claims arising out of disputes in relation to property as well as matrimonial disputes.

(d) Alternatives to the matter in dispute (musalah 'alaihi- badal al sulh)

This element necessitates that, where the parties agree to resolve the dispute amicably and replace the subject matter of the dispute, which is either destroyed or already utilized, the parties must ensure that the replacement is ascertained to avoid uncertainties. Further to this, the defendant must know such replacement or the party concerned who is willing to present it as a replacement for the main subject matter of the contract must legally own it. Muslim jurists of the four main schools of thought have also categorised sulh proceedings into two main types. Hence, it is also important that the types of sulh, as are categorised by Muslim jurists are also explored. The types of sulh can be broadly divided into two main types. They are:

- i. Permissible just Sulh.
- ii. Disapproved unfair Sulh.

Each of the above types of sulh are elaborated on below.

Permissible just Sulh

Permissible just sulh refers to a negotiated settlement reached in accordance with the injunctions of Allah. Based on true knowledge of the laws of Sharia this type of sulh refers to a negotiated settlement where both parties stand to gain from the settlement. Based on the knowledge of the mediator of the subject matter of the dispute, the mandatory rules prescribed in relation to it in Islam and an attitude of delivering and upholding justice and fairness, this type of sulh aims to guarantee full compliance with the injunctions as are found in the Qur'an, the Sunnah and the other sources of Islamic law.

The permissibility of sulh also depends on the what is stipulated to be halal and haram and the rulings in fiqh or by Muslim scholars in relation to Islamic law.

Disapproved unfair Sulh.

Any negotiated settlement or sulh proceeding which contradicts and contravenes the sources of Islamic law and goes against the notion of upholding justice and fairness is considered to be a disapproved unfair sulh in Islamic law. This type of sulh is disapproved given that it has the potential to spread injustice and it perpetuates transgression of the fundamental tenets of Islamic law. Where injustice is apparent in a negotiated settlement, such a transaction or process is vehemently disapproved under Islamic law. "Islamic law recognizes several types of settlement based upon the relationship of the parties involved, and each type is treated individually. These include: settlement between a Muslim state and a non-Muslim state; between the Imām and renegades; between husband and wife, and between parties to a financial transaction." Thus, sulh may also be further classified into types; based on the subject matter and/or parties involved in the negotiated settlement. Such classifications may be stated as follows:

- a. Sulh between the Muslims and the non-Muslims;
- b. Sulh between the just people and the transgressors;
- c. Sulh in Marital Dispute;
- d. Sulh in non-commercial dispute;
- e. Sulh in commercial dispute;

Each of the above classifications are elaborated on below.

a. Sulh between the Muslims and the non-Muslims:

This type of negotiated settlement or sulh is reached where a peace treaty is signed between the two parties to a dispute; it may also involve a protection agreement with one party being non-Muslim, for the purpose of establishing peace. In the context of modern day international relations, this type of sulh or negotiated settlement is recognised and given credence.

This type of sulh is arrived at in accordance with Qur'anic injunctions to the effect; thus, Surah Al-Anfal, Ayat 9 says: But if they incline to peace, you also incline to it and put your trust in Allah”.

b. Sulh between the just people and the transgressors:

Negotiated settlement or sulh is also encouraged with an Islamic state where part of the society rebels against the other. This has been clearly shown to be the case in Islamic history and Qur'an has thus laid down clear injunctions which instruct such disputes to be settled through a negotiated settlement or sulh. To this effect, the Qur'an states, in Surah Al-Hujurat, Ayat 9: “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.”

c. Sulh in Marital Dispute:

There are many instances which may necessitate a negotiated settlement or sulh in marital affairs. Thus, this is also a form of negotiated settlement which Islam actively encourages. Islamic sources of law have clearly advocated negotiated settlements in marital affairs. The Qur'an to this effect states in Surah Al-Nisaa Ayat 128. It says “And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them - and settlement is best. And present in [human] souls is stinginess. But if you do good and fear Allah - then indeed Allah is ever, with what you do, Informed.”

d. Sulh in non-commercial dispute;

Disputes arising out of civil transactions such as those in relation to property can be settled using sulh as the facilitating process. Thus, ownership and disposal of property and associated rights can be the lawful subject matter of a sulh process. Liabilities arising out of tort may also be settled through sulh; which caters to the needs of both parties to a dispute.

e. Sulh in commercial dispute;

In the economic sphere, commercial disagreements can be the lawful subject matter of sulh proceedings. Mutual agreements arrived at without having recourse to formal court proceedings in such instances can serve the best interest of both parties to any dispute.

LEGALITY AND ADVANTAGES OF SULH

The legality of sulh as a process of the dispute resolution mechanism in Islamic law is well established. The Qur'an and the Sunnah clearly indicate that the process of sulh is advocated in Islam.

Qur'an 4:35 provides:

If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers; if they both

wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things.

Qur'an 4:114 provides:

There is no good in most of their secret talks save (in) him who orders Sadaqah (charity in Allah's cause), or Ma'ruf (Islamic monotheism and all the good and righteous deeds which Allah has ordained), or conciliation between mankind; and he who does this, seeking the good pleasure of Allah, We shall give him a great reward.

Qur'an 4:128 provides:

And if a woman fears cruelty or desertion on her husband's part, there is no sin on them both if they make terms of peace between themselves; and making peace is better. And human inner-selves are swayed by greed. But if you do good and keep away from evil, verily, Allah is Ever Well-Acquainted with what you do.

Qur'an 8:1 provides:

...so fear Allah and adjust all matters of difference among you...

Qur'an 49:9-10 provides:

And if two parties or groups among the believers fall to fighting, then make peace between them both. But if one of them outrages against the other, then fight you (all) against the one which outrages till it complies with the command of Allah. Then if it complies, then make reconciliation between them justly, and be equitable. Verily, Allah loves those who are the equitable.

The Sunnah also sheds light on the legality of sulh as a process of negotiated settlement. Several ahadith of the Prophet (S.A.W.) may be cited here to support this contention. It is reported that the Prophet Muhammad (S.A.W.) said:

Sulh is permissible among the Muslims except the one which makes the unlawful as lawful and which makes the lawful as unlawful. Muslims are bound by their promises except promises that permit the unlawful as lawful and the lawful as unlawful.

From the above injunctions, it is clear that sulh is a permitted form of dispute settlement based on negotiation; in the interest of both parties to a dispute.

In the light of the above exploration of the legality of sulh as a form of dispute settlement in Islam, it is appropriate also to examine the advantages of the process of sulh. Islamic law allows all benefits to mankind and prohibits any harm. This principle is of paramount importance in Islamic law. Clear demarcation is provided in Islamic law as to what is halal and haram. It is in this spirit that the process of sulh is also allowed in Islam; to prevent disagreements from blowing out of control and proportion.

Reaching an amicable settlement in each and every dispute is highly encouraged in Islam. Ending conflict and fostering peace and

harmony between individuals and the society at large remains a cardinal aim of Islamic law. To this end, sulh is an important process which enables this objective to be achieved. On an ethical level, forgiveness and compromise are the most important characteristics of the process of sulh. Human relationships can only be preserved based on the above elements. Productive relationships are established through the process of sulh which will stand the test of time. For instance, in divorce settlements, sulh enables the parties to part based on a sense of respect and peace. Sulh also enables the parties to resolve the dispute without wasting precious time. The strife and ill-feeling which accompany litigation is avoided through the pursuit of sulh. Further, cordiality, mutual respect and forbearance between the parties is enhanced as a result of sulh.

CONCLUSION

This exposition has attempted to clarify and explain the concept and process of sulh, and its legality and advantages. It has also explored the concept and process as is used in the Maldives and Malaysia. From the above exposition of the position of the laws in relation to sulh in Malaysia and the Maldives, it is clear that the approach adopted in both countries to the concept of sulh is different. While the Maldives has attempted to give credence to the concept and process of sulh within the broader concept of arbitration, Malaysia has adopted a more rigorous approach in formulating rules and mechanisms in relation to sulh and its implementation. However, it is submitted that both approaches to sulh and its implementation have their own benefits and short-comings. What is clear is that the development of the concept of sulh and the laws in relation to it in both countries, have taken their very own unique trajectories.

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