ISLAMIC PERSPECTIVE OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

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A B S T R A C T

Alternative dispute resolution (ADR) has become an appropriate means of adjudicating in most of the disputes, such as in international trade, family disputes, consumer protection, disputes arising in the Internet environment, electronic commerce, intellectual property in the digital age and other disputes. This paper analyses the Islamic Sharia methods used in alternative dispute resolutions (ADR). 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.

INTRODUCTION

Ever since the very beginning of human life on this earth, there were disputes, conflicts, enmity and hatred among the people. For instance, the very first human dispute were, the dispute emerged between first two sons of Prophet Adam, Qabil and Habil (in Eng. *Cain* and *Abel*). So, since that date, we all are facing the problems and disputes, which must be settled through amicable process.

The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini trials that look and feel very much like a courtroom process. Processes designed to manage community

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tension or facilitate community development issues can also be included within the rubric of ADR. ADR systems may be generally categorized as negotiation, conciliation/mediation, or arbitration systems.

Many people assume that sulh is only applicable in civil cases. Nevertheless, in Islamic law sulh is also applicable in criminal cases particularly in homicide and bodily injury cases. A key part of this ethos is to let the parties come to their own terms of settlement with limited normative constraints. Both the Islamic systems and 'secular' ADR can, broadly speaking, accept such a framework. Alternative dispute resolution (ADR) refers to all methods of resolving disputes short of litigation, including arbitration. Each country has its own laws concerning ADR. Although there has been resistance to ADR historically, it has recently gained widespread acceptance among both the general public and the legal profession. While local arbitration laws typically do not allow arbitration alone to effect a divorce, they do often allow arbitration to determine collateral issues arising from a divorce (e.g., division of assets, child custody, and support).

DISPUTE SETTLEMENT IN PRE ISLAMIC ERA

Arbitration and amicable settlement (*sulh*) have a long history within Arab and Islamic societies and have their roots in pre-Islamic Arabia. The Arabs and several other ancient communities, before Islam, knew and used arbitration as a method for the settlement of disputes. When the Islamic Ummah was established in Madhina, on the basis of Islamic Sharia, it recognized and accepted some of the pre-Islamic methods, which were used to settle the disputes among the people, with some modifications.

Traditionally, there has been a cultural partiality in the Arabic mentality to settle disputes confidentially through negotiation, mediation and conciliation rather than public court process. In addition to the structure of the society, this trend has historical roots that go back to the pre-Islamic era or, what it is called in Arabic, *al-jaheliyah.*

During that era, different types of tribal ruling systems controlled Arabia with the total absence of regulations and regulatory bodies. Even the chief of a tribe did not have absolute power to regulate and settle disputes between individuals. As a result, revenge and wars were the main means of settling any dispute; however, it has been reported that individuals and tribes referred to arbitration and other forms of dispute resolution mechanisms, but mostly after being exhausted by wars.

According to Al-Ya'qoubi, a well-known Arab historian who lived in the 10th century: "As a result of not having religions or laws to govern their lives, pagan Arabs used to have arbitrators to settle their disputes. So when they have a conflict regarding blood, water, grazing or inheritance they used to appoint an arbitrator who carries the characters of honour, honesty, older age and wisdom." (Saunders, 2002).

During the period of Jahiliyya, there are some well-known arbitrators such as Aktham bin Saifi, Hajjeb bin Zurarah, Al-akra'a bin

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Habis and Abdulmuttalib bin Hashim, the grandfather of Prophet Muhammad (PBUH). And also there were notable female arbitrators such as Hind bint Alkhas, Jam'a bint Habis and Sahar bint Loukman. Even though, the Prophet himself acted as an arbitrator in many disputes roused up between citizens and tribes. (Saunders, 2002).

There are so many examples of alternative dispute resolutions in the pre-Islamic era. Most significantly, the dispute arose during the completion of Ka'ba renovations were solved by using arbitration method. And the arbitrator was the Prophet Muhammad (PBUH) himself.

"A dispute broke out between the tribes on who would reinsert the Black Stone in the *Ka'ba* after its renovation. No clan chief wanted to relinquish this great honor to any other clan. Through his successful arbitration of that dispute, the Prophet Muhammad prevented potential war among the Quraysh tribes." (Al-Ammari, 2014). Once the walls of the *Ka'bah* were rebuilt, it was time to place the Black Stone (*Alhajar al Aswad*) on its south-eastern corner. Arguments went off about who would have the honour of putting the Black Stone in its place. A fight was about to break out over this issue, then Abu Umayyah, Mecca's oldest man, proposed that the first man to enter the gate of the mosque the following morning would decide the matter. That man was Muhammad. The people were delighted "This is Muhammad". "We accepted him as arbitrator", Muhammad came to them and they asked him to decide on the matter. He agreed. Prophet Muhammad proposed a solution that all agreed to place the Black Stone on a cloak; the elders of each of the parties to the dispute held on to one edge of the cloak and carried the stone to its place. The Prophet then picked up the stone and placed it on the wall of the *Ka'bah*.

The above incident shows the main features of arbitration in that era, which are:

- Arbitration agreements were simple and spontaneous,
- The agreement was not in writing,
- Arbitration was similar to conciliation because the purpose behind the whole process was to reach an agreement and settle the dispute by any amiable solution, not to give a binding judgment.

The very first treaty signed between the Muslims and the citizens of *Madhina*, provided for arbitration to resolve disputes. And the concept of arbitration was practiced to settle various types of civil and commercial disputes. And the arbitration emerged as a cheap mechanism employed among tribes to put an end to their conflicts. Regarding the above mentioned incidents, there is no doubt that the means of reconciliation and methods of ADR were used by the Arabs before Islam or during the Jahiliyya era. And Islamic Sharia has recognized and accepted some of those methods, with some modifications. Long before the introduction of Islam, Arab tribes created a procedure to identify and resolve disputes that threatened social stability. The process, *sulha*, continues to be practicedin some parts of the region and vestiges of it can be seen even in highly

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developed economies in the Middle East. During the pre-Islamic period, the principles of *sulha* are "embedded in tribal culture and in wisdom and experience passed down from generation to generation." *Sulha* arose to respond to the need to restore order between families, tribes or villages so that quarrels and feuds do not threaten the stability of the larger community.

Hence, independent judicial system or conventional court system was not established those days, and with the absence of any official organization to administer the law, people used to knock at the door of the tribal chief as an arbiter to solve their problems and disputes. The tribal chief administer his point of view or the judgement for the dispute, accordingly with the tribal law which is based on unwritten rules and tribal precedents. "The tribe was bound by a body of unwritten rules, which had evolved along with the historical growth of the tribe itself as a manifestation of its spirit and character. No one had the legislative power to interfere with this system, and there was no any official organization for the administration of the law. Enforcement of the law was generally the responsibility of the private individual who had suffered injury. Tribal justice was administered by the chief of the tribe in a form adapted to their way of life which used arbitration and conciliation extensively.

In the structure of tribal Arab society, soothsayers, astrologers, tribal chiefs (sheikhs) and healers (kuhhaan), and influential aristocrats played a vital role as arbiters in all disputes within the tribe or between rival tribes. The authority and stature of those men served as sanctions for their verdicts. And their verdicts are based on their tribal laws. Tribal law is built upon two basic principles: (1) the principle of collective responsibility; and (2) the principle of retribution or compensation. The objective of tribal law is not merely to punish the offender but to restore the equilibrium between the offending and the offended families and tribes.

Prior to Islam, the recourse to arbitration was voluntary as well as the enforcement of the final judgment. The attendance of the parties in the dispute to the hearings was an important condition for the validity of the arbitral award. With regard to the procedural rules, arbitrators were not bound by any certain rules apart from a number of certain customs like the obligation to hear the disputing parties on an equal basis and to bear in mind the customary rules of the tribe when examining proofs presented by the parties.

Resort to arbitration in the pre-Islamic period was optional and left to the free choice of the parties. It relied on tribal justice administered by the chief of the tribe and trustworthy individuals instead of an organized judicial justice.

ADR IN ISLAM

Before the rise of Islam, there was no formal judicial system in the Middle East or anywhere else in the world. "As the rise of Islam was accompanied by a call for peace, it was only natural for Islam to call for settlement of

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disputes in an amicable manner." And Islamic culture disrespects the argumentative process of lawsuits. The Arabic tradition has always favored *Sulh*, which embodies the concepts of settlement and reconciliation, over formal litigation.

In the Pre-Islamic era, thahkim was a voluntary procedure that could be prompted with the mutual consent of the disputed parties, and by their agreement on a specific person to act as hakam. Prophet Muhammad (PBUH) did nothing to change this voluntary aspect of thahkim.

But he much preferred to settle disputes by suggesting an amicable settlement (sulh) rather than by imposing a judgment on an unwilling party. The object of Islam is to bring about complete integration and planned development between all faculties and in all scopes, the sanctions in respect of all action and conduct are not only material but also moral and spiritual. In fact it is interesting to note in connection with the controversy what is the province of religion and what is the province of law and politics, or, in other words, the controversy with regard to a secular state and a religious state, that Islam does not make that distinction at all. Islam is a way of life and is a code of laws regulating all aspects of human life.

The validity of arbitration has been recognized by the four sources of Sharia; (1) the *Holy Quran*, (2) the *Sunna* (the acts and sayings of the Prophet Mohamed), (3) *Ijma'* (consensus of opinion) and (4) *Qiyas* (reasoning by analogy).

The different schools of Islamic legal thought also have different opinions regarding the type of matters that may be arbitrated; however, all four schools of Islamic thought agree that arbitration cannot be used in disputes where a judge alone is competent to decide. *Shari'ah*, has recognized arbitration (*tahkim*) as a method for settling disputes from its earliest beginnings. People of the Arabian Peninsula used arbitration prior to the establishment of an Islamic judiciary and even into pre-Islamic times. The Noble Qur'an approves of arbitration: "If you fear a breach between the two (*the man and his wife*), appoint (*two*) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things."

It should be noted here that the position of an arbitrator is similar to the position of a *qadi* (judge) in the formal court in the sense that under Islamic law, the same jurisdiction would be given to the arbitrator as a judge in terms of solving the dispute and giving an award in a dispute. However from the beginning, it must be known that neither arbitration nor acompromisation can be made to disputes of a Hudud nature. Furthermore, matters concerning *li'an* (mutual imprecation), *talaq* (divorce), *nasab* (paternity), *fasakh nikah* (judicial abrogation of marriage), emancipation of slaves, *rushd* (adolescence), *safih* (spendthrift), *mafqud al-khabar* (a person whose whereabouts are unknown), *waqf* (endowments) and revenue matters cannot be arbitrated, as the judge alone has the discretion to decide these matters (Rashid, 2006).

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The leading case where arbitration was used by the companions of the Prophet (peace be up on him) was the famous political case between the Caliph „Ali bin Abi Taleb" (the fourth rightly guided Caliph) and „Muawya bin Abi Sofian" (the governor of Assham which is Syria, Lebanon, Palestine and Jordan). Muawya had refused to recognise Ali bin Abi Taleb"s right to the Caliphate. The dispute led to a civil war between the two parties. During the fighting, Muawya bin Abi Sofian demanded the settlement of their dispute through arbitration. Ali bin Abi Taleb accepted that and each party appointed his arbitrator. The two arbitrators were to decide on who would be the Caliph. The two arbitrators were nominated in the arbitration agreement document and drafted an arbitration agreement specifying the dispute. The procedure, duration of the arbitration, place of arbitration and the applicable law were fixed in the arbitration document.

Islam is not just a religion, it is a complete system of life. *Al-Dheen* -the Arabic word for religion- incorporates theology, scripture, politics, moral ethics, law, fairness, justice, equality, and all other aspects of life relating to the thoughts or actions of the people. A distinct feature of Islam is the codified set of rules and regulations that regulate and control society in its behavioural aspects as well as in its relations towards the state. Islam includes a just economic order, a well-balanced social organisation and codes of civil and criminal laws. The fundamentals of Sharia (Islamic law) contain two parts; first rules governing ibadat (devotion of rituals) which are legislated by God and explained by the Prophet, and second rules which govern, for example, civil transactions and state affairs.

So the main object of the dispute settlements is to defend and protect the civil transactions and state affairs as well as the interest of whole Ummah.

ADR METHODS IN ISLAM

Besides formal method of litigation, there is alternative dispute resolution or ADR – which is less formal – to compromise disputes in the construction and engineering industry. Methods such as arbitration, adjudication and mediation have been employed throughout the world. Similarly, the *Sharī'ah* also possesses a method in compromising disputes; where Islam has promoted civil and trivial criminal disputes to be settled through negotiation, mediation, conciliation, arbitration or compromise which has been justified in both Quran and *Sunnah* of the Prophet (PBUH).

According to the letter from the second Caliph, Umar Al-Khattab to Abu Musa Al-Asha'ari who have been appointed as *Qadi*; "All types of compromise and conciliation among Muslims are permissible except those which make *Haram* (unlawful) anything which is *Halal* (lawful), and a *Halal* as *Haram*." The core of the *Sharī'ah*-compliant dispute resolution lies firstly in dispute avoidance and then effective dispute resolution. When these features can be applied during compromising disputes, it is clear that the *Sharī'ah*-compliant dispute resolution has its own

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significance compared to the conventional method of dispute resolution. And the mostly used methods in *Sharī'ah*-compliant dispute resolution are;

a- Sulh (Negotiation, mediation / conciliation, compromise of action)
b- Thahkim (Arbitration)
c- Med-Arb (A combination of Sulh and Thahkim)
d- Muhthashib (Ombudsman)
e- Wali al-Mazalim (Informal justice by the chancellor)
f- Fatwa of Mufti (Expert Determination)

SULH (NEGOTIATION, MEDIATION / CONCILIATION, COMPROMISE OF ACTION)

Negotiation and Mediation or *Sulh* is the most well known and most frequently used form of ADR. Mediation is a form of neutrally assisted (or facilitated) negotiation. It is a process in which the parties to the dispute select a mutually acceptable independent third party, the mediator, who will assist them in arriving at an acceptable solution to their conflict or dispute. In a typical mediation, the mediator will discuss the problem with the parties, both together in open forum, and separately in private sessions. The origin of *sulh* is found in the following two verses of the Holy Quran:

1- "And if two parties among the believers fall to fighting, then make peace (sulh) between them both. But if one of them outrages against the other, then fight you (all) against the one that 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." (Surah al-Hujurat: 9)

2- The believers are but a brotherhood. So make reconciliation (sulh) between your brothers, and have Taqwa of Allah that you may receive mercy. (Surah al-Hujurat: 10).

In Another Quranic verse powerfully supports amicable settlement of dispute on equitable and fair. In the word of the Almighty Allah:

3- There is no good in most of their secret talks save (in) him who orders Sadaqah, or goodness, or conciliation between mankind; and he who does this, seeking the good pleasure of Allah, We shall give him a great reward. (Surah al-Nisa: 114)

Prophet Mohammad (PBUH) supported sulh. He encouraged people to settle their dispute by sulh. In one of the hadith reported in *Sahih Al Bukhari* he 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, ḥadhith no. 2692)

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"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, hadhith No 3.857)

There are at least two recorded incidents in which the Prophet Muhammad (PBUH) mediated between two warring parties. "Narrated Sahl bin Sa'ad: There was dispute amongst the people of the tribe of Bani Amr bin-Auf. The Prophet went to them …… in order to make Sulh (Peace) between them." (Sahih Al Bukhari)

"Narrated Sahl bin Sa'ad: Once the people of Quba fought with each other till they threw stones on each other. When Allah's Apostle was informed about it, he said: "Let us go to bring about reconciliation between them." (Sahih Al Bukhari)

The companions of the Prophet SAW also encouraged *sulh*. For example, in the famous letter written by Umar bin al-Khattab to Abu Musa al-Asharion, the latter"s appointment as a judge contained several principles relating to *sulh*:" (Islam, 2012)

"All types of compromise and conciliation are permissible except those which makes haram anything which is halal and a halal is haram."

In private settlement (*ṣulḥ*), individual parties agree to settle a disputed matter among themselves without recourse to a third party. The linguistic meaning of "*ṣulḥ*" is ending a dispute; its legal meaning is a contract through which this occurs. The textual basis for settlement comes from the Qur'an and Prophetic reports.

Allah Most High says: "*...and making peace is better...* The Prophet said: "Making a settlement between Muslims is permitted, except one which legalizes what is prohibited or prohibits what is legal." Scholars of hadith and fiqh observe that this hadith applies to Muslims and non-Muslims alike, but that the report only mentions Muslims since they are the ones most likely to adhere to Shari'ah judgments.

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. Each type of settlement is given separate treatment in different chapters in the legal texts: *bāb al-hudnah, bāb al-bughāt, bāb al-qasam wa al-nushūz,* and *bāb al-ṣulḥ*, respectively. Only the last two are relevant to Muslims residing in non-Muslim regions.

Private settlement (*ṣulḥ*) is appropriate for situations where the concerned parties can agree upon a solution together and in private, without involving a third party. However, it is applicable only to a small range of personal disputes and cannot resolve disputes where one of the parties involved remains adversarial. (Islam, 2012)

THAHKIM (ARBITRATION)

In voluntary arbitration, disputing parties appoint an arbitrator to decide their case. The linguistic meaning of "*taḥkīm*" is designating someone as a

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judge and appointing him to decide the matter. The textual basis for arbitration comes from the Qur'an, where Allah Most High says: And if ye fear a breach between them (the man and wife), appoint an arbitrator from his folk and an arbitrator from her folk." (Sura Al-Nisa: 35)

Concerning this verse, al-Qurṭubī said: "This verse is proof that arbitration is established [in the religion]." It is also affirmed in the actions of the Prophet (PBUH) in that he was pleased by the arbitration performed by Sa'd bin Mu'ādh (may Allah be pleased with him) in the matter of Banī Qurayẓah.

Arbitration tends to be stated together with settlement by a selected judge (*qaḍā*). But arbitration is a minor form of dispute resolution, in as much as it is undertaken pursuant to private authority, while settlement by an appointed judge is performed pursuant to public authority.

Arbitration (*thaḥkim*) is appropriate for situations where the concerned parties cannot agree upon a solution together in private, but can agree to voluntarily bind themselves to the decision of a third party who will arbitrate their case according to the Shari'ah. A binding and valid arbitration requires the arbitrator, two parties, and a voluntarily binding agreement.

The most remarkable verse with regard to arbitration in the Quran is the 35th verse of Surah al-Nisa of Noble Quran: "If you fear a breach between the two (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things."

The use of word "reconciliation" in the above mentioned verse specifies, that an arbitral award is not binding upon the disputed parties. "Imam Shafie also held that arbitral awards are binding if parties mutually agree to enforce it. Prophet Mohamed SAW also recognised and practiced arbitration. He appointed arbitrators and accepted their decisions."

As Zahidul Islam (2012) has said; the second view is that Shariah knew arbitration in its modern sense. This view is based on the following verse from the Quran:"(Islam, 2012). "Verily, Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All-Seer."

According to Zahidul Islam (2012), the different schools of Islamic jurisprudence also have different opinions regarding the nature of arbitration and its' abidingness;53

Hanafi: The nature of arbitration is contractual in nature and they are close to agencies and conciliation. An arbitrator acts as an agent on behalf of the disputed parties who appointed him. Arbitration is closer to conciliation and hence the arbitral award has a lower level of abidingness than that of a court judgment. The contractual nature of the agreement

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would ultimately force the parties to agree to the decision of the arbitrators.

Maliki: Arbitrators can be chosen by any one of the parties and the arbitrator cannot be revoked in the middle of the proceedings.

Shafie: Arbitration is not like a formal court proceeding and the arbitrators can be changed before they issue an arbitral award.

Hambali: Arbitration has the same effect as a court proceeding. Hence, the arbitrator shall have the same qualification as a judge and the award given by him is bound by the parties who chose him.

It is now universally accepted that the western law of arbitration has become too technical, formal, costly and protracted. Compared to this, *tahkim* offers informal, far less technical, cheap and speedy process. Each party has a right to withdraw from the arbitration before award is given. Arbitration is not a new kind of ADR to Muslims, but it is just a mere renaissance of the Islamic *tahkim* principles with a fresh coat of paint.

When the parties were unable to agree on a single person to act as hakam, the general practice in the early Islamic community was for each side to appoint one hakam. The two appointed hakams had to agree on the final judgment. This was the practice used in the disastrous tahkim that occurred twenty-seven years after Muhammad's death. The tahkum was an attempt to end the civil war between 'Ali, the fourth Caliph, and his rival Mu'awiya, the governor of Syria. Accounts of this event also provide a good illustration of the other aspect of pre-Islamic tahkim that has been discussed; the emphasis on strict law as contained in the Qur'dn and the Sunna which provide grounds to set aside a judgment.

MED-ARB (A COMBINATION OF SULH AND THAHKIM)

In Islamic ADR, some times more than one method of amicable settlement are used to solve the disputes. For instance, a combination of mediation and arbitration are mentioned in the Nobel Quran:

"If you fear a breach between the two (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things." (Surah Al-Nisa: 35)

It is clear from the above mentioned verse that the first job of the arbitrator is to mediate between the disputing parties. And his second duty comes only when the mediation is failed. Than he should start arbitrating. And this is a clear message that in Islam, med-arb is also recognised and used.

Combining Mediation and arbitration is an idea which is now being universally accepted. In China, Japan, Korea, Vietnam and Malaysia, for example, mediation and arbitration are combined. According to Article 18 of the Rules of the Korean Commercial Arbitration Board, Article 28 of the Rules of Maritime Arbitration of the Japan Shipping Exchange, Article

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35 of the Arbitration Rules of the Vietnam International Arbitration Centre, Article 34(1) of the (revised) Kuala Lumpur Regional Centre for arbitration Rules, 2001, conciliation may be possible even after the start of arbitration proceedings. If conciliation fails, arbitration starts; if it succeeds, it is incorporated into the arbitral award.

MUHTHASIB (OMBUDSMAN)

Enjoining good and forbidding evil is the basic rule of faith. All prophets, from Adam till the Last Messenger of Allah (peace and blessings of Allah be upon all of them) performed this function and their sincere followers also did the same. Justice and peace prevailed in the society by this function and whenever and wherever this function was not performed the injustice and insecurity came in.

This principle of enjoining good and forbidding wrong has developed over time into an Islamic institution which takes the responsibility of supervising social, political and economic behaviours in the Muslim community. The origin of Hisbah could be traced to the injunctions of the holy Qur'an and Allah further prescribes that Muslims must choose among their community people that carry out this duty as he said:

"Let there arise out of you a group of people inviting to all that is good (Islam), enjoining Al-Ma`ruf (all that Islam orders) and forbidding Al-Munkar (all that Islam has forbidden). And it is they who are the successful."

In complying with these injunctions, the holy Prophet Muhammed directed his followers to this noble admonition. Prophet Muhammed told his people that: "If some people commit sins and if there are other persons among them who can prohibit them and still they do not do it, soon punishment from Allah will fall on all of them. Ombudsman in Islamic law is *Muhthasib*, whose office is mentioned in the Quran and the first two ombudsmen that of Makkah and Medinah, were appointed by the Prophet himself. *Muhthasib* serve towards dispute resolution and dispute avoidance. The institution of ombudsman in the form of *Muhtasib* was mentioned in the Nobel Quran.

"Let there arise out of you a group of people inviting to all that is good (Islam), enjoining Al-Ma`ruf (all that Islam orders) and forbidding Al-Munkar (all that Islam has forbidden). And it is they who are the successful." (Sura Aal Imran: 104).

This Quranic duty of "forbidden what is wrong" did not remain a theoretical idea. The Prophet appointed two prominent persons as *Muhtasibs*: Umar bin Khattab for Madinah and Sa'ad ibn Al A'as Umayyah for Makkah. According to the famous jurist Ibn Taimiyyah, the Jurisdiction of the *Mushtasib* covered areas generally considered outside the scope of law courts.

The duty of *Muhthasib* is to keep an eye on public morals, to eradicate dishonest practices of the traders and generally to ensure the goal health of the civil society. Prophet Mohammed administered the principle of Hisbah in several situations.

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It was reported that once the Prophet saw a man selling foodstuffs (wheat) and it pleased him. He then placed his hand unto the interior of the wheat and found moisture in it. He asked the merchant: Why are there wet things in it? He said: Rain melted them. The Prophet then said: why did not you put the wet part above so people can see it. He who defrauds us is not of us.

The principle of enjoining good and forbidding evil is called in the terminology of the Shari`ah al-hisbah. According to Imam Ghazzali, there are four essential ingredients of hisbah:

- Muhtasib (Ombudsman)
- Muhtasib `Alayh (the wrong doer)
- Muhtasib fih (the wrong itself)
- Ihtisab (notice and action taken by the Ombudsman against wrong-doer).

Since the Almighty Allah revealed his words to the prophet Muhammad (PBUH), every forms of amicable settlement were used to solve the disputes among Muslims and the disputes between Muslims and non-Muslims too. Muhtasib (Ombudsman), the function of hisbah as the superintendent to the account record Early function of hisbah is primarily related to oversee the market affairs, the maintenance of the mosque, as well as the municipal affairs. In the fragmented, tribal society of pre-Islamic Arabia, tahkim, unlike arbitration, was not an alternative to an established judicial system. Rather, it was the only means of dispute resolution short of war if direct negotiation and mediation failed to achieve a settlement.

Hakams, or arbitrators, were therefore persons of significant importance, although they did not hold any political power as a rule. Most hakams were kahins, or soothsayers, whose opinions would invoke the appropriate deities and would be understood in terms indicating they were revelations from heaven. The general belief that hakams were divinely inspired was extremely important in bringing pressure to bear on the parties to submit disputes to tahkim and to abide by the awards rendered.

"The main purpose of ombudsman under Islamic law is account taking (hisbah). The function of the muhthasib covered religious activities of people such as offering a salat (prayers), maintenance of mosques, etc. He also regulated community affairs and behaviour in the market, such as accuracy of weight and measures and honesty in business dealing. Also the municipal affairs like keeping the roads and streets clean and lit at night."

The basis of a muhthasib is found in the following verses of Quran:

You are the best of peoples ever raised up for mankind; you enjoin Al-Ma'ruf (all that Islam has ordained) and forbid Al-Munkar (all that Islam has forbidden), and you believe in Allah. And had the People of the Scripture (Jews and Christians) believed, it would have been better for

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them; among them are some who have faith, but most of them are Fasiqun (rebellious).
They believe in Allah and the Last Day; they enjoin Al-Ma`ruf and forbid Al-Munkar; and they hasten in (all) good works; and they are among the righteous.
The believers, men and women, are supporters of one another; they enjoin good, and forbid evil; they perform the Salah, and give the Zakah, and obey Allah and His Messenger. Allah will have His mercy on them. Surely, Allah is All-Mighty, All-Wise.
O my son! Perform the Salah, enjoin the good, and forbid the evil, and bear with patience whatever befalls you. Verily, these are some of the important commandments.
"Whenever he saw someone indulging in an evil he would forbid him. This function he carried out both as a Prophet of Allah and as a head of the Islamic state. In this regard, the Prophet has been termed as the first muhtasib in the Muslim history. Later, when his personalengagements increased he appointed Said b. al-As b. Umayyah as muhtasib in Makkah and Umar b. al-Khattab in Medina. This marked the initiation of the institution of Hisbah as well as laying down its principles and regulations, whose salient feature was the role of the Muhtasib and his scope of operation." (Salim. 2015). From the very beginning of Islam, the Caliphs themselves performed this function but when the Islamic State expanded far and wide, the necessity to establish regular departments of Ihtisab was felt and it was the era of Caliph Mamun that this department was formally established. According to Mawardi, there are 3 types of complaints which a *muhtasib* may entertain:

i) Complaints regarding weights and measures;

ii) Complaints against adulteration of various kinds and undue hike in prices of items sold; and

iii) Complaints against non-payment of debt even while possessing the ability to repay it.

One of the major function of the *hisbah* institution is the maintenance and implementation of justice in society. This entails insistence on fair play among different economic factors to minimise possibilities of exploitation of the economy - such as checking manipulation of prices, monopolistic collusion, supplies and productions.

WALI AL-MAZALIM (INFORMAL JUSTICE BY CHANCELLOR)

According to the primary sources of Islamic Sharia, the State should carry out their responsibility in accordance with Noble Quran and Sunnah. Therefore every citizen will enjoy their guaranteed rights without claiming for them. And the leaders of Islamic States would always do their best to

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protect the interest of the citizens as well as the State. Indeed it was the situation during the period of Prophet Muhammad (PBUH) and his rightly guided four Caliphs.

To protect against the excess of the appointed authorities, especially the infringement of human rights, the office of Mazalim was created. The office was officially known as Wali al-Mazalim. It is a novel office which is neither a court nor Hisbah in the strict sense, but a mixture of the two.

Wali al-Mazalim is a public office in Islam which, by bringing into play the coercive authority of the ruler and the adjudicative function of the judge, may enforce a just solution on the parties to a dispute. It is an office which combines the high- handed power of the Sultan with the "nasafa" or justice of the judge. It is headed by a Mazalim who is charged with the responsibility of investigating complaints of maladministration against public authorities.

As Lukman Thaib (1990) said, the system of Wali al-Mazalim was first established by Caliph Umar Ibn al-Khattab. And later it was combined and merged by Caliph Ali ibn Abi Thalib. Caliph Ali personally presided over the special Mazalim Court where cases against the administration were examined and people, irrespective of rank, status, wealth or position lodged complaints against any public officers.

Generally, the jurisdiction of Mazalim includes injustice suffered directly as a result of an act of the ruler or one of his deputies; complaints against governmental agency or officials which involve corruption or misappropriation of property belonging to an individual; complaints against irregularities in the public records kept by registrars, clerks and accountants; complaints against irregularities in administering lands dedicated as waquf; and complaints from stipend holders. The other jurisdictional aspects of Wali al-Mazalim are complaints against misappropriation of property of another person, complaints regarding matters which normally fall within the jurisdiction of Muhtasib, and complaints concerning any dispute between individuals.

A *wali al-mazalim* is considered as a fusion of a judge and an ombudsman. He is a public officer appointed by the king to set into motion the coercive authority of the ruler and the adjudicative function of a judge at large in order to bring about quicker, cheaper and just settlement of disputes.

The settlement of disputes by Wali Al Mazalim was done in a purely informal manner. The procedure differed from that of ordinary Courts in several respects. For example: a *wali al-mazalim* could admit evidence which a court might declare inadmissible and at the same time, he could also call persons as witnesses who were not qualified to act as such before a court.

A *wali al-mazalim* may also rely on his own personal knowledge while deciding a case compel litigants to arbitrate, and dispense away with the requirement of proving matters which require strict proof before a court plus many other things. Ibn Khaldun and Jaufar Ibn Yahya were appointed by Caliph Harun al-Rashid to the office of *wali al-mazalim*. The jurisdiction of *wali al-mazalim* included the following types of cases:

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- complaints about the misappropriation of property;
- complaints lodged by stipend holders;
- complaints against misdeed in administering lands given as private or public endowments;
- complaints against the indiscretion in public records kept by registrars, accountants and clerks;
- complaints against the corruption of government;
- complaints against things which normally fell in the jurisdiction of a *muhtasib*; and complaints against individuals.

FATHWA OF MUFTHI (EXPERT DETERMINATION)

A fatwa or expert determination is an Islamic religious ruling, a scholarly opinion on a matter of Islamic law. According to The Islamic Supreme Council of America (ISCA), "A fatwā is an Islamic legal pronouncement, issued by an expert in religious law (mufti), pertaining to a specific issue, usually at the request of an individual or judge to resolve an issue where Islamic jurisprudence (fiqh), is unclear."

We can say a fatwā same as the legal ruling of a high court or the Supreme Court, depending on the authority of the mufti behind it. However, a fatwā is not binding as is the verdict of the judicial courts; while correct and applicable to all members of the Muslim faith, the fatwā is not obligatory for the individual to respect or not. But the question is, how does a fatwa of mufti become an ADR process?

ADR methods like evaluative mediation or conciliation, mini trial (executive Tribunal) and expert determination allows an impartial third party, chosen by the parties to make a non-binding evaluation assessment on a dispute based on the merit and on his own expertise. The reason promoting the parties to submit their dispute to a neutral evaluator for giving his non-binding assessment is desire to know their rights and duties, and if satisfied, to comply with the assessment on a purely voluntary basis.

Fathwa of muftis has proven to be an effective appliance to solve disagreements between the disputed parties. Normally, the *fatwa* issued would be based on the use of *ijthihad* or reasoning. Fatawa in Islamic law are non-binding evaluative opinions given by a Mufti (jurist consult), regarding a specific issue affecting the whole of society (eg. birth control, cloning, transplantation of human organs, etc) or a specific individual problem affecting only two a parties (eg. a business dispute, matrimonial problem, testamentary disposition, ect).

In many Muslim countries, there are government constituted Fatawa Committees or Fatawa authorities to make decisions on matter of general interest for every Muslim. In some other Muslim and non-Muslim countries, there are Dar al-Ifta established by the religious parties to rule fatawa on voluntary basis.

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Mufti is usually a non-state actor qualified to issue non-binding fatwas. The role of the Mufti in issuing Fatwas interacts with the function of a qadi (judges). In some regions of Ottoman rule, away from the key Ottoman influenced cities, the Mufti's role included issuing legal opinions to individuals who perhaps wished to 'avoid the courts altogether'.
Tucker (1998) describes the role of the Mufti "as purveyors of justice and enlightenment to their communities. Their knowledge of the law and their ability to engage in active, relevant interpretation were the attributes that made them worthy of the mufti's mantle."

The Muftis fulfilled an informal judicial role by virtue of their expertise, knowledge and character which formed the essential basis on which they were approached by communities to arbitrate or opine on specific concerns or divergences. They considered issues of religion that would ordinarily fall outside of the qadis remit in the context of a courthouse, including sensitive and personal issues which the parties would not wish to air in public in a formal legal process.

"As the qadis roles were limited to the courthouse, the Muftis had a considerable remit in dealing with social and community issues. Thus, where family law is concerned, in Muslim communities, there was (and remains) a need for and provision of, both informal and formal dispute resolution mechanisms."

CONCLUSION

Islam has made sufficient provisions for human rights. Not only that, enough procedures, mechanisms and instruments are in place to defend and promote those rights. Such mechanisms are among those discussed above, namely the Shariah Court, the Mazalim, and the hisbah. Islamic law delivers several choices for determining personal disputes, including arbitration (taḥkīm), private settlement (ṣulḥ), and settlement by an appointed judge (qaḍā). Many non-Muslim countries allow for an ADR process, therefore creating an opportunity to apply these Shari'ah-based methods within the local legal system.

Islamic suggestions of ADR and confident of its rareness have made it unique among the legal systems of the world. Its massive coverage is hard to be matched by any other judicial system, so also the willingness of persons professing Islam to submit themselves to the idea of amicable settlement of disputes. The Nobel Quran is very clear when it comes to Islam's stand on peace, war and conflict. As the name *al-Islam* itself signifies, the religion of Islam is based on peace and it is against the conflicts or war. In fact, if the five pillars of Islam are practiced sincerely, are meant to serve as a way of achieving peace, the first step being the achievement of inner peace. So all the injunctions which is used to settle the disputes were given to maintain peace, harmony, solidarity and justice.

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