EXPLORING THE CONCEPT OF CONCILIATION (ṢULḤ) AS A METHOD OF ALTERNATIVE DISPUTE RESOLUTION IN ISLĀMIC LAW

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Pluralism

Prophetic Tradition, (imitatio Muḥammadi) (Sunna)

Reconciliation (Ṣulḥ)

Secondary sources of Islāmic law (Ijmā', Qiyās)

ABSTRACT

EXPLORING THE CONCEPT OF CONCILIATION (ṢULḤ) AS A METHOD OF ALTERNATIVE DISPUTE RESOLUTION IN ISLĂMIC LAW

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Masters Legum (LL.M) Thesis, Faculty of Law, University of Western Cape

This research will chart and navigate the early stages in the development, conceptualisation, and formulation of Islāmic law and the concept of ṣulḥ as a mechanism of legal redress in Islāmic law (Sharī'a). The research shows that firstly, the mechanism is deeply rooted and embedded in scriptural (Qur'ānic) and extra-scriptural text namely the corpus of Ḥadīth. There is a plethora of instructions to prove that reconciliation is indeed a lofty goal which is rewarded as an act of worship. Like many other aspects of the Sharī'a, ṣulḥ is regulated by provisions of the scripture and extra-scriptural sources considered by Muslims as the (Sharī'a). Secondly ṣulḥ is also the preferred method of alternative dispute resolution because it is fluid, contractual, expeditious and one of the most effective ways of solving different types of disputes, whether commercial or family. It has therefore gained considerable traction in modern western financial industry which I think is largely due to its contractual nature and the absence of the adversarial element. As a mechanism of redress, ṣulḥ is governed by Islāmic law of contract which takes the form of an agreement which can be mutually negotiated between two or more parties. Of late it has also become the mechanism of choice in family and marital disputes.

However, because of the caricatured and jaundiced perceptions of Islāmic law (Sharī'a) by the West and some Muslims themselves as a result of recent and past global events, it is necessary to conceptualise and to explore certain pertinent questions regarding the (Sharī'a). This mini-thesis examines the origin, development and application of the (Sharī'a) as a lived reality and the role it played in shaping the contours of the Muslim society regarding its sanctity, interpretation and application.

The research further investigated the legal status and dynamics of reconciliation (ṣulḥ) in Islāmic law as one of the primary mechanisms of legal redress as expounded in classical and modern Arabic sources. It further explored and unearthed the tradition

of peace and conflict resolution that derives out of the religion of Islām and Islāmic law. Existing literature in the field was examined, and a qualitative exploration was carried out, in order to formulate a better understanding of the dynamics of the Qur'ān, ḥadīth and jurisprudence of Islām, as they relate to peace and ṣulḥ as a mechanism of conflict resolution. It proceeds with Qur'ānic and ḥadīth injunctions on ṣulḥ and conflict, and how revelation as believed by Muslims, were applied by Prophet Muḥammad and his early followers. The mini-thesis also investigates and analyses historical events from the lifetime of Muḥammad (pbuh) and the early caliphate of Islām.

The mechanisms for redress envisaged under the Sharī'a may take numerous forms. It may be in the form of litigation before a court of law i.e. (qadā), it may assume the form of an amicable settlement (ṣulḥ), arbitration (taḥhkīm) or even a combination of both. Each of these mechanisms has its own distinctive features, characteristics and peculiarities. As human interaction is inevitable, conflict becomes unavoidable, so it is primarily for this particular reason that the Sharī'a has established and formalised amicable settlement (ṣulḥ) as a dispute resolution mechanism in addition to litigation. This was done because this particular mechanism not only restore peace and tranquillity among the Muslim Ummah, but also retains the honour and integrity of an individual member of society. The major similarity between the element of ṣulḥ and Western style mediation is the motivation and determination for reconciliation and compromise. Like the western style of mediation, ṣulḥ is essentially a voluntary process which requires the agreement of the disputants for it to take place. In other words, it is contractual in nature. In some countries, there exist what we call court-annexed mediation under certain conditions. However, even in this instance the disputants may terminate the process by rejecting the agreement. Unlike Western style mediation, the disputants involved in ṣulḥ are often encouraged by the community, or family members to participate in the process. A phenomenon which is very common in Muslim societies where disputes have been lingering for years and which often impact the honour of families involved. The potential, efficacy and importance of ṣulḥ in various spheres of life to resolve interpersonal, communal, national, and international conflicts is what has actually prompted and motivated me to explore this fairly unknown concept and notion of ṣulḥ.

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Glossary of Arabic and Legal Terms

Fiqh	Islāmic jurisprudence
Ḥanafi	Oldest school of Sunni Islām founded by Abū Ḥanīfa Al Nu'mān (699–767)
Ḥadd	Criminal penalty prescribed by Allah Almighty
Ḥanbali	Last major school of Sunni Islām founded by Imām Aḥmad ibn Ḥanbal (780–855)
Ijmā'	Unanimous agreement between Muslim jurists about a particular issue
Māliki	Sunni Islām school of thought founded by Imām Mālik bin Anas (715–796)
Majalla	First Islāmic Civil Law code that is considered the first attempt to codify Sharī'a
Qur'ān	The sacred book in Islām that contains the words of Allah Almighty
Shāfi'ī	Sunni Islām school of thought founded by Muḥammad ibn Idrīs Al Shāfi'ī (766–820)
Sharī'a	Islāmic law based on the teachings of the Qur'ān and the traditions of the Prophet
Sunnah	The traditional record of the words and acts of the Prophet Muḥammad (Peace Be upon Him)
Usūl al-Fiqh	Principles of Islāmic jurisprudence

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CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND TO THE PROBLEM

Until fairly recently communities and nations have lived in relative isolation of each other. However, with the advent and advancements made in social media and digital technology, our world has become a global village where people are more interconnected.[1] Although human interaction and technological advancement continues at rapid speed and growth, it has presented greater challenges along with countless opportunities. As a result of the rapid growth of technology and enabled connectivity of sovereign states, communities can no longer afford to exist on their own and in isolation.[2] There is thus a greater need for human beings, communities and sovereignties to interact on various levels and platforms to cultivate relationships to co-exist peacefully. People of sovereign states and governments must come to terms with the fact that a hallmark of our life on this planet is human diversity and pluralism, with all its facets.

Social plurality and religious diversity cannot be avoided. It is an inevitable consequence of social behaviour. Over the past few decades, the accommodating and congenial attitude towards religion and multiculturalism in various societies and the

[1]Schmidt E & Cohen J *The New Digital Age: Reshaping the Future of People, Nations and Business* (2013) 9-23. Also see Zeitzoff T 'How Social Media Is Changing Conflict' (2017) *Journal of Conflict Resolution* 1-17. See also Campbell H A & Evolvi G Contextualizing Current Digital Religion Research on Emerging Technologies (2019) *Human Behavior& Emerging Technologies* 1-13. See also UNESCO world report: Investing in Cultural Diversity and Intercultural Dialogue (2009) 9-21. Also see what is Globalisation and how has the global economy shaped the United states at https://www.piie.com/microsites/globalization/what-is-globalization.html (accessed on 2 June 2019).

[2] See McKinsey & Company 'Digital Globalization: The New Era of Global Flows 'available at https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20globalization%20The%20new%20era%20of%20global%20flows/MGI-Digital-globalization-Full-report.ashx (accessed on 27 June 2019). See also Jim S & Korateyev A *Globalisation Yesterday, Today and Tomorrow* (2013) ch 1. See also comments of Anita Salem, systems research and design principal at Salem Systems, wrote, "Without a concerted effort to design these new systems ethically and responsibly with a goal of improving the human condition, we will see a world of increasing power disparity with capitalism and corporations at the top. Worldwide, we already see a rise in authoritarianism, a weakening of democracy and the dominance of transnational corporations. In the United States, we are also seeing a shift in demographics and economics that looks to further weaken democratic ideals of freedom (but not for people of color), identity (a corporation has human rights) and free speech (journalists are the enemy of the people)." In Internet and Technology Pew Research Center (2019).

world have been substituted with anxious pleas and appeals for integration and even assimilation.[3] This ideological and conceptual evolution commenced with a number of intellectual contributions[4] and was brought into full swing by numerous developments which significantly altered human co-existence. This was exacerbated and intensified by the 9-11 events, and the subsequent milieu of unrest and mutual distrust between Muslims and non-Muslims all over the world.[5]

The West where a large number of Muslims are now living, have prided themselves for their welcoming and hospitable attitude to the extent that they offer various programmes to facilitate a smooth process of accommodation of immigrants. However, following the 9 -11 events, European countries experienced unprecedented violence on their own soil convincing people that assimilation is but a delusion and that the existing boundaries are much deeper than previously thought.[6]

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[3] Integration involves adding to an existing culture which in turn transforms and enhances that particular society, whereas on the other hand assimilation may be described as the approach and process whereby outsiders or immigrant groups become indistinguishable within the dominant host society and eventually conforming to the existing cultural norms of society. Available at https://sites.cardiff.ac.uk/islamukcentre/rera/online-teaching-resources/muslims-in-britain-online-course/module-4-contemporary-debates/assimilation-vs-integration/ (accessed 27 June 2019). See also Heinö AJ *Integration or Assimilation An Assessment of The Swedish Integration Debate* (2011) 16-26. Also see Houtkamp C Beyond Assimilation and Integration: The Shift to 'National' and 'Transnational' Inclusion (2015) *Sapientiae, European and Regional Studies* 8 73-87. Also see Ager A & Strang A Understanding Integration: A Conceptual Framework (2008) 21 *Journal of Refugee Studies* 2-26.

[4]Justus U *The Ascendancy of Culturalism: In Dynamics of Power in Dutch Integration Politics: From Accommodation to Confrontation* (2012) 77-120. See also Çelik G Kirk K & Alan Y. *Gülen's Paradigm on Peaceful Coexistence: Theoretical Insights and Some Practical Perspectives* (2008) The Netherlands 1-21. See also Mösslinger M *Assimilation and Integration Discourses in the Social Sciences (1945-1962)* (unpublished Doctoral thesis, University of Vienna,2016) Also see Borooah K & Mangan J 'Multiculturalism versus Assimilation: Attitudes towards Immigrants in Western Countries' (2014) I*nternational Journal of Economic Sciences and Applied Research 2*(2) 33-50.

[5] On the 13 July 2018, at least 149 people, along with the Balochistan Awami Party candidate Nawabzada Siraj Raisani, were killed when a suicide bomber detonated his explosive device in Mastung in the Pakistani province of Balochistan. There was also an attack in 2018 As-Suwayda city located in southwestern Syria, close to the border with Jordan. Islamic state militants carried out suicide bombings and gun attacks killing 255 people, including 142 civilians, and injuring 180 others. The latest 2019 Sri Lankan Easter bombings on 21 April 2019, Easter Sunday, three churches across Sri Lanka and three luxury hotels in the commercial capital Colombo, were bombed. Later in the day, there were smaller explosions at a housing complex and a guest house, killing mainly police officials investigating the situation and raiding suspect locations. Several cities in Sri Lanka, including Colombo, were targeted. At least 359 people were killed, including at least 35 foreign nationals, and around 500 were injured in the bombings. Available at https://en.wikipedia.org/wiki/List of terrorist incidents in 2018. (accessed 28 May 2019).

[6] Vehapi F *Peace and Conflict Resolution in Islam: Islamic Perspectives on War, Peace and Conflict Resolution* (2016) 4-9. See also https://www.spiegel.de/international/germany/germany-and-immigration-the-changing-face-of-the-country-a-1203143.html.(accessed on 28 May 2019) for a perspective on the unique German challenges faced by Germany. See Rubin D & Verheul J (eds) American Multicultarism after 9/11(2009) 181.

Unfortunately, a few hours of internet surfing reveal a very unsettling and deeply troubled discourse and narrative of religious pluralism and peaceful coexistence between the West and Islām. Calls for racial and ethnic cleansing have become shockingly disturbing whilst perusing social media. This narrative and polemic also contribute to a volume of negative encounters between the west and Islām. This no doubt can be attributed to the accumulated historical experience extending from the medieval encounter through to colonialism, the Arab Israeli conflict until the contemporary war on terror.[7] Of extraordinary significance has also been a fairly neglected area of research on the jurisprudential foundation, exposition as well as the historical role of religion as a preventative measure in building and sustaining peace.[8]

A perusal of social media and print material reveal that the drivers of conflict are largely political and between Islām and the West. On a popular level, Islām is seen to be the root cause of this conflict. Its teachings espoused from many Western authors is seen as an essentially violent faith and doctrine that propels its worshippers to acts of terror.[9] This claim is further accentuated and inspired amongst jihādist interpretations which are wholly founded on the Qur'ān and the Sharī'a. Secularists sometimes regard all religion as essentially divisive. This is so because the Western paradigm of Islām and alternative dispute resolution has been approached from a secular perspective

[7] For a detailed and robust research on the above issues see Kalin I *Islam and Peace: A Preliminary survey on the sources of peace* (2004) Istanbul 1-3. See also his footnote 2 Lewis B *Atlantic Monthly* (1990) 47-60.

[8] See. Funk NC &Said A A *Islam and Peace in the Middle East* (2009) USA. From this source the reader can also access other important works by the authors. Both authors have contributed significant works and novel ideas to the field of peacebuilding and conflict resolution. Also see Qamar Huda *Crescent and Dove* ((2010) United States Institute of Peace. See also Richard Bowd & Annie Barbara Chikwanha (eds) Understanding Africa's contemporary conflicts Origins, challenges and peacebuilding. (2010)

[9] See Boroumand L & Boroumand R 'Terror, Islam, and Democracy' (2002) 13 *Journal of Democracy* 1-16. "There is in the history of Islām no precedent for the utterly unrestrained violence of al-Qaeda or the Hezbollah. Even the Shi'ite Ismaili sect known as the Assassins, though it used men who were ready to die to murder its enemies, never descended to anything like the random mass slaughter in which the Hezbollah, Osama bin Laden, and his minions glory. To kill oneself while wantonly murdering women, children, and people of all religions and descriptions—let us not forget that Muslims too worked at the World Trade Center—has nothing to do with Islam, and one does not have to be a learned theologian to see this. The truth is that contemporary Islamist terror is an eminently modern practice thoroughly at odds with Islamic traditions and ethics". See also the work of Hans Kung who analyses the impact of religion on current conflicts and offers a departure from the concept of *holy war* in monotheistic religions. "Armed conflicts in which religion, often accompanied by ethnic differences, plays a part have proliferated in recent decades in various parts of the world: Northern Ireland, the Balkans, Sri Lanka, India, Nigeria… So it is not Islamic terrorism alone which has again raised the question as to whether religion tends to encourage violence rather than help overcome it and whether religion is not the source of, rather than the solution to, the problem of violence". 'In Religion, violence and "holy wars" (2005) 87 *International Review of the Red Cross* 1-16.

founded upon the view of the absence of pacifism in Islām. This has become more so in recent years where religion has been usurped by adherents of certain groups within Islām.

The prevalent debate at popular as well as academic level about the role of Islām in perpetuating violence, needs to be robustly explored. A study of Islām and the conflict resolution paradigm must be understood from within Islām and its political context. The West versus Islām remains the dominant discourse positing the irreconcilable and incompatible values which are totally apposite and thereby negating the idea of pluralism and religious co-existence. [10]

1.2 RESEARCH QUESTION AND OBJECTIVES

The portrayal of Islām and Muslims representations of Islām perpetuated in popular media and elsewhere, continues to paint a grim picture of a people plagued by violence, poverty, oppression and fanaticism. These conventional and dominant images often include various groups and individuals who have justified and translated their ideology to extreme patterns of violence in the name of ideological interpretations of Islām.[11]

We find, however, that there is a stark contrast between the dominant conventional hegemonic projected discourse on Islām, as well as the lived realities and strides being

[10] Abdullah A *Principles of Islamic inter personal Conflict intervention: A Search Within Islam and Western Literature* (2002) 151-182.

[11] Vehapi F *Peace and Conflict Resolution in Islam: Islamic Perspectives on War, Peace and Conflict Resolution* (2016) 4-10. See also Tarlow P 'The interaction of religion and terrorism' *International Journal of Safety and Security in Tourism/Hospitality* (2017) 4-24. For a very interesting perspective on this point see Okoro Kingsley "Terrorist activities have taken a new turn in the wake of 21st Century, thereby creating a sense of insecurity in the global family, The reason for the upsurge of terrorism has also remained an enigma. However, scholars have posited diverse reasons and motivations for terrorist activities. Scholars mostly of western orientation, blame religion for it. On the other hand, scholars with liberal inclinations place the blame on the socio-political exigencies that fosters authoritarianism as the sole cause of the social phenomenon. The third group of scholars posits eclectic sources of terrorism. They opine that though, socio-political exigencies are at the root, however, religion fans the ember and gives it legitimacy. The fourth group proposed an alternative model in which they subsumed that globalization and not religion is the purveyor of modern terrorism. They noted that globalization agenda depersonalizes culture, breaks traditional identities, nullify national sovereignty and violates human rights and life of those at the fringes of development. Thus, those affected adversely by the scheme resort to terrorism as retaliation for the violation done to them. Religion, on the one hand, occupying a central position in human life becomes a medium of translating this sociopolitical conflict into a moral one. It is by religion that secular conflict acquires a cosmic nature. Any conflict understood in cosmic terms acquires stateless and timeless status and as such become unending. Therefore, the paper surmises that terrorism will not end unless globalization ends" *Journal of Alternative Perspectives in the Social Sciences* (2010) 2 550-576

made by individuals in the peace building fields. They are animated by and derive impetus for the transformation and negations of violent conflict from an interpretation of Islāmic faith, which posits peace (salām) as central to the goal of human history. It is the core and kernel of the Islāmic worldview.[12]

The purpose of this mini-thesis is to offer a framework for evaluating this inconsistency and incongruity by offering an in depth excursus of Dispute Resolution in Islamic law with specific emphasis on the notion and concept of ṣulḥ. Chapter two proffers an alternative view by firstly seeking to robustly explore textual and extra-textual sources and thereafter conducting a detailed study of the primary[13] and secondary Arabic resources[14]. The study further aims to contextualise peace (salām) in an Islāmic context by exploring the relationship between Islām (submission), salām (peace) and Sharī'a

[12]Jeremy S *Unlocking a Narrative: Stories of Islam and Peacebuilding and Conflict Transformation* (M.A Thesis, Vermont University, 2015). See also Nimer MA & Orellana AK 'Muslim Peace-Building Actors in Africa and the Balkan Context: Challenges and Needs' *Peace and Change* (2008) 33 549-581.See also Maffettone C 'Principles and Practices of Peace and Conflict Resolution in Islam. The Case of Morocco' available at https://www.mediate.com/articles/MaffettoneC2.cfm (accessed 12 November 2019). See also Abu-Nimer, M. An Islamic Model of Conflict Resolution: Principles and Challenges. In: Huda, Q. (ed.) Crescent and Dove: Peace and Conflict Resolution in Islam. (2010)73-92.

[13]This topic is canvassed in much detail in chapter two. The remarks here are to be considered introductory and merely for the sake of brevity. The Quran is considered to be the undeviating and direct words of God. During the 23-year period of revelation until his death in 632 CE the Prophet received waḥy (revelation) from the Angel Gabriel. It is the principal source of guidance and law for Muslims. The Qur'ān describes itself in many ways including 'A Book', 'A Guidance', 'An Admonition and a Reminder', but the overriding one is that of Book of Guidance which enables humankind to discern truth from falsehood and live a life that is pleasing to God. The sunna as it exists consists of the sayings and deeds of the Prophet Muḥammad and forms an integral part and relation to the Qur'ān in terms of its interpretation. In many instances the sayings and deeds serves as an explanatory and supplementary to the Qur'ān. The sunnah also provides impetus and emphasis for the interpretation thereof and together they are inexplicably bound in an inseparable relationship. See also Kamali M H 'Principles of Islamic Jurisprudence' (1999) 14-85.

[14]According to the Muslim worldview the Prophet Muḥammad has contributed significantly to establishing a blueprint for a moral life for Muslims. His demise imposed an unsettling task upon Muslims to keep Islāmic law receptive and responsive to the new and unprecedented challenges faced from within and without Islam. Despite the absence of continuous prophetic guidance, the companions of Muḥammad eventually managed to develop the raw legal material by formulating new juristic tools to meet the demands of a rapidly growing social movement. These tools, known as the 'non-revealed' secondary sources on account of their non-divine origin include (1) the general consensus of commentators on a moot point of law (ijmā'), (2) the method of analogical reasoning (qiyās), and (3) the application of critical personal reasoning in the interpretation of Islāmic law (ijtihād) These sources, particularly ijmā' and ijtihād, proved to be crucial in providing answers to questions of law when primary sources were silent. Norms arising from the primary sources cannot be altered, whilst they may be subject to interpretation whether through ijmā 'or ijtihād all of which involve derivative legal reasoning. Novel principles whose roots are not strictly embedded within primary sources may also be crafted, provided the results fit the appropriately within the overall Islāmic framework. Secondary sources have thus provided a degree of fluidity and flexibility to the growth of law. Although Islāmic law has its origins in the primary sources, it has overwhelmingly prospered and flourished due to juridical activity which was particularly intense during the classical period of the growth of Islamic law.

as well as the associated mechanisms for legal redress within the Sharī'a.[15] Because there is a symbiotic relationship and a nexus between Sharī'a and dispute resolution in Islām and both are inextricably linked, it is imperative and appropriate to explore this connection and to conceptualise the Sharī'a process and its dynamics in relation to dispute resolution.

It is my hypothesis that contrary to popular belief, scriptural and extra-scriptural sources, as well as the various schools of Islāmic law[16] provide relevant options for dispute resolution mechanisms which have hitherto been insufficiently explored.[17] Scriptural and extra scriptural sources are replete with admonitions to its adherents exhorting them to peace and seeking reconciliation. This is a further component which is argued and explored in detail in chapter two with specific reference to ṣulḥ. Peace related values are central to the Muslim scriptures and teachings and are reflected in the daily greeting of Muslims to one and each other, as salāmu alaykum, which means peace be upon you.[18] In the Islāmic worldview peace (salām) is a state of, spiritual and

[15]Because of constraints this mini-thesis will focus on one of the primary mechanisms of dispute resolution in Islāmic law, namely conciliation (ṣulḥ). There are other mechanisms of legal redress as well such as arbitration (taḥkīm), mediation (waṣṭa) and truce (hudna). See further 1.2.1. These mechanisms do not form part of this research, but mention of it is made in passing. See also Abu-Nimer M &Yılmaz I 'Islamic Resources for Peacebuilding: Achievements and Challenges' (2010) 2-24.

[16] See also Ovamir Anjum. Islamic law and the state in pre - modern Muslim thought. In: Khaled Abou El Fadl, Ahmad Atif Ahmad, Said Fares Hassan Q. (eds.) Routledge Handbook of Islamic Law. (2019) 357-373. Most of what is now known as fiqh, may be defined as a jurist's understanding, or interpretation of the primary sources of law in Islām (the Quran and Sunnah) in order to derive laws. Since interpreters are human beings, there will unavoidably be differences of opinions among Islāmic jurists. Such differences are animated firstly, by methodologies adopted by individual jurists in interpreting and deriving laws from their primary sources. Secondly, the geographical location as well as the context within which the jurists function, as well as the specific needs and interests of the communities. With the expansion of Islām and its establishment within different cultures outside Arabia, as many as 300 schools of legal reasoning developed in the formative years, most of them disappeared though, and by the beginning of the third century of Islām four prominent Sunni schools of jurisprudence survived up to the present day. These are the Ḥanafi School widely spread throughout Turkey, Syria, Lebanon, Jordan, India, Pakistan, Afghanistan, Irāq, and Libya), the Māliki School which is prevalent in North and West Africa and also Kuwait), the Shāfi'ī school prevails in Egypt, Southern Arabia, East Africa, Indonesia and Malaysia). The Ḥanbali school prevails in Saudi Arabia and Qaṭar). Other schools of jurisprudence also emerged from within the Shī'a. The major ones being the Ithna 'Ashar'i, prevalent in Irān and Southern Irāq and the Zaydi in Yemen. The jurisprudence of these schools on both the aspects of worship (ibadāt) and inter-human relations (mu'āmalāt) compiled in the form of legal treatises became the material sources of Islāmic law. See also Hallaq Wael B "A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh" (1997) 150-172. Also see Coulson NJ "The History of Islamic Law" (2003) 72. Abu Zahra M "The four Imams- Their Lives, Works and Schools of Jurisprudence" (2010) 229. Also M. H. Kamali "Principles of Islamic Jurisprudence" (1991) 17-19.

[17]Keshavjee M M *Islam, Sharia & Alternative Dispute Resolution* (2013) p70. See also Huda, Q. (ed.) Crescent and Dove: Peace and Conflict Resolution in Islam. (2010)

[18]See Saḥiḥ Muslim, Book 26 hadith number 5379 Abu Hurayra reported Allah's Messenger (may peace be upon him) as saying: "Six are the rights of a Muslim over another Muslim. It was said to him: Allah's Messenger, what are these? Thereupon he said: When you meet him, offer him greetings; when he

communal harmony, living at peace with God through submission to Him. It is a belief system that renders it obligatory to its adherents to seek peace in all aspects of their lives and to render an ideal environment and society that the religion strives to create. The concluding chapter three shows that mechanisms for legal redress has existed and practiced widely by various civilisations prior to Islām. Islāmic law has adopted these mechanisms and refined the fundamental principles thereof. Classical Islāmic law texts offer various dispute settlement models, e.g. private settlement, reconciliation (ṣulḥ), arbitration (taḥkīm) and mediation (waṣṭa).[19] The mini-thesis concludes in its chapter three with a detailed examination and an analysis of the Islāmic law of conciliation (ṣulḥ) as one of the most oft practiced dispute resolution mechanism of redress amongst Muslims themselves and Westerners who do business with Muslims in the Middle East.

However, a word or two along with introductory and general remarks about the various other mechanisms, devices, techniques and procedures will be quite apt and useful at this moment and juncture. It is equally important to ask the question why these mechanisms have assumed such prominence and gained so much traction in Islāmic law. Is it the natural and innate yearning of humankind towards peace and peaceful existence, the absence of war, mercy and forgiveness or compassion? Or is it simply the ease and efficacy with which it can be implemented. Since the 1990s there seems to have been a significantly altered and different way and a paradigm shift in the manner people and corporates want their disputes to be resolved, out of the public domain and into the private spaces. This is where they have more control over the processes and also greater autonomy to devise most effective procedures from amongst the various mechanisms and procedures available to them. There are a host of other issues which renders Alternative Dispute resolution and more particularly ṣulḥ as a primary mechanism within the genre of the Modern Alternative Dispute Resolution regime.[20]

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invites you to a feast accept it. When he seeks your council give him, and when he sneezes and says: "All praise is due to Allah," you say Yarhamuk Allah (may Allah show mercy to you); and when he fails ill visit him; and when he dies follow his bier".

[19] Vehapi F *Peace and Conflict Resolution in Islam: Islamic Perspectives on War, Peace and Conflict Resolution* (2016) 113-145. Kalin I *Islam and Peace: A Preliminary survey on the sources of peace* (2004) Istanbul 1-10. See also Sayen G 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia' (1987) 9-11 *Journal of International Business Law*. The last decade has also witnessed an upsurge in literature and studies of conflict resolution which I think was due largely also to the violent events that occurred around the world.

[20] Vehapi F *Peace and Conflict Resolution in Islam: Islamic Perspectives on War, Peace and Conflict Resolution* (2016) 113-129. See also See also Abu-Nimer M &Yılmaz I 'Islamic Resources for Peacebuilding: Achievements and Challenges' (2010) 2-24.

1.2.1 MECHANISMS OF REDRESS AS ALTERNATIVES TO LITIGATION IN ISLĀMIC LAW

Within the Islāmic legal system there are generally two ways in whereby disputes are resolved and dispensed with. This may take place through litigation in Islāmic courts i.e. adjudication (qaḍā) and may assume an adversarial or inquisitorial process.[21] The second category falls into the category of Alternative Dispute Resolution (ADR). These include amongst other, conciliation / mediation (ṣulḥ), arbitration (taḥkīm), ombudsman (muḥtasib) and expert determination (fatwa). Alternative dispute resolution (ADR) as indicated, is an alternative and a substitute to the long and costly litigious court procedure. The displeasure and discontent with the traditional litigious method is largely due to the high cost involved and time that is invested in resolving disputes as well as the chronic court roll congestion. There are also numerous other factors which have contributed to this discontent namely, the mind-set established and fostered by the adversarial system along with its competitive nature. Another important distinction and factor is the function of a judge in a formal judicial setting and a third party in ADR. The judge's decision is inhibited and constrained by legislation and precedent and is limited by notions and theories of what is relevant or irrelevant. These processes are rigid, structured with formal rules and procedures.[22]

In essence then the litigious system involves the presentation of opposing perspectives to an adjudicator normally a judge, or magistrate who is tasked with assessing the relevant evidence and its merits. Attorneys representing opposing parties have the responsibility to present evidence and argument that might benefit their client/s. By training and professional duty, lawyers are inclined to exploit these procedures and to persevere as long as any hope remains.[23] In ADR proceedings these processes such as time limitations, financial obligations, presentation of evidence and argument may be mutually agreed by all parties involved.

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[21]Rokhmad.A 'Islamic Legal Paradigm on Dispute settlement' (2017) 8 *International Journal of Civil Engineering and Technology 1060-1067.*

[22]Bello T 'Why Arbitration Triumphs Litigation' available at *https://ssrn.com/abstract=3354674* (accessed 15 July 2020).

[23] Jay Tidmarsh 'Resolving Cases on the Merits' (2009-2010) 87 *Denver University Law Review* 407. See also Robert B. Gordon 'Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics'(1985) 18 *University of Michigan Journal of Law Reform* 503.

Nowadays there are many different areas of law, which make provision for mediation to be used as a mechanism for resolving disputes between parties. In South Africa we have the compulsory court annexed practice of mediation within the field of family law and is currently affected through a statute referred to as the Mediation in Certain Divorce Matters.[24] This legislation imposes a compulsory process of mediation before a divorce is finalised. The rationale of the legislature for integrating the process of mediation into legislation is derived from the problem and fact that family law practitioners often view divorce as an exclusively legal phenomenon and event to the exclusion of other important role players and stakeholders. Family law matters are extremely complex consisting of a web of relationships and disciplines which extends beyond the legal family. The family is a basic unit of study in many social science disciplines, it is studied in disciplines such as sociology, psychology, economics, anthropology, social psychiatry and social work to mention but a few who all play a pivotal role in all aspects family life. [25]

Another area of the law where dispute resolution processes are extensively utilised is the field of labour law.[26] In fact one of the main objectives of the Labour Relations Act (LRA) as expounded in its preamble, is to afford and provide simple and effective procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration through the Commission for Conciliation, Mediation and Arbitration or, alternatively through accredited independent ADR facilities. This has significantly and fundamentally altered the Labour Relations landscape in South Africa. It is to be noted that ADR has gained significant traction of late. Societies in general have come to appreciate the necessity for access to justice through alternative dispute resolution processes and techniques based on equity and good conscience. As an institution and a form of justice, ADR has always been part of African, Asian and Islāmic traditions where solutions were often seen to be to the benefit of all and often regarded as a sine qua non for survival.

Having stated the above, and after perusal of some of the major classical books on Islāmic jurisprudence we do not find the term Alternative Dispute Resolution used in

[24] Act 24 of 1987
[25]See also South African Law Reform Commission. Alternative Dispute Resolution in Family Matters. Discussion Paper 148.
[26] Act 66 of 1995

any form. The term does not appear to be used in the Arabic language either. In Islāmic law the collective noun has rather promoted notions and concepts such as negotiation, mediation, conciliation, arbitration or compromise which has been promoted and justified in both scriptural *(Verba Dei)* and extra scriptural sources *(Prophetic Tradition)*.[27] It is clear therefore, that in Islām it exists as norms and principles of justice and equity which has been promoted by conciliation (ṣulh), Arbitration (Tahkīm), Advice (Nasīḥah), Ombudsman (Muḥtasib), and Special Tribunals (Wali al-Maẓālim). At this stage it will be quite opportune to give some consideration and provide a brief overview of these concepts and notions to provide the reader with an overview of dispute resolution in Islām.

Arbitration (Taḥkīm)

The word Taḥkīm is defined in the Hans Wehr Arabic-English dictionary as arbitration, arbiter, umpire and referee.[28] Taḥkīm is derived from root word of (ḥa ka ma) which means to judge or to be an arbiter, while the word ḥakam refers to an arbitrator. In the dictionary of Al-Mawrid the word taḥkīm and all of its derivatives and related terms refers to arbitration and its subsidiaries terms.[29] In its jurisprudential sense it refers to the authority assumed by a person to judge in all matters, to compose the rules and bind parties to an award made. In essence Taḥkīm is derived from justice (‘adl) which is needed to resolve disputes and bring peace. In Islāmic law taḥkīm seem comparable

[27] “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.” (Al-Nisā:35). See also “In most of their secret talks there is no good: But if one exhorts to a deed of charity or justice or conciliation between men, To him who does this, seeking the good pleasure of Allah, We shall soon give a reward of the highest (value).” (Al-Nisā: 114). In a ḥadīth narrated Abū Hurayra: Allah's Apostle said, "There is a sadaqa to be given for every joint of the human body; and for every day on which the sun rises there is a reward of a sadaqa (i.e. charitable gift) for the one who establishes justice among people." (Al-Bukhāri, Book of Peace-making, Number 870). See also The legality of arbitration in the Sunnah is derived from the fact that Prophet Muḥammad consented to arbitrate between Jews of Banī Quraytha when they requested him to do so. He appointed Saʿad ibn Muʾāz to arbitrate and then recognized the award made by him and ordered it to be carried out. This became tangible evidence that arbitration is both permissible and legal. (See Abū Dāwud & Sulaiman al-Sajestanī, Sunan Abī Dāwūd, by Muḥammad Mohiedeen Abdul Hameed Vol. 4 289, Ḥadīth 4955. See also Al-Nisaee, Aḥmad bin Shuwaib, Al-Sunnah al-Kubrā, reviewed by Abdulgafar Al-Bandari, and Syid, Vol. 3 p. 466, Ḥadīth 5940/1, corrected by Al-Albānī, Erwa al-Ghaleel al-Albanī 1979) Vol. 8, p. 237.

[28] Hans Wehr *A Dictionary of Modern Written Arabic* ed J M Cowan (1976) 196. See also Ibn Manthūr M *Lisān al-‘Arab*, vol. 12 (1990) 142-144. See also E.W. Lane Arabic-*English Lexicon* vol. 1, (1984) 616.

[29] Hoda Magdy Nour Mediation Choice, the new Arab's trend to protect internal and International investments (2015) 11 *Journal of American Science* 1-11

to the concept of conventional arbitration where both hold the primary and essential intention to resolve a dispute between the parties. All the prominent schools of Islāmic law endorse and agree upon the validity of arbitration with slight variations. The majority tend to preclude crimes and punishments and the decisive injunctions of Sharī'ah, such as the prescribed penalties (ḥudūd) and retaliation (qisās). According to the Ḥanbali school there are no such limitations, or exemptions. This school applies arbitration to all disputes and any litigation that can be adjudicated before the court, including financial matters, matrimonial disputes, crimes and penalties, ḥudūd and qisās.[30]

The Arbitration Agreement

According to all schools of Islāmic law the arbitration agreement is the primary instrument which confer power to issue binding decisions upon the arbitrators. The use of arbitration as a technique and method for the settlement of disputes under Islāmic Law depends upon the full and valid consent of the parties.[31] Whether the arbitration agreement should be in writing, or orally is not discussed by any school of Islāmic law. The Prophet recognized the practice of arbitration and acted upon it. During his lifetime there were many instances when he himself had recourse to taḥkīm, and acted as an arbitrator between tribes to settle their disputes. While he was still resident in Mecca, he was invited by the people of Medīnah to act as an arbitrator in a dispute between two large Arab tribes of Al 'Aus and Al-Khazraj. In another matter the Prophet appointed Saʿd ibn Muʿādh as an arbitrator relating to the actions of the Banū Quraythah in the Battle of Al-Aḥzāb. In this case, the Banū Quraytha requested that the dispute should be arbitrated under customary law, accepting Saʿad as arbitrator. After the Prophet passed on, taḥkīm continued to be commonly practiced by the Caliphs and Companions.[32] They agreed that taḥkīm is an accepted method for dispute resolution in Islām which can be traced back to pre-Islāmic Arab customs. In a dispute which altered the course of Islamic history which took place between the Caliph 'Ali bin abī Ṭālib (the fourth rightly guided Caliph) and "Muāwya bin Abi Sufiyān", the two parties agreed to appoint two arbitrators in a written deed which included all

[30] Muhammad Amin ibn 'Abidin Ḥāshiyah Radd al-Mukhtār 'al Durr al-Mukhtār, 8 vols. 3rd ed (1984) 5:428.
[31] M I Abul-Enein 'Liberal Trends in Islamic Law (Shari a) on Peaceful Settlement of Disputes' (2000) 2 Journal of Arab Arbitration at p. 5.
[32] Ibn Nujaym, Al-Baḥr al-Rāʾiq Sharh Kanz al-Daqāʾiq, Vol. 5, (n.d.) 498. Ibn Hajar al-ʾAsqalānī, Fatḥ al-Bāri, Vol 7 (n.d) 411-412.

the essentials.[33] This deed included the names of the arbitrators, the time frame for making the award, the applicable law and the place where award was issued. In this dispute the parties had recourse to arbitration to settle their dispute, but the arbitration provision was not valid and effective. The question which arise in this regard is whether, an arbitration clauses which refer future disputes to arbitration ought to be valid under Islāmic law. The major works of the four schools of Islāmic law deal with the use of arbitration in existing disputes, but are silent on the issue about arbitration clauses which refer to future disputes.[34] This matter has been a subject of disagreement among some classical scholars of Islāmic law. Whatever the case, the absence of such discussion in early works does not signify a prohibition. According to the principle of freedom of contract under Islāmic law, parties are free to include any provision in their contract as long as it does not permit that which God has rendered impermissible such as the incorporation of interest (Riba) clauses which is prohibited under Islāmic law.[35]

In Islāmic law there are also diverse opinions as to the binding nature of an arbitration agreement and an award. The contemporary tendency in Islāmic law is to consider the arbitration agreement binding upon the parties once it has been executed. Parties would also be held to the decision of the arbitrator(s).[36] Authorities on the subject are of the opinion that this view is in keeping with the general principles of Islāmic law and

[33] This is the famous political case between the Caliph "Ali bin Abī Ṭālib" (the fourth rightly guided Caliph) and Mu'āwya bin Abī Sūfiyān" (the governor of As Shām which today constitutes Syria, Lebanon, Palestine and Jordan). Mu'āwya had refused to recognised Ali bin Abi Ṭālib's right to the Caliphate. The dispute led to a civil war between the two parties. During the fighting, Mu'āwya demanded the settlement of their dispute through arbitration. Ali accepted and each party appointed his arbitrator. The two arbitrators were to decide 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.

[34] Turner P 'Finding your path: Arbitration, Sharia, and the Modern Middle East' available at https://www.tamimi.com/law- update-articles (accessed 25 July 2020).

[35] About the validity of arbitration clause, see article 1 (1) of the Saudi Arbitration Law of 2012 and article 1 of the Emirati Federal Arbitration Law Nº 6 of 2018. See also Muhammad Abu Sadah, 'International Arbitration Contract Principles: Analysis of Middle East Perceptions', [2010] 9 (2) Journal of international Trade Policy 148, cited by Mutasim Alqudah, 'The impact of sharia on the acceptance of international commercial arbitration in the countries of the gulf cooperation council', [2017] 20/1 Journal of legal, Ethical and Regulatory Issues, 7.

[36] Znan Hassan Kyaw Hla, 'The Application of Choice of Law and Choice of Forum Clauses to Islamic Banking and Financial Cross Border Transactions', [2012] Australian Journal of Basic and Applied Sciences, 6 (11), 374.

the direct application of the Qur'ānic provision where it states "…and fulfil every agreement, for every engagement…"[37] This meaning was stressed by the Prophet Muhammad in a famous Saying; he said, "Believers should honour their engagements…".[38] Modern life is much more intricate and multifaceted than ever before. Rapid economic growth and developments are ever increasing. Various jurisdictions with new laws and legal issues now appear which were hitherto unknown and have to be considered skilfully and cautiously solved. Therefore, the law should change from time to time based on the general principles of Islāmic law, and any difficulty should thus be reduced according to the objectives of the sharī'a. Although arbitration agreements were not viewed as part of the law of contract, yet in view of their modern importance these deserve to be considered as contractually binding. It may be concluded that the view which is widespread amongst scholars of fiqh and in the legal profession is that arbitration agreements are binding and no party is permitted to withdraw from any agreement which such party concluded with others by his own free and valid volition.[39]

From the aforegoing discussion it is clear that Islām encourages the settlement of disputes through taḥkīm. This process is informal, far less technical, inexpensive, speedy and much more efficacious. Each party has the right to withdraw from arbitration process before the award is made.[40] If the parties have a prescribed time limit for their convenience, such time limit must be complied with. The disputing parties may appoint an arbitrator, preferably an individual who is proficient in the field of Islāmic law as well as the technical knowledge of the issue in dispute.[41] In Islāmic law the arbitrator is not fettered with cumbersome procedures. In the event that no settlement is reached, an arbitrator gives an award which is legally binding on both parties. In handing down an award, the arbitrator is allowed to utilize his/her own sense of equity and justice as long as doing so does not infringe upon a Sharīʿah principle or customary rule that is pertinent in settling such dispute.[42]

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[37] Q 17:34

[38] Narrated Abu Hurayra from: Saḥiḥ Buḳhari. Chapter 53 Ḥadith No**:** 12

[39] The Saudi Arbitral Law 1983 issued by Royal Decree No. M.46 dated 12-7-1403.H(April 25.1983), but its Executive Rules 1985 issued by award from Saudi Prime Minister No.M/202ln dated 10.I0.1405H.(1985)

[40] Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries,* 2nd ed (1999), 16-17.

[41] Amer R *Arbitration between Sharia and Law* 1st ed (1987) 46

[42] See M. Bajad *Arbitration in the Kingdom.* 1st ed, (1999) 71.

Mediation / Wisāṭa in Islamic Jurisprudence

The definition of mediation (wisāṭa), portrays it as a non-binding procedure to finalise a dispute. It is an act characterized by one or more persons intervening in a dispute either of their own, or at the behest of one of the parties.[43] The independent mediator is then tasked to seek an amicable settlement by suggesting solutions to the parties' dispute. Mediation existed in the Middle East and was always part of Arab culture. The custom of deferring to a neutral third-party for a judgement or advice towards the resolution of a disagreement is well entrenched in Islāmic custom. For example, one of the early life of Prophet Muhammad's most famous stories is that of him being chosen by feuding tribes to settle a dispute over the restoration of the Ka'ba. The Prophet bridged the gap between the quarrelling parties by proposing an original solution which benefited both parties. Islamic Law (Shari'a) supports this notion of an impartial mediator by action.[44] Islamic Law (Shari'a) strongly encourages this concept of a neutral mediator by way of the practice of *Wisāṭa,* which is very similar to contemporary mediation practices. *Wisāṭa* is the act whereby one or more persons intervening in a disagreement to resolve same, either at the request of one or both parties or at their own will. The independent mediator endeavours to resolve the dispute by making suggestions to the parties, who are then free to determine if they want to accept the proposed solutions or not.

One of the major factors which distinguishes mediation in the Middle East is the function. In the Islāmic approach to mediation, the reputation of the mediator and respect for the mediator and his office are crucial to reaching an amicable compromise.[45] The mediator is perceived as someone of extra ordinary standing who is experienced in all matters. He thus assumes an active role (i.e., as a fact finder) and

[43] Ramizah Wan Muhammad Mediation in the Malaysian Shariʿah courts", in: Mohammad Naqib Ihsan Jan & Asghar Ali Mohamed (Eds.), Mediation in Malaysia: The Law and Practice (2010) 420. See also A common encountered definition of mediation can be found in Jay Folberg and Alison Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation (1984) 7. It reads as follows: "Mediation is the process by which participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs."

[44] Guillaume A The *Life of Muhammad* (1967) 85. See also Qamar-ul Huda Peace building: 'A Collection of Stories and Anecdotes from the Prophet Muhammad's Life' *United States Institute of Peace Religion & Peacemaking Center* (2012) 8.

[45]Irani George and Funk, Nathan C 'Rituals of Reconciliation: Arab-Islamic Perspectives' (2000) Kroc Institute Occasional Paper 4.

takes an evaluative stance as opposed to the Western mediator who is neutral and plays a facilitating role by permitting the disputants to reach a resolution by themselves.[46] While the Western mediator is more concerned with the legal procedures and structures, the mediator in the Middle East is required to know more about the history and facts of the conflict.[47] The goal, and approach of the mediator is different in the two contexts. Firstly, it is important to continue the relationship between the parties and preserve social cohesion in the group, unlike the Western mediator who places much focus on the maximization of personal and group interests, the goal of the Middle Eastern mediator is to restore the broken relationship between the parties and within the community.[48] The Western mediator understands mediation as having a win/lose or win/win outcome, while the Middle Eastern mediator recognizes the preservation of social harmony as a superordinate goal.

Islamic mediation normally assumes the following three forms. First, each disputant may select a "mediator" to effect an agreement in them on their behalf. Essentially, this model allows for each side to employ a presumably more professional person to negotiate on their behalf to reach an agreement. This kind of mediation is most common for marriage contracts; it is not unknown in commercial dispute resolution though. Secondly, conflicting parties may select a single mediator to engage in a more conventional mediation process. Traditionally, this kind of mediation was considered a judicial function and so Muslims tended to select judicial officers as their mediators. However, the overriding reason for the choice of judicial officer in mediation was not their official position, but rather their ability to successfully resolve disputes. Thirdly, conflicting parties may seek an opinion on their issue from a respected legal expert (*mufti*). After hearing a particular controversy, the expert engages in a process of (*iftā*) or in-depth legal research to find all the applicable substantive legal rules on the subject.[49] The legal expert *(mufti)* is then expected to present a document akin to a

[46]Nahla Yassine- Hamdan and Frederic S Pearson *Arab Approaches to Conflict Resolution Mediation, negotiation and settlement of political disputes* (2014) 125-202.

[47] For reference to the pragmatic approach as corresponding with a lawyer's state of mind, see Roger Fisher, Elizabeth Koppelman & Andrea Kupfer Schneider *Beyond Machivelli* (1994) 11-12

[48] AE Boniface African Style Mediation And Western Style Divorce AND Family Mediation: Reflections For The South African Context (2012) Potchefstroom Electronic journal 15 5.

[49] Enquire about their religious beliefs and practices and the Qur'ān would respond to those questions with instructions (fatwas) on proper observance of religious devotion. Hereafter it became an

judgment detailing his / her research and its application to the conflict. Although a *mufti*'s opinion is not legally binding, it carries substantial weight in Islāmic legal proceedings.[50]

Types of ADR in Islām	**Comparable To (Conventionally)**	**Characteristic**
Wasṭa	Mediation	Islamic mediation normally assumes three forms.[51] Firstly, each conflicting party may select a mediator to negotiate an agreement on their behalf and stead. Essentially, this model allows for each side to employ a seemingly and presumably more professional negotiator to reach an agreement. Although this kind of mediation is more common for matrimonial contracts, it is not unknown in commercial dispute resolution. Secondly, conflicting parties may select a single mediator to participate in a more conventional mediation process by western standards.[52] Third, conflicting parties may seek an opinion on their issue from a respected legal expert (*mufti*). After hearing a controversy, this expert engages in a process (*iftā*) of in-depth legal research to find all the

established legal practice and norm where religious practitioners would pose questions to Muslim jurists (muftis) who then would respond to these questions with religious legal advice that informed these practitioners on the correct performance of religious and social teachings. This dialogical activity between religious specialist and non-specialist became the essential process by which an Islamic legal system was constructed. This is because fatwas, the product of this activity, became the atomic components for the formation of the Islamic legal canon once a critical mass of these statements was accumulated, analyzed, and synthesized. See Omer Awass Fatwa Discursivity and the Art of Ethical Embedding *Journal of the American Academy of Religion* XX (2019) Vol. XX, No. XX, 1–26.

[50] Bernard Weiss How Muftis Think Studies in Islamic Law and Society vol 44 (2018) ch 1. See also Muhammad Khalid Masud, Brinkley Messick and David, S. Powers eds, *Islamic Legal Interpretation: Muftis and their Fatwas* (*1*996) 431.

[51]Ratno Lukito 'Religious ADR: Mediation in Islamic Family Law Tradition' *Al-Jāmi 'ah* (2006) Vol 44 No. 2, 1427.

[52]Sayed Sikander Shah 'Mediation in Marital Discord in Islamic Law: Legislative Foundation and Contemporary Application' *Arab Law Quarterly* Vol. 23 No 3 (2009) 329-346.

		applicable substantive legal rules on the subject.[53]
Tahkīm	Arbitration	Taḥkīm is a verbal noun of the Arabic word ḥakama which signifies the turning of a person back from wrongdoing.[54] Al-Zamakhsharì explains the meaning of the word ḥakkama as making someone an arbitrator (ḥakam/muḥakkam) Literally, taḥākim means to make someone an arbitrator (ḥakam) and to authorise him to pass judgement. According to Ibn ‘Ābidīn, taḥkīm literally means to make judgement in a case for someone by some-one else. Although the jurists differ in definition, they are in agreement as to its meaning and scope, in that taḥkīm is an appointment, and together with it, authority, made by the disputing parties of a third party to resolve the disputes of the parties.[55]
Muḥtasib	Ombudsman	Al-Muḥtasib is a judge (Qāḍi) who delivers a judgement immediately as long as he protects the interests of the public. [56] His responsibilities are almost open-ended in order to implement

[53] Said Bouheraoua Foundation of Mediation in Islamic Law and Its Contemporary Application available at *http://www.asiapacificmediationforum.org/resources/2008/11-_Said.pdf* (accessed 1 August 2020).
[54] For further discussion on the word Taḥkīm and its derivatives see Ibn Manthūr Muḥammad *Lisān al-'Arab* (1990) vol. 12, pp. 142-144.
[55] Article 1790; In this article an English Translation of the Majallah al-Aḥkām al-'Adliyah is used, i.e., Majalla, translated by C R Tyser 494. The Ottoman Majalle is the first civil codification of Muslim law. It represents an attempt to codify part of Ḥanafì fiqh on mu'āmalāt (transaction).
[56] Munīr Aḥmad Mughal ‘Islamic Concept of Ombudsman’ *Ta’mīr-i-Insāniyat Lahore* vol 2 issue 9 (1983) 24-33. See R P Buckley ‘The Muḥtasib’ *Arabica* (1992) 59-117.

		his decisions. Al-Muhtasib and/ or his deputies as full judge (s) must possesses qualities of being wise, pious, well-poised, and learned scholar (faqīh). He has the ability to distinguish the permissible (halal) from the non-permissible (ḥarām).[57]
Wali al-Mazālim	Chancery or special tribunals	Al-Mazālim is a form of 'extraordinary justice' that portrays a type of superior justice which is not determined by any precise rules that can be carried out by individuals, administration or a group.[58] The term Walī al-Mazālim refers to the chancery or special tribunals, a fusion between judge and ombudsman appointed by the ruler to hear and give judgment on sensitive cases that involves people in the society, handling public cases that may not be settled through ṣulḥ, for example embezzlement by public officer.[59]
Fatwa of Mufti	Expert determination	The word Fatwa is a technical term that refers to the "legal judgment or interpretation" given by a qualified jurist or a mufti on issues related to the Sharī'ah.[60] Fatwa is a religious ruling, within the context of dispute resolution and conflict avoidance, fatwa serves and is akin to the

[57] Willem Floor 'The Office of Muhtasib' in *Iranian Studies* Vol 18 No 1 (1985) 53-74. See also Abbas Hamdani 'The Muhtasib as Guardian of Public Morality in the Medieval Islamic City' *Digest of the Middle East* (2008) 13.

[58] Wansbrough J The safe-conduct in Muslim chancery practice. *Bulletin of the School of Oriental and African Studies* (1971) 34 (1) 20-35. See also M. Lapidus *Muslim Cities in the Later Middle Ages* (1967) 117, 137, 285, 287.

[59] J. H. Escovitz 'Vocational patterns of the scribes of the Mamlukes Chancery' *Journal Arabica* (1976) Vol 23 1 42-62. Also see Mathieu Tillier Qadis and the political use of the mazalim jurisdiction under the 'Abbāsids. Christian Lange, Maribel Fierro. Public Violence in Islamic Societies: Power, Discipline, and the Construction of the Public Sphere, 7th–18th Centuries CE (2009) 42-66.

[60] Ibtisam I & Mohd Khairul Firdaus 'Fatwa as a Medium Da'wah: Studies on the Role of Mufti as a Preacher' *International Journal of Academic Research in Business and Social Sciences* (2017) 7 4 1-9. See also Alexandre Caeiro 'The making of the fatwa' *Archives de sciences sociales des religions* (2011) available at http://journals.openedition.org/assr/23312 (accessed on 1 August 2020).

		expert determination, where the disputed parties have recourse to an impartial-neutral third party with knowledge to end their dispute which in this case is a mufti. The nature of fatwa as advisory and "non-binding evaluative opinion" is similar to the expert determination.[61]

1.3 LITERATURE REVIEW

A review of the literature is based on the analysis and examination of accessible books, journals, reviews, reports and internet resources. This list is not exhaustive and will be confined to a critical assessment and survey of only pertinent and relevant literature available on the topic.[62] In this regard, I will have recourse to authoritative classical Arabic literature which is germane to Alternative Dispute Resolution in Islāmic law,[63] as well as contemporary English literature which interprets and analyse some of the classical literature in order to conceptualise Islāmic mechanisms of redress.[64] This approach is adopted to avoid becoming entangled and entrapped in legalistic interpretations developed centuries ago which sometimes tend to lack the spirit and objective (maqāsid) of conflict resolution as a measure and movement for social and political change.

The problem is further exacerbated and compounded by the codification of Islāmic laws which occurred during the colonial era across the African continent and during

[61] Calder, Norman. 'Al-Nawawi's Typology of Muftis and Its Significance for a General Theory of Islamic Law' Islamic Law and Society 3, no. 2 (1996): 137-64.

[62] Abu-Nimer M *Nonviolence and Peace Building in Islam* (unpublished thesis Florida University, 2013) 165. See also Abu-Nimer M *Reconciliation, Justice and Coexistence*. (2001).112

[63]Al-Shoronbassy RA *The Introduction to Islamic Jurisprudence: Development, Schools, Sources, Doctrines and Theories* 2ed (1983) 227. See also Alī J "*Al-Jihād fī al-Islām: Dirāsah Tahlīliyyah*", *The Truth about Islam in a Changing World*, Researches and Proceedings, the Fourteenth General Conference of the Supreme Council for Islamic Affairs. Cairo: Supreme Council for Islamic Affairs, (2004), pp. 693-724. Also *Al-Tasamuh al-Islamī fī Nusus al-Sharʿ al-Sharīf*", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs. Cairo: Supreme Council for Islamic Affairs, (2004), pp. 57-80. Also see Ibn Kathir *Tafsīr al-Qur'ān al-ʿAthīm* (1980)-1

[64] Calder N *Islamic Jurisprudence in the Classical Era* (2010) 243. Also Kamali MH *Principles of Islamic Jurisprudence* 3rd ed (2003). Also Abdalla, A. et al, "*Say Peace*": *Islamic Perspectives on Conflict Resolution Manual for Muslim Communities*. A Manual from The Graduate School of Islamic & Social Sciences Leesburg, VA. Available: salaminstitute.org/new/wp-content/uploads/./Say-Peace.-Islamic-.pdf (accessed 30 June 2019).

the latter stages of the last Muslim Caliphate, the Ottoman Empire.[65] For those who hailed from these territories, the previously fluid system of law became rigid and resulted in a more inflexible approach to religion and more so where personal and family law issues were concerned. For centuries, the neglect of this dynamism and fluidity, or the inability of Muslims to employ ijtihād, has left a number of problems unsolved in the Muslim socio-legal spheres.[66]

At present, the presence of Muslims in pluralist societies has forced Muslims to revive ijtihād in the face of novel problems where Muslims have no longer been living in their exclusive Muslim *Gemeinschaft* to employ traditional Muslim law. They have had to solve their problems in a new milieu and context.[67] The question as to what Islāmic Law is, is a fairly intricate study.[68] In order to understand the current construction and application of Islāmic laws within pluralist communities, one must look at the original legal theories and juridical developments within this complex system of law and its interaction with both the adherents of the faith and those governing them. This is what I have amongst other things attempted to do in chapter two.[69]

There is no single structure and framework that fits all. The text is contextual and fluid, and hence the multitude of schools of thought and opinions constituting the Islāmic legal traditions.[70] Historically there has never been a single text which embodied all of Islāmic law in its varying forms. The term 'law' itself comes into question as the historic

[65]Available at *www.utrechtlawreview.org* Volume 12, Issue 2 (June) 2016 http://doi.org/10.18352/ulr.351 (accessed 3 June 2019). See also Quataert D *The Ottoman Empire 1700-1922* 2ed (2005) 85-90. Also see Qazi Zada S & Qazi Zada M Z 'Codification of Islamic Law in the Muslim World: Trends and Practices' (2016) 160 *Journal of Applied Environmental and Biological Sciences* 160-171.

[66] Donohue J & Esposito J (eds) *Islam in Transition: Muslim Perspectives* (2007) 97. Also see Fayzee A A *The Reinterpretation of Islam*151. See also Hallaq WB 'Was the gate of ijtihad closed? (1984) *Journal of Middle East Studies* 16 3–41.

[67]Sidique MH *et al* Ijtihad Reinterpreting Islamic Principles for the Twenty First Century available at https://www.usip.org/sites/default/files/sr125.pdf (accessed on 26 June 2019). See also Hashim K 'Issues in the understanding of Jihad and Ijtihad' (2002) *Journal of Islamic Studies* 4 616-634. See also Al-Alwani TJ 'The Crisis in Fiqh and the Methodology of Ijtihad' (1991) *The American Journal of Islamic Social Sciences* 8 317-337.

[68] Al Fegierie M 'Islamic law and Human Rights' (2016) 15-41. See also Kamali MH *Principles of Islamic Jurisprudence* 3ed (2003).

[69] See Weiss B 'Interpretation in Islamic Law: The Theory of Ijtihad' In The American (1978) 26 *Journal of Comparative Law* 199–212.

[70] Gulam H 'Application of Sharia in Different Countries and its implications' (2002) 24 *Sharia Journal* 321-340.

reality of Islāmic laws and what we understand of the term law in the contemporary context represent very different constructions.[71]

There has always been a need for Islāmic scholars to reconsider and re-evaluate their understanding of Islāmic law. Particularly the application thereof, in various historical contexts, specifically when we consider nonviolence and peace building.[72] Islām is subject to diverse interpretations and diversity that may be justifiably and legitimately pursued by scholars from different nations, cultures and schools.[73] Therefore, knowledge and interpretations should not be treated as the property of a privileged class. Interpreting and viewing Islām and cultural patterns through nonviolence and peace building lenses become imperative in understanding the meaning of Islām.

Approaching the Islāmic tradition from these perspectives only perpetuates negative images and perceptions, particularly by Westerners. Although a wide variety of Islāmic religious teachings and practices address conflict and peace building, the validity of their application depends on the type of interaction involved in the conflict situation. Islām however, provides peace building values that, if systematically applied, can transcend and govern all types and levels of conflict.[74] Values such as forgiveness (‘afwu), justice (‘adl), beneficence (iḥsān), and wisdom (ḥikmah) constitutes core principles in peace-making strategies and frameworks[75].

The use of these three fundamental assumptions in research and proposals on integrating Islām and peace building can assist both Muslim and non-Muslim researchers in expanding their understanding of the relationship between the concepts and practices of nonviolence, peace building, and religion tradition. Perhaps and

[71] The body of fiqh as a whole is the physical collection of rules and principles developed by Muslim legal scholars seeking to articulate God’s Law (sharī’a) in concrete terms. Some of the contents of fiqh and usūl-ul-fiqh (the “roots” of fiqh, or rules and principles for deriving (fiqh) command virtual consensus among the body of scholars, while other parts a great many, in fact remain subjects of great disagreement between the jurists. Thus, for a Muslim, there is one Law of God (sharī’a), but there are many versions of Islāmic law (fiqh) articulating God’s Law for the people.

[72] Abu Nimr M ‘A framework for Non Violence and Peacebuilding in Islam’ (2001) 15 *Journal of Law and Sharia* 217-265.

[73] Haq MZ ‘Religious Diversity: An Islamic Perspective’ (2010) 49 *Journal of Islamic Studies 493-519*.

[74] Aysae S Kadayiifci-Orellana ‘Religion Violence and the Islamic Tradition of Non Violence’ (2003) *The Turkish Yearbook* 34 3-40.

[75] Yimer A ‘Countering Islamic Fundamentalism and outgroup hostility in North East Ethiopia: Kemissie City Administration’ (2018) 9 *International Journal of Peace and Development Studies* 1-10. See also Zahra M *Acces to Justice; What do Iranian Women Think about their Law and Legal System* (Unpublished PhD Thesis, University of Warwick, School of Law, 2011).

importantly, such awareness can reduce the negative characterisations of Islām in both popular and academic literature, particularly eradicating ill-founded generalisations about Islāmic ways of thinking, belief, or living.[76]

Qur'ānic language evolves, and what may mean one thing today might come to mean quite another centuries from now, depending on the context.[77] Qur'ānic and ḥadīth language, like any other texts, are not immune to this ambiguity, however, this is a point that is often ignored by many a scholar. Like any scripture, says Esposito, "Islamic sacred texts must be read within the social and political context in which they were revealed".[78] It is therefore, surprising, that scriptures like the Qur'ān, the Old and the New Testament speak of fighting and war. The world within which these early communities emerged, was a hostile one and as far as the first Muslim community is concerned, the Arabian society in which they were born was very war-like. People were ready to fight for the slightest "deviation" to the tribal norms.[79] We have to keep in mind that Arabia itself was surrounded by the two warring superpowers of the time, the Byzantines and the Persians, and as a result, fighting was the only way to survive in such conditions.

After discussing the evolution and development of Sharī'a, the mini thesis shows that Islāmic law actively encourages disputes as far as possible to be resolved outside court through various mechanisms of legal redress such as arbitration (taḥkīm) and mediation (ṣulḥ). The dispute resolution processes in Islām are part of a larger Islāmic legal framework, known as Islāmic law or Sharī'a which is explored in detail in chapter two. There are two main primary sources of Islāmic law. The first is the Qur'ān, which is the holy book for Muslims and the second is the ḥadīth, which are written collections, recording the actions and sayings of the Prophet Muḥammad (Sunna).[80] Islāmic law

[76] The principles of *'adl*, *iḥsān* and *ḥikmah* also have been referred to as core values of the Islāmic peacemaking framework: 'Islam yields a set of peace building values that if consistently and systematically applied can transcend and govern all types and levels of conflict.
[77] Esposito J L 'Perspectives on Islamic Law Reform: The case of Pakistan' (1980) 13 *Journal of International Law and Politics*
[78] See footnote 31above Esposito J L.
[79]Johnson JT 'The Tradition on Jihad of the Sword, Counter-Narratives, and Policy' (2015) *Soundings An Inter-disciplinary Journal* 98 440-448. See also Paul L Heck 'Jihad Revisited' (2004) *Journal of Religious Ethics* 32 95-128.
[80] Kamali MH *Principles of Islamic Jurisprudence* 3ed (2003). See also Farooq A Hasan 'Sources of Islamic Law' (1982) *American Society of International Law* 7665-75. Also see Imran Ahsan Khan Nyazee '*Islamic Jurisprudence*' p. 156.

is also divided into different schools of jurisprudence and varying interpretations.[81] I am of the view that it is important to have this discussion and that it should be explored with the aim of empowering communities and accommodating religious diversity and co-existence of pluralist societies.

1.4 SIGNIFICANCE OF THE STUDY

There is a paucity of published studies on Alternative dispute resolution in Islāmic law. Much of the studies on dispute resolution in Islām and Muslim societies have emerged in the last decade or so, and portrayed dispute resolution practices as a manifestation of customary practice. However, primary and scriptural sources reveal that it is not extra-judicial but is rather an integral aspect of Islāmic law.[82] Of particular significance of this research is to understand how peace is defined according to Islāmic tradition. Peace as per Islāmic tradition is based on the Qur'ānic verses, the Ḥadīth and Prophetic tradition. Muslim scholars and activists argue that Islāmic tradition incorporates different teachings and practices towards conflict necessary to understand how peace is conceptualised in the Qur'ān and in Islām.[83]

A study of this nature is important for numerous reasons. It concerns an analysis of conflict /dispute resolution in different societies, whether it is ravaged by conflict, or not. Although there are times when conflicts have been profitable, most conflicts are almost always destructive in nature.[84]

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[81] Okon E 'Sources and Schools of Islamic Jurisprudence' (2012) *American Journal of Social and Management Sciences* 3 106-111. See also Ahmad H *The Early Development of Islamic Jurisprudence* (1970) Islamabad: Islamic Research Institute.

[82] Ramahi AA 'Ṣulḥ: A Crucial Part of Islamic Arbitration' (2008) *Law, Society and Economy* 3-25. Available at http://ssrn.com/abstract=1153659. According to the author Arbitration and amicable settlement (ṣulḥ) have a long history within Arab and Islamic societies and have their roots in pre-Islamic Arabia. Ṣulḥ is the preferred result and process in any form of dispute resolution. See also Quran 'O you who believe! obey Allah and obey the Apostle and those in authority from among you; then if you quarrel about anything, refer it to Allah and the Apostle, if you believe in Allah and the last day; this is better and very good in the end. 'Verse 59 chapter on Women.

[83] See footnote 36 above. Also see study commissioned by the United Kingdom Department for International Development South Asia Research Hub (DFID-SARH), Available at https://assets.publishing.service.gov.uk/media/5b0fe39d40f0b634c24e6190/NSJ-Final-Sept04_report.pdf. (Accessed on 3 July 2019).

[84] Hawley A *Conflict and Catastrophe Medicine* (2002). A very insightful discussion regarding the drivers of conflict as well.

Everyone therefore, in a society is a stakeholder in conflict issues.[85] Parents, teachers, politicians, community leaders, religious leaders, the private sector, security agencies, women, men, governments etc. inevitably become important role players and participants in the search for peace. Throughout the years, scholars have conducted several research studies in an attempt to provide solutions to the numerous conflicts. This study is a contribution to that on-going research, albeit from an Islāmic theological and legal perspective.[86]

It is therefore, also argued in this mini-thesis that a theological model for religious conflict transformation can complement other efforts already in use. It has been noted that religious conflict has become one of the most potent threats to the stability and development of a nation and if nothing urgent is done to alter this trend, peace will remain an elusive ideal and a distant dream.

1.5 RESEARCH METHODOLOGY

The study adopts a flexible approach which is primarily a desktop library-based research. The sources and material consist mainly of books, journals, articles and online material and employs a number of key research methodologies to conduct its analysis. The first methodology is that of legal research. I also consulted original Arabic sources with a variety of secondary sources, such as arbitration journals and publications as well as commentaries of the original Arabic sources by scholars to ensure that the principles and trends analysed, reflect the most up to date and contemporary approaches.[87] Further, this research engages in a doctrinal analysis and legal textual interpretation of the applicable textual and extra-textual sources, and Sharī'a provisions.[88] By dissecting these primary texts, this study is able to draw conclusions about the intent and effects of such provisions within the dispute resolution context. Finally, this research engages in a certain degree of comparative analysis by examining the different approaches to various concepts of dispute

[85] Fontaine C *The Stake Holder Theory* (2006) 4.
[86] Israel Adelani A *Towards a Theology of Conflict transformation: A Study of religious Conflict in Contemporary Nigerian Society* (2011). Also see David R. Smock Religious Contributions to Peacemaking: When Religion *Brings Peace, Not War* (2006).
[87] As previously stated I consulted only pertinent literature on the subject. The literature consists of classical Arabic sources as well as contemporary English literature.
[88] In this regard I engaged in detail discussions of the etymological meanings of the Arabic terms that are the core subject matter of the research along with the jurisprudential analysis.

resolution processes and principles. The thesis also highlights the areas in which Islāmic dispute resolution approaches differ from the Western traditions with the nuances implicated by the applicability of Sharī'a.

1.6 CHAPTER OUTLINE

This thesis will be arranged as follows:

***Chapter Two**:*

This chapter will chart and navigate the early stages in the development, conceptualisation and formulation of Islāmic law. It will further explore its nature and the process of legislation from the time of the demise of the Prophet Muḥammad (PBUH). It will then consider the complex process of formulating legal principles and its application. Throughout the discourse, there is a running theme of the traditionalist and rationalist division where Islāmic jurisprudence and its evolution are concerned. When applying the rules favoured by traditionalists, there is often a lacuna to be bridged between the 21st-century realities of the law. The chapter also discusses the important bifurcation between (Sharī'a) and fiqh. The purpose of this chapter is to set out the Islāmic legal framework within which the theory of Alternative Dispute Resolution mechanism processes were developed and applied throughout Islāmic history and also to show the link between the two disciplines

***Chapter Three**:*

The primary purpose of this chapter is to explore and unearth the tradition of peace and conflict resolution that derives out of the religion of Islām, which is unknown to many Muslims today. In this study, existing literature in the field is examined, and a qualitative exploration is carried out, in order to formulate a better understanding of the dynamics of the Qur'ān, ḥadīth and jurisprudence of Islām, as they relate to peace and conflict resolution. It proceeds with Qur'ānic and ḥadīth injunctions on peace and conflict, and how these divine revelations as believed by Muslims, were applied by Prophet Muḥammad and his early followers. The chapter also investigates and analyses historical events from the lifetime of Prophet Muḥammad and the early caliphate of Islām and further explore the concept of conflict resolution in Islām and interpretations of Muslim scholars are included as well.

It posits the view, that Islām has within its sources i.e. the textual (Qur'ān) and extra-textual (Sunna) a robust and rich tradition of support for notions of dispute resolution mechanisms and notions of peace, nonviolence, peaceful co-existence as well as justice.[89] I explore the Islāmic origins of Alternative Dispute Resolution (ADR) and peace practices, as well as the various mechanisms of dispute resolution as developed by the various schools of Islāmic law and as encapsulated in these classical sources.

CHAPTER TWO
CONCEPTUALISATION OF SHARĪ'A – AN ANALYSIS

2.1. INTRODUCTION

The term Sharī'a is the conventional and general name given to the body of Islāmic law.[90] In its literal and linguistic sense, it conveys the meaning of a "path" a "way" or a "road to a water source," also a "path to be followed", "the way to the source of life".[91] It is the legal framework within which the public and private aspects of the life of a Muslim is regulated. The famous Muslim jurist Ibn al-Qayim speaks of the Sharī'a as a revered and sacred bridge to the Almighty God. His description conveys a sense of reverence and adoration with which the Sharī'a is held, accordingly he says;

> "The Sharia is God's justice among His servants, and His mercy among his creatures. It is God's shadow on this

[89] The principle of resolving disputes amicably can be found in several places in the Qur'ān. See Qur'ān al-Baqarah (The Cow): 178, 182, 224, 228: al-Nisā (The Women): 35, 114, 128, 135, al-Anfāl (The Bounties): 1, al-Shu'rā (The Poets): 40, al-Hujurāt (The Compartments): 9. Also see Quadir Wani G "Understanding Peace and Nonviolence in Islam with Maulānā Wahīduddīn Khān" *Journal of Islamic thought and civilsation* (2017) *vol* 7 2 1-10. "Al-Salām" is, one of the ninety-nine Most Excellent Names (al-asmā' al-husnā) of God that occur in the Qur'ān. These are descriptive of the illustrious Self of God, the way that God makes Himself known to His human servants.

[90] Readers will note that the term Sharī'a is spelt differently by different authors. Both spellings Shariah and Sharia't are in vogue. Unless quoting an author who may have spelt the word differently, this thesis will use the following Sharī'a as the standard spelling. See also Qattān M *Al Tashrī' wa al Fiqh fil Islām* (1989) 14-16. See also Sardar Ali S 'Teaching and Learning Islamic Law in a Globalized World: Some Reflections and Perspectives' *Journal of Legal Education* 61 (2011) 206-230.Wael B. Hallaq *Sharī'a Theory, Practice, Transformations* 84 (2009). See also. Berger MS "Sharia – A Flexible Notion", 35 *Rechtsfilosofie & Rechtstheorie* (2006), 335–345.

[91]Lane EW Arabic- *English Lexicon* Vol 2 (1984) 1534-1536. Lane provides us with a detailed etymological analysis study of the term with its various usages. This lexicon is useful for both a linguistic as well as a legal study. See also Hursh J 'The Role of Culture in the Creation of Islamic Law' *Indiana Law Journal* (2009) 1-25.

> earth. It is His wisdom which leads to Him in the most exact way and the most exact affirmation of the truthfulness of His Prophet. It is His light which enlightens the seekers and His guidance for the rightly guided. It is the absolute cure for all ills and the straight path which if followed will lead to righteousness. . . . It is life and nutrition, the medicine, the light, the cure and the safeguard. Every good in this life is derived from it and achieved through it, and every deficiency in existence results from its dissipation. If it had not been for the fact that some of its rules remain [in this world,] this world would become corrupted and the universe would be dissipated. . . . If God would wish to destroy the world and dissolve existence, He would void whatever remains of its injunctions. For the Sharia which was sent to His Prophet . . . is the pillar of existence and the key to success in this world and the Hereafter."[92]

In the above passage, Ibn ul-Qayim speaks of Sharī'a not as a technical legal system, but as a symbol, which despite its remarkable diversity and accommodation of pluralism, represents the unified Muslim identity. According to ibn ul-Qayim, the Sharī'a always changes to meet the demands of justice and fairness. This kind of unconventional thinking is not uncommon in classical Islāmic literature. Muslim legal scholars throughout history have offered different versions, concepts and ideas of the Sharī'a, and their diversity of thought is captured in their legal texts. Therefore, it seems that Islāmic legal texts will not help us come up with a monolithic and single definition for and of the Sharī'a.

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[92] Ibn Qayyim M *A'lam al-Muwaqqi'in*, (nd.) 3:3. See also Taqi ad-Din Ahmad Ibn Taymiya *Collections of Fatwa of IbnTaymiya Al-Hanbali* (1985) 11 344-45 stating that "Islamic Sharī 'a is based upon the attraction of interests and the prevention of harm to human beings. This guiding principle is that everything of interest to human beings that does not cause harm is permissible (i.e. *Halal*) without regard to whether the thing is beneficial in whole or in part. "See also Ibn Taymiyya who is particularly influential among many modem Islamist thinkers as well as followers of the so-called Wahhabi sect. *See* Nettler, RL *Ibn Taymiyah, Taqi al-Din Ahmad, in* the oxford encyclopedia of the modern Islamic world 165-66(John L. Esposito ed., *1995**).*** However, he also has a wider appeal in the Muslim community and is often lauded with the title "Shaykh al-Islām," meaning *"The* Sheikh (i.e., authority) of Islam." *See* 'al Nadwi S A shaikh-*ul-islam ibn Taimiyah* (2005).

Joseph Schacht, on the other hand, describes the Sharī'a as "the epitome of Islāmic thought, the most typical manifestation of the Islāmic way of life, the core and kernel of Islām itself".[93] Coulson also succinctly puts it "law in classical Islāmic theory, is the revealed Will of God, a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by the Muslim society". Within the Islāmic worldview and ethos then, the law is considered to be part and parcel of the religious and ethical framework.[94] According to Rahmān, it is a

> "practical concept having to do with conduct. It includes all behaviour, spiritual, mental and physical. Thus it comprehends both faith and practice, assent to or belief in one God is part of the *Sharī'a* just as are the religious duties of prayer and fasting, etc. Further all legal and social transactions as well as all personal behaviour, is subsumed under the *Sharī'a* as the comprehensive principle of the total way of life".[95]

In its theological sense then, and to the Muslim mind, it is considered as the speech of God, vouchsafed to Prophet Muhammad (pbuh)[96] in Arabic, through the agency of the Arch Angel Gabriel in its precise meaning and wording.[97] Unlike other legal systems, the Sharī'a does not admit of the bifurcation, or division of law and morality, religion and state.[98] In so far as Sharī'a is concerned, it embraces moral duties, ritual observances, rules of hygiene and even social etiquette in addition to matters ordinarily covered by the term "law". The word generally used in t h e Islāmic tradition

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[93] Schacht J An *Introduction to Islāmic Law* (1986) 1. See also by the same author *The Origins of Muhammadan Jurisprudence* (1979). See also Coulson NJ *Conflicts and Tensions in Islāmic Jurisprudence* (1969) 1-3. See also An Na 'im *Islamic Family Law in a Changing World* (1988) 1-9.

[94] Coulson NJ *A History of Islāmic Law* (1964) 1-2. See also by the same author his introduction to *Conflicts and Tensions in Islāmic Jurisprudence* (1969) 1.

[95] Rahmān F *Islām* (1979) 100. See also p 3. See also Quraishi Landes A 'The Sharia Problem with Sharia Legislation' *Ohio Northern University Law Review* (2015) 41 1-23.

[96] The abbreviation (PBUH) peace be upon him referred to above is the salutation repeated by Muslims every time mention is made of the name of the Prophet. The salutation although not written is implied every time his name appears.

[97] Von Denffer A '*Ulūm al Qur'ān*' "An Introduction to the Sciences of the Qur'ān" (1989) 17. See also Murād K *Way to the Qur'ān* (1985) 15. For a more detailed account see also Suyūti J *al Itqān fī 'Ulūm al Qur'ān* Vol 2 (1991). See also Tames R *Approaches to Islam* (1982) 30-34.

[98] Vessey-Fitzgerald SG "*Nature and Sources of the Sharī'a*" in Khāddūri M and Liebesny HJ eds *Law in the Middle East* (1955) 85. See also Rahmān F *Islām*. (1979) 101.

to signify law is Sharī'a, which means a "watering place", or a resort which both human and beast generally frequent to quench their thirst, or for other purposes. The choice of words in this statement also seems significant in so far as it is used not only to indicate the totality of the Islāmic way of life, which comprises a corpus of duties and obligations which Muslims are bound by their faith to follow and implement, but also an "inherent symbolism which equates it with a life-giving source".[99]

In Islām, the very foundation of the sacred law is the Qur'ān is believed by Muslims to be the *Ipsissima Verba Dei,* a heavenly book expressed in an earthly language. Therefore, no Muslim individual or body may claim that theirs is the only interpretation and, more so, the only correct interpretation. The question that begs to be answered then, is how was the Divine, or original intent of God to be discovered after the demise of the Prophet? With whom is authority vested to interpret the word of God.[100]

These are some of the pertinent questions and issues we need to consider and examine to understand the dynamics and application of Alternative Dispute Resolution (ADR) mechanisms in Sharī'a in a contemporary context. Because a substantial component of this mini-thesis is concerned with dispute resolution (hereinafter referred to as (ADR) which is derived and drawn to a large and considerable extent from both the Sharī'a and fiqh. It will thus be most appropriate and opportune to commence at this juncture of this mini-thesis with an analysis and enquiry of various aspects thereof. An understanding of these terms is absolutely crucial in any research, or discussion on the application and accommodation of dispute resolution mechanisms, which is to a large extent scripturally regulated.

2.2. CONCEPTUALISATION: THE *SHARĪ'A* AND *FIQH*:

The classical Arab lexicographer Ibn Manthūr (1232-1311) observes in his lexicon that Shara'a, which is the root and principle word from which Sharī'a and Shir'a are derived, are words frequently used in the Arabic language to denote and refer to an open and

[99] See further also Habīb S A al *Qāmūs al Fiqhi lughatan wa istilāḥan* (1977) 193.See also Khaled Abou El-Fadl 'Islam and the Challenge of Democratic Commitment' *Fordham International Law Journal* (2003) 3-70.
[100] See also Von Denffer A '*Ulūm al Qur'ān*' "An Introduction to the Sciences of the Qur'ān" (1989) 17. See also Murād K *Way to the Qur'ān* (1985) 15. For a more detailed account see Suyūti J *al Itqān fī 'Ulūm al Qur 'ān* Vol 2 (1991).

vast expanse of water which is clearly visible, easily accessible and perennial.[101] Upon careful perusal, the etymological description provides us with a number of characteristic features which are integral to the Sharī'a and upon which the edifice of Islāmic law is founded. Foremost, of these features is the element of ease, efficacy (yusr), and the removal of difficulty, which is considered an essential component of the Sharī'a. In other words, the Sharī'a shall not impose any act which is unduly harsh or, which is beyond human capacity to perform.[102] A further lexical source is the Qur'ān wherein the noun Sharī'a and its root word Shara'a is used with other derivatives in approximately five instances. The verb Shara 'a appears with God as its subject in the following verse:

> "In matters of faith, He has ordained (Shara 'a) for you that which He has enjoined upon Noah and into which We gave thee (Muhammad) insight through revelation as well as that which We had enjoined upon Abraham and Moses, and Jesus. Steadfastly uphold the faith, and do not break up your unity therein."[103]

The Iranian scholar al Tabātabā'i mentions a number of characteristic features of the word Sharī'a in his Qur'ānic commentary. He observes that Sharī'a is a clear path, or way that people pursue, it may also have reference to the law vouchsafed to a specific prophet amongst the prophets of God, for instance, we may speak of the Sharī'a which Noah, Abraham, Moses, as well as Jesus proclaimed and expounded.[104]

The carefully crafted Qur'ānic usage of the terms Shara'a and Sharī'a reveal that these words were actually never used in the sense of law and legislation. These are connotations which it assumed much later. In fact, revelation of the verses wherein

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[101] Manthūr Ibn *Lisān al 'Arab* Vol 7 (1994) 86. See also al Zubaydi *Tāj al 'Arūs* Vol 5 (n d) 349. See further also Habīb S A *al Qāmūs al Fiqhi lughatan wa istilāhan* (1977) 193. Lane E W Arabic- *English Lexicon* Vol 2 (1984) 1534-1536.

[102] See also Shātibī al *Muwāfaqāt fī Usūl Sharī'a* (nd) Vol 1 29-31. "Allah intends for you ease, and does not want to make things difficult for you", Surah 2, verse 185. See also Masud K *Islāmic Legal Philosophy* (1977) 206.

[103] Q. 42:13. See also 42:21

[104] al Tabātabā'ī Al Mīzān *fī Tafsīr al Qur'ān* Vol 5 (1980) 100-116. See also al Qurtubī *al Jāmi'li Ahkām al Qur'ān* Vol 4.

which these words appear, are restricted to the Meccan period of revelation during which it's meaning, and usage was confined to the "straight path", that is the path ordained by God. Its scriptural usage during this period had no legal connotations.[105] After the Prophet's migration to Medina where the bulk of legislation occurred, the derivative Shir'a appeared once without, however, having reference to its later legislative usage. Instead, the Qur'ān has used the terms Sharī'a and its derivatives in a much broader sense to denote "a path ordained by God or a revealed religion". For legislative purposes, the Qur'ān has neither used the word Sharī'a nor any of its nominal forms, but instead employs a range of other terms such as "command" (amr), "ordained" (fard) and prescribed (kataba) which it had reserved for purposes of legislation. It is quite noticeable in the scripture that it is not words such as Sharī'a and its derivatives that sets its legislative tone.[106]

Secondly, the etymological meaning and the normative Qur'ānic usage of the term also conjures up an image of a metaphysical phenomenon whereby God makes an entry into the world by means of revelation. This revelation is a heavenly, metaphysical phenomenon expressed in earthly terms and establishes a "way" or a "path". This "way" or a "path" provides a means of access to the divine will. Viewed from this perspective, the whole Sharī'a process is restricted in space and time which correlate with the commencement of revelation and ends with the demise of the Prophet. The demise of the Prophet also signified the end of direct access to the divine will. This contention leads one to the following question, how then, thereafter, is it possible for the divine will to be known, or the original intent of God to be discovered?

This process of discerning or knowing the divine will and determining the original intent came to be known as fiqh.[107] The term is inevitably mentioned in any discourse of

[105] Ahmed H *The Early Development of Islāmic Jurisprudence* (1988) 1-9.
[106] "Verily God commands you to be just and kind". See also, "Verily We have prescribed fasting for you as We have prescribed it for those before you". See also Asghar A *The rights of Women in Islām* (1992) 6-19.
[107] Literally, the word fiqh means to understand and have knowledge of something. As a technical term it refers to knowledge of the practical legal rules as derived from their particular sources. During the time of the Prophet (pbuh), fiqh was not used in the latter sense alone but carried a wider meaning covering the whole of religion. For instance, the Qur'ān states: "That they may gain understanding (*liyatafaqqahu*) of the religion" (9: 122). The Prophet is also reported to have blessed Ibn [Abbas saying: "O God give him understanding (*faqqihhu*) in religion" Both, the Qur'ānic verse and the Ḥadīth, conveys a sense of a deeper understanding of the religion and not only knowledge of the legal rules. However, later the science of fiqh assumed a more specialised meaning, which became synonymous with law

Islāmic law, which would be academically unjustifiable without mention of it. The term fiqh is often erroneously assumed to be synonymous with Sharī'a and as such is often interchangeably used.[108] In essence, it is considered to be the vehicle by means of which access is gained to the Sharī'a. Unlike the Sharī'a is a heavenly phenomenon restricted in time and space, fiqh, on the other hand, is a purely earthly phenomenon. It is fluid and may be described as a human attempt to understand and appropriate the will of God on earth.[109] In this regard scholars often assert the probable nature of fiqh. Because of the human element involved, it is not certain and definitive and therefore, mutable. Although both Sharī'a and fiqh are interrelated there are cardinal and fundamental differences as indicated herein.[110]

In its literal sense, the term fiqh refers to "profound knowledge, understanding and intelligence". In the words of Abū Zahra, it signifies a clear and profound understanding of that which acquaints one with the ultimate, or original intent and objective of words and deeds.[111] It implies an understanding of Islām in a general way or the way in which any reasonable or prudent person would likely conclude from obvious evidence and proofs. In the Qur'ān the word fiqh is used as a verbal noun in approximately twenty verses where it denotes understanding and comprehension of things in general.[112] This sense of understanding and comprehension seems to have permeated the Prophetic era as well as the first two centuries of Islām. It was only until and during the

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and legal matters. Thus, fiqh as understood today includes various branches of legal rules on transactions, family matters, criminal offences, as well as matters related to worship (ibādāt).

[108] Mashood A. Baderin, *International Human Rights and Islamic Law*, (2005) 32–34. Some scholars use the terms Islāmic law, *Sharíʿah* and *fiqh* interchangeably. For example, Mohammad Hāshim Kamāli considers *Sharíʿah* to also include *fiqh*.

[109] Islāmic law since its inception is pluralistic and not monolithic. Its jurisprudence accommodates various interpretations from its sources, the Qur'ān and Hadith, and has produced significant differences of legal opinions. The complexities of Islamic law and its varieties does not mean that there is no certainty. The varieties and differences of legal opinions are appreciated as '*different manifestations of the same divine will'* (Kamāli 1991). This reflects recognition of plurality in the society, supported by the Prophet's hadith, "Blessings for the Muslims lie in the different opinions of their jurists *(rahmah al-ummah fi ikhtilafi al-aimmah').* This means that differences of opinions of Muslim jurists in interpreting sources of law on certain issues offer a wider scope which has equally strong legal status. Judges can appropriately choose the most humane and advantageous legal opinions for the cases they are dealing with. This is the basis for developing the principle of *takhayyur* or *ikhyar* (eclectic choice) which shows the flexibility of Islāmic law. Appreciation of differences is an important principle in Islāmic law.

[110] Abou El Fadl K *The Great Theft Wrestling Islam from the Extremists* (2005), 18-21.

[111] Abū Zahra *Usūl al fiqh* (1958) 4. Also see Shātibī *al Muwāfaqāt fī Usūl Sharī'a* (nd) Vol 1 29-31.

[112] *Yafqahūna* meaning they understand appears in thirteen instances 4:78, 6:65, 6:98, 7:179, 8:65, 9:81, 9:87, 9:127, 18:93, 48:15, 59:13, 63:3, and 63:7. *Yafqahuhu* meaning they understand in 3 instances 6:25, 17:46, and 18:57. Yafqahū meaning they understand one instance in 20:28. *Nafqahu* meaning we understand one instant 11:91. And *Tafqahūna* meaning you understand one instant 17:44 and finally *Liyatafaqqahū* once, meaning to study in 9:122.

Abbāsid period when specialisation in law and various other disciplines and tradition became more widespread and independent disciplines emerged. It was at this time that the term came to be applied exclusively for knowledge concerning the law, and when it assumed a more technical legal definition.

The more accepted definition of fiqh amongst jurist consults is the one attributed to Imām al Shāfi'ī who defines fiqh as the knowledge of the legal rules (al aḥkām al Sharī'a) pertaining to conduct that has been deduced from specific evidence in the sources.[113] It is evident from the definition that fiqh is concerned with the practical part of the Sharī'a relating to human conduct in relation to God, him/herself and others. It is also used to denote the corpus of argued opinion of religious scholars of the past. Essentially however, it is the jurisprudence which implies a process of human scholarly activity, particularly an intellectual activity directed to expound and elaborate the details of revelation.[114] It is the intellectual process in which human beings are required to engage, in order to understand and approximate God's will, which consists of transcendentally inspired values.[115]

It is in this sense that scholars distinguish between the terms Fiqh and Sharī'a, by asserting the probable nature of fiqh. Because of the human element involved, it is not certain. This human element or argument can be countered by another human element.[116] Fiqh here is thus juxtaposed to the Sharī'a which is a divine and heavenly process which emanates from the sovereign and sole legislator, Allah. Unlike fiqh, there is thus no human intervention except for Muḥammad who was the recipient and courier. Fiqh involves an element of probabilities due to its derivative nature. Fiqh is arrived at after a process of interpretation of the Divine will (Qur'ān). Thus, due to its probable nature, it can be substituted by another probable character. This implies that fiqh is in a continuous state of flux and is bound to inspire divergent opinions.[117]It is thus not construed as the sole monopoly of a particular person, group or organization.

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[113] The Imām is a recognised founder of one of the Sunni schools of Islāmic law. See also Zubaida S *Law and Power in the Islāmic World* (2005) 27-33.
[114] See also Hallaq W "*Use al-fiqh*: Beyond Tradition", *Journal of Islamic Studies,* Vol. 3, No. 2 (1992), p. 178.
[115] See Asad M *The Principles of state and Government in Islam* (1986) 11-17.
[116] Quraishi-Landes A 'Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible' Rutgers Journal of Law & Religion' 16 1-27.
[117] See Ahmed H *The Early Development of Islāmic Jurisprudence* (1988).

Perfect knowledge rests with God alone.

As a concept Sharī'a is more comprehensive and inclusive than its common-law counterpart. Sharī'a, the Islāmic term which is commonly termed "law" in English is well summarized in the following words:

> "It is rather the whole duty of man. Moral and pastoral, theology and ethics, high spiritual aspirations and the detailed ritualistic and formal observances which to some minds is a vehicle for such aspiration and to others a substitute for it. All aspects of law, public and private, hygiene and even courtesy and good manners are all part and parcel of the Sharī'a".[118]

In summarising and concluding the above discussion, it may be stated that there is a fundamental distinction between Sharī'a and fiqh. This distinction is often ignored by practitioners of Islāmic law and theologians alike. Whilst Sharī'a is a divine process fiqh is often viewed as a scholarly human process to discover the divine.

2.3. AN EXPOSITION OF THE PRIMARY SOURCES OF ISLĀMIC LAW

2.3.1 The Qur'ān

Muslims consider the Qur'ān to be the *Ipsissima Verba Dei* and the principle source of Islāmic law vouchsafed to Muḥammad who expounded and interpreted its provisions by way of word and action. The Qur'ān and the Prophetic Tradition (Sunnah) together constitute the foundational, or primary sources of Islāmic law. The relationship of the Qur'ān and Sunnah is described as that of a light (Nūr) and a book (kitāb). For the purpose of law, both are deemed to be interdependent but operate in tandem with each other.[119] There are a number of provisions in the Qur'ān itself describing the legal nature, status and relationship of these two sources. Scholars have also discussed the relationship of these sources with each other at length as well

[118] Vessey-Fitzgerald S G "Nature and Sources of the Shari'a" in Khāddūri and Liebesny H J eds *Law in the Middle East* (1955) 85.
[119] Usmāni JMT *The Authority of the Sunnah* (1990) 45-70. See also W. Hallaq, *A History of Islamic Legal Theories* (1997) 3-15. See also M.M. Al-Azamī Studies in Hadīth Methodology and Literature (2002) 6.

as the authority of the Prophetic practice.[120]

In its linguistic sense, the Arabic word Qur'ān (also sometimes written *Korān)* is a noun which is derived from the root *qara'a* which, in its literal sense means reading or recitation.[121]It is stated that the word may also be a derivative from *qarana*, which means to put together, or to compile and hence conveying the meaning of a scripture contained between two covers in the form of a book. In its theological sense and to all Muslims it is considered as the speech of God vouchsafed to Prophet Muḥammad in Arabic and transmitted by means of a concurrent chain of narrators. "In its more universal connotation, it is the self- expressed *umm al-kitāb* or, a paradigm of divine communication (13:39). For all Muslims, the Qur'ān is the quintessential scripture of Islām."[122]

Qur'ānic revelation commenced with the commissioning of the Prophet Muḥammad in 610 and continued until his death in 632. During this period its 114 chapters (*sūrahs*) were intermittently revealed in fragments in the form of verses over a period extending approximately 23 years. During this period, the Prophet was resident in both Mecca and Medina.[123] The verses were generally revealed in response to the various questions posed to the Prophet and to meet the socio-religious needs, political trends, and legal requirements of the growing Muslim community.[124] In Mecca, where revelation commenced and where the Prophet was resident for almost thirteen years, we find that its primary aim was to entrench the doctrine of Unity and Sovereignty along with exclusive obedience and worship of God with the essentials of the Islāmic

[120] Ayoub M *The Qur'ān as Scripture* in *Modern Encyclopaedia of the Islāmic World* (1955) ed Esposito JL 387-393. See also Wan Khairul Aiman Wan Mokhtar & Wan Mohd Khairul Firdaus Wan Khairuldin *et al* 'The Authoritativeness of Sunnah in the Development of Islamic Worldview Research' *International Journal of Education and Research* (2013) 1.11 1-10.
[121] Poole SL *Arabic English Lexicon* (1877) 2502-2504. See also Ayoub M *The Qur'ān as Scripture* in *Modern Encyclopaedia of the Islamic World* (1955) ed Esposito J L 387-393.
[122] Tames R *Approaches to Islam* (1982) 30-33. See Calder quoted in Sami Zubaida *Law and Power in the Islāmic World* (2005) The words and deeds of the Prophet Muhammad his (Sunna), being an embodiment of the divine command and an expression of God's law (*shari 'a*), were preserved by the Companions of the Prophet, in the form of discrete anecdotes (ḥadīth). These were transmitted orally through the generations and became the source of juristic discussion (fiqh).
[123] Qattān M *Al Tashrī' wa al Fiqh fil Islām* (1989) 59-66. See also Watt Montgomery W *Muhammad at Mecca* 1979 8-9. See also Bashier Z *The Meccan Crucible* (1978).
[124] See Abdulla Saeed *Interpreting the Quran; Towards a Contemporary Approach* (2006) 26-41. Also see Navid Kermani *From Revelation to Interpretation: Nasr Hamid Abu Zayd and the Literary Study of The Qur'an, Modern Muslim Intellectuals and the Qur'an* (2004) 92-169.

faith.[125] The characteristically short and concise Meccan verses first established the ideological foundation of Islām and largely elaborated its theological concerns. Along with the devotional matters, Meccan revelation is also characterized by its observational nature supported by logical arguments, directing the attention of humankind to the phenomena of nature by drawing examples from the immediate environment.[126]

Closer observation also reveals a very significant feature in that Meccan revelation is also almost devoid of detailed legislation, primarily (as previously stated) because of its preoccupation with matters of worship and with entrenching the fundamentals of Islām. Because Islām was in its infant stages and because Muslims had not yet founded a formal state and were also numerically insignificant, there was no need for detailed legislation concerning state affairs and constitutionalism. During this formal period, the principals and foundations of faith were entrenched in the minds and hearts of the Islāmic nation.[127]

The second and final phase of revelation commenced with the migration of the Prophet from Mecca to Medina, or Yathrib as it was then called. Here the Prophet was resident for approximately ten years (622-632).[128] It was here in Medina where the Prophet

[125] See al Suyūti J *al Itqān fī 'ulūm al Qur'ān* (1991). See also Toshihiko Izutsu, *God and Man in the Quran: Semantics of the Quranic Weltanschauung* (2008).

[126] This is a very common style of the concluding chapter thirty of the Qur'ān. Its verses are short, with strong and striking language. Its concern for nature and aspects of the environment whose care and respect is often taken for granted by humankind, is described as a trust. In order to explain the trust in Islāmic perspective, one has to be aware that one's exercise of power and harnessing of nature on earth is allowed only on condition that it be according to God's laws. According to Islāmic criminal law a harm, injury, wrong or crime should not be committed against any creature. This is regardless of the nature of such a creature, whether human, animal or otherwise. More significantly, according to Islāmic law, when there is an injustice or crime against another creature, one not only has to try to repair the damage by compensation to the victim of one's violation of the right which had been taken away from him, but one also has to beg for the forgiveness of Allah. On the basis of these rules, activities against animals and the natural environment are crimes against one's immediate victim, and are also considered a crime against God, since the conduct in question constitutes a violation of Divine prescriptions. In this regard Muslim jurists maintain that conservation of the environment is one of the rights of Allah for which humankind is responsible and answerable. Muslim armies were also ordered by the Prophet not to destroy crops and other livestock. It was strictly forbidden. See Qattān M *Legislation and Jurisprudence in Islām* (1989) 58-63.

[127] Kamāli M H *Principles of Islāmic Jurisprudence* (1989) 20-25.

[128] Qattān M *Legislation and Jurisprudence in Islām* (1989) 60-70. The migration from Mecca to Medina occurred in 622 CE and is considered a turning point in the nature and direction of the early Muslim community. With the migration, the Muslim community transformed from being a purely moral and spiritual community into a political one. It is in the context of this transformation that the Constitution of Medina was drafted and that it gains its significance. G.S. Hodgson, *The Venture of Islam: Conscience and History in a World Civilization* (1977) 172-74.

became a ruling sovereign and Muslims under his leadership could really consolidate themselves and proselytize with relative ease. The prevailing atmosphere, the cordiality of the people of Medina (Anṣār) and to a large extent the absence of persecution provided the impetus and animated an Islāmic state.[129] It was at this stage that the bulk of legislative content of the Qur'ān, including its complex system of family law, its criminal laws, law of evidence, commercial and international law, was gradually revealed as required by social exigencies.[130] This was due to a number of factors, such as the encounter of Muslims with people of other faiths, namely, the Jews and Christians, some of whom were resident in Medina. This inevitably gave rise to political, social and legal implications to which the scripture had to respond. Here, the type of response given by the Qur'ān leads one to incline to the view that Islāmic law certainly viewed both religious and legal pluralism favourably.[131] In other words, the notion of pluralism had already taken root in Medina where the bulk of its legislative content was revealed.[132]

According to the Qur'ānic pronouncements, Islām considers religious pluralism quite central to its system of beliefs. There are emphatic statements to this effect. For Muslims, it is the axial text of the Qur'ān in which God reminds humankind that it is He who has created the diversity of languages and colours of humanity (30:23) and the diversity in all His creation (5:27-28). It is God who created humankind, male and

[129] See Umarī A D *Madīnan Society at the Time of the Prophet* (1991) 43-62. See also Sardar Z *Muhammad: Aspects of His Biography* (1978) 23. The significance of Muhammad's emigration from an Islamic perspective evidences a major role in Muhammad's mission, both as the prophet of Islam, as well as a spiritual and political guide. By way of significance, Firstly, the Hijri calendar was eventually inaugurated in accordance to Muhammad's emigration (13th September 622 AD/1st Rabī' al Awwal) by the second caliph of Sunni Islam, 'Umar ibn al-Khaṭṭāb (c. 584 – 644 CE), about some 17 years later. Secondly, the (migration) hijrah played a conclusive role in consolidating the unity of the nascent and infant community of Muslims, both in terms of faith and physical exodus to a new destination. Thirdly, the most significant one, is that the hijrah moved the center stage of events in the early history of Islam, at a distance of 270 km north from Mecca. Fourthly, for the foremost supporters of Muhammad at Mecca, this event became a vital test of devotion to Islam to forsake family and loved ones, and to encounter trials and tribulations in preserving one's life and faith (īmān). Moreover, the emigration institutionalised three vital facets of life: political, social and economic. Nonetheless, the aforementioned significances of hijrah in the prophetic mission are not in short supply only to the Muslim community, as suggested by Ramadan (2007), the hijrah transformed the wider Arabian Peninsula, both politically and socially. Also, the exodus became one of the primary factors of transition for the religion of Islam.

[130] Schacht J *An Introduction to Islāmic Law* (1986) 1. See also Coulson N J A *History of Islamic law* (1990) 9-20. See also Qattān M *Legislation and Jurisprudence in Islām* (1989) 10-25.

[131] M Hāshim Kamāli "Diversity and Pluralism: An Islāmic Perspective." Institute for Advanced Islāmic Studies Journal (2009) 1-28. See also al Qur'ān 13:49 "O mankind! Behold, We have created you into nations and tribes so that you might come to know one another. Verily the most noble of you in the sight of God is one who is the most deeply conscious of God".

[132] See al Qur'ān 30:22

female, and created nations and tribes in order that they might know each other (49:13). We find for instance (5:48) the verse reads as follows: “Unto every one of you We have appointed a different law and way of life. And if Allah had so willed, He could surely have made you all one single community, but (He willed it otherwise) in order to test you by means of what He has given you. Vie, then, with one another in doing good works! Unto Allah you all must return; and then He will make you truly understand all that on which you were wont to differ.” This is a very seminal statement in favour of religious and legal pluralism. Many classical, as well as modern commentators, have commented on this significant verse. The most significant and operative part of this verse is "Unto every one of you have We appointed a (different) law and way of life”. The term “every one of you” obviously denotes different communities, whether cultural or religious.[133] God has blessed us with pluralism as it adds richness and variety to life. Each community has its own unique way of life, its own customs, culture, law and literature, art and architecture. But these laws, or way of life should be such as to ensure growth and enriching of life, howsoever different and unique they might be. Allah does not want to impose one law on all. He created communities rather than a community.[134]

2.3.2 Qur‘ānic Legislation

In total, the Qur‘ān is estimated to contain approximately 6219 verses of which it is stated that only about 500-600 deal with legal subject matter and that also in a rather broad sense.[135] The bulk of the content of the Qur‘ān, it is noted, is generally of a religious and moral character from which it derives its primary and predominant concern.[136] “The basic *élan* of the Qur‘ān is moral, with an emphasis on monotheism as well as on social justice”.[137]Alluding to the same issue and while discussing the Qur‘ān as a primary source of law, Dr Iqbāl observes the following, “The Qur‘ān,

[133] See also Mahmoud Ayoub *Contemporary approaches to the Qurān and Sunna* (2016) 3-39.
[134] Seyed Hossein Nasr, “Islam’s Attitude Toward Other Religions in History”, in: Muhammad Suheyl Umar (ed.), Towards a Muslim Theology of Other Religions in a Post-Prophetic Age (2008), 133–4. See also Sayed Hoosain Nasr available at https://journals.sagepub.com/doi/pdf/10.1177/0096340215599785 (accessed on 30 September 2019).
[135] Coulson NJ *A History of Islāmic Law*(1964) 12. See also Vessey-Fitzgerald S G “Nature and Sources of the Shari’a “in Khāddūri and Liebesny H J eds *Law in the Middle East* (1955) 85.
[136] Rahmān, F Islām (1979) See also Hasan A *The Early Development of Islāmic jurisprudence* (1988) 43.
[137] Rahmān, F *Islām* (1979). See also Robinson N *Discovering the Qur'an, A contemporary approach to a veiled text* (1996) 7-17.

however, is not a legal code. Its main purpose….. is to awaken in humankind the higher consciousness of its relation with God and the universe".[138] Coulson and Fitzgerald, along with a number of classical and contemporary scholars such as Fayzee, support this view.

Whilst there is no doubt that the basic *elán* of the Qur'ān is principally of a religious and moral character, this does not preclude the Qur'ān's concern with legal matters. This is evident from the meticulous and explicit provisions relating to personal law issues, which is enumerated in approximately seventy verses and dealing, inter alia, with marriage, divorce, maintenance, the waiting period ('iddah), custody, inheritance and bequests.[139] There are also detailed provisions pertaining to penalties for crimes such as murder, adultery, marriage and divorce.[140] Though there is a difference of opinion amongst jurists concerning the quantum of legal verses (āyāt al ahkām), it does not seem to be a contentious issue. The main dispute seems to revolve around the Qur'ānic approach to legislation and the nature of legislation.[141]

It will be quite appropriate at this juncture to cursorily consider these issues before proceeding to the second primary source of Islāmic law, namely the Sunnah. A fundamental feature of Islāmic revelation is the element of graduality (tadrīj) or the piecemeal legislative enactment of Qur'ānic law.[142] Unlike previous revelations, the Qur'ānic law did not impose itself all at once, neither did it discard, or repeal all prevailing habits, customs and tribal laws that had existed in the environment in which

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[138] Iqbāl A M *The Reconstruction of Religious Thought in Islām* (1989)131. See also Baljon, *Modern Muslim Koran Interpretation* (1961) p. 21.
[139] Coulson NJ *A History of Islāmic Law* (1964) 9-20.
[140] Sherif F A *Guide to the Contents of the Qur'ān* (1995) 48, 213, 192. See also See also Kamāli M H *Principles of Islāmic Jurisprudence* (1989) 24-25.
[141] Manna al-Qattān *Mabāhith fi ulūm al-Qur'ān*, 1414/1994. pp. 329–33.
[142] The Qur'ānic provision concerning the ban on the consumption of alcohol is one such example of the style of legislation. It is neither too harsh nor too lenient. The consumption of alcohol was a widespread habit prior to the advent of Islām. The Qur'ān did not immediately impose a ban on its consumption but instead limited its consumption at first, and prohibited Muslims to pray whilst in a state of intoxication. The second stage they are warned concerning the effects of alcohol and gambling, "They ask you about alcohol and gambling, say to them, "In these there are great harm and also profit for the people, but the harm outweighs the profit". (2:219) Hereafter in the final stage, alcohol and gambling was completely prohibited in Islām on the grounds as the Qur'ān states, "They are works of the devil who wants to sow enmity and rancour amongst your ranks, so shun it completely". (5:90-91). See also Esposito J L *Women in Muslim Family law* (1982) 4. For a detailed discussion on this particular issue see For more, refer to Ibn Hishām, 'Abd al-Malik (d. 218/833), *al-Sīra al-Nabawīya*, (2nd ed.), 2:190–191, and in more detail in Ibn Kathīr, Ismā'īl ibn 'Umar (d. 774/1373), *al-Bidāya wa-al-Nihāya* (1988) (1st ed.), 3:127–128. 4:10.

it was revealed. Instead, the Qur'ān adopted a gradual process of legislative reform (tadrīj / tanjīm) by means of introduction, adaptation and finally abrogation.[143] In some instances the Qur'ānic law introduced completely novel legal concepts, at times it merely adapted ancient customs and laws to bring it in conformity with Islāmic ideals and principles.

In other instances, it completely discarded customs and laws that were repugnant to the policies and dictates of Islām. The reformative spirit of the Qur'ānic legislation also abrogated a considerable number of oppressive family laws and other practices that were prevalent amongst Arabs and which were inconsistent with Islām. Family law in, particular was an area that was almost completely overhauled.[144] The style, linguistic structure and Prophetic tradition is sufficient evidence of the liberative and reformative spirit of the Qur'ān.

Dr Iqbāl, the Pākistāni scholar amongst others, also favoured this view of the ad hoc nature of Qur'ānic legislation in that it was occasioned by specific events.[145] The view concerning the ad hoc nature of Qur'ānic legislation is still characterized by a perennial debate between orthodox scholars, who maintain that the legal provisions of the Qur'ān are sanctified. They therefore argue that the Qur'ānic provisions ought to be eternally followed. Scripture is interpreted on the basis of the letter of the law, and it is prohibited to go against the literal word of God. They tenaciously hold to the letter of the law. According to them, God had meant what he had said and he has said what he had meant.[146]

Reformist scholars, on the other hand, contend that the Qur'ān had not only generally improved the prevailing condition of society but, more particularly, it had reformed the existing status quo.[147] In this regard it had granted women virtually equal rights with

[143]Abdullah Saeed *Interpreting the Qur'ān Towards a Contemporary Approach* (2006) 88-100.
[144] Niaz Sha *Women, the Koran and International Human Rights Law* (2006) 27-69.
[145] See Rahmān F *Islām* (1979). Also Coulson NJ *A History of Islamic Law* (1964) 13. Also see Masud K *Islāmic Legal Philosophy* (1977) 206.
[146] Abdullah Saeed *Interpreting the Qur'ān: Towards a contemporary approach* (2006) 68-79. See also Ali, Amer. "A Brief Review of Classical and Modern Tafsir Trends and the Role of Modern Tafsir in Contemporary Islamic Thought." Australian Journal of Islamic Studies 3, no. 2 (2018): 39-52.
[147] See the tafsīr works of Muḥammad ʿAbduh, Sayyid Quṭb, and Muḥammad al-Ṭāhir ibn ʿĀshūr. Also see Abdulkader Tayob "Decolonizing the Study of Religions: Muslim Intellectuals and the enlightenment Project of Religious Studies" Journal for the Study of Religion" 31/2 (2018) 7-35.

men and entrenched dispute resolution processes and provisions in civil and criminal matters.[148] Some scholars have even claimed that the Qur'ān made women equal to men in all essential respects.[149] The alleged inequalities that existed were largely due to social custom that was adopted and absorbed into the corpus of Islāmic law. Much of these inequalities, it is asserted, were due to misperceptions of the purpose (Maqāsid) and original intent of the Qur'ānic provisions, along with restrictive interpretations by scholars or courts. It is also further asserted that the male-dominated fiqh discourse also provided the context and environment within which the Qur'ān was later interpreted.[150] There is yet another problem which has further compounded the application of Islāmic law, that is the popular perception concerning fiqh, which has elevated its status and confused it with the immutable moral law of the Qur'ān, i.e. the Sharī'a.[151]

2.3.3 The Sunnah (*imitatio Muḥammadi*)[152]

The Sunnah is the second most important source of law. The Prophet, who was commissioned to interpret the Qur'ānic text, constitutes the second most important source of Islāmic law.[153] His narratives, ḥadīth *(*qawli), that which he did (fi'li),

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[148] See Hibba Abugideiri "The renewed Woman of American Islam: Shifting Lenses of Gender Jihad" The Muslim World 91(2001) 1-18.

[149] The interpretations of all three of these modern exegetes evince a heightened gender-consciousness that is absent from the interpretations of pre-modern exegetes on the same verses.

[150] See for example Rahmān observes that Ṭabari in his Qur'ānic commentary provides us with about seventeen different accounts of the issue of polygyny, certainly somewhere there must have been a fundamental dislocation in this report and practice.

[151] "Muslim as well as non-Muslim authors very often refer to Islamic law as Shari'a law, which is not entirely accurate. As indicated previously, linguistically, the word sharī'a literally means the path to a water source, or fountainhead that quenches the thirst of living beings, or the way to goodness. Jurisprudentially, Shari'a is the revealed guidance of God, perfect, complete, incorruptible, and immutable. In this sense the Shari'a provides the ethical and moral norms of the Islamic legal system. Human beings must strive and struggle to realize the righteous path to the best of their abilities through a process of *fiqh* (understanding) which is human law, it is the human attempt to reach and fulfil the eternal law as it exists in God's mind. *Fiqh* is not eternal, immutable, or unchanging. By definition, *fiqh* is a human endeavour and therefore, subject to error. It is alterable as well as contingent and contextual". See Mas'ūd M K *Islāmic Legal Philosophy* (1984) 21-25.

[152] Muslims since the day of al-Shāfi'ī had agreed that hadith or the Prophetic tradition is recognized as revelation though not at par with al-Qur'an but has the legal authority equal to it (el-Khadūri, 1987: 109-16). There are many indicators in al-Qur'an indicating the importance of *Sunnah* as part of the revelation and as a complement to al-Qur'ān, (Qur'ān, 3:31; 3: 132; 4: 65; 4: 80; 16: 44; 24: 63; 33: 36;49: 1; 53: 3, 4; 59: 7,

[153] Siddīqī Z M *Hadīth Literature Its Origin, Development, Special Features and Criticism* (1961) 120-156. According to Islamic teachings, the Qur'an is the word of God and is divine in nature. See M Hashim Kamali, Principles of Islamic Jurisprudence (2003) 16. See also Mahmoud M. Ayoub, The Qur'an and Its Interpreters (1984). In contrast, the Sunnah, or practice of Prophet Muhammad, is considered divine insofar as it is inspired by God, although not in the same sense that the Qur'an is divine. See Quran 53:2-5 "Your companion has not erred and has not gone astray; nor does he speak

approved (taqrīri), and confirmed, largely supplement the Qur'ān and provide it with practical shape in the form of the Prophet.[154]

His example, (*imitatio Muḥammadī)* is the Sunnah, an example of excellence and perfection to be emulated by all Muslims.[155] His Sunnah became singularly and uniquely the way to be pursued by the Muslim nation *(ummah)* and provided a normative paradigm for Muslim behaviour.[156] The way in which the Prophet interpreted the Qur'ān and acted upon it became a source of law of Islām. In several instances, the relationship and centrality of Muḥammad in the Islāmic worldview is stated without any ambiguity in the Qur'ān where its status, its relationship and authority is well defined. No Muslim has ever denied or refused to accept, the Sunnah as a source of law.[157]

The symbiotic relationship of the Qur'ān and Sunnah[158] becomes further evident when we consider the etymological meaning of the term Sunnah. Classical lexicons indicate that the word was used with various shades and colours and that the term had been in vogue prior to the advent of Islām.[159] We find, for example, the term Sunnah has been used fairly extensively in pre-Islāmic poetry to describe anything that was smooth, which was well-fashioned and well- proportioned.[160] Reference is also made to the course along which water flowed or an expanse across which the wind blows with ease and efficacy. The etymological sense seems to have been extended later to

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from desire. It is just an inspiration with which he is inspired: one strong in power taught him."). Kamali defines the Sunnah as "all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved, plus all the reports which describe his physical attributes and character."

[154] Kamāli M H *Principles of Islāmic Jurisprudence* (1989) 55-109. See also Siddīqī Z M *Hadīth Literature Its Origin, Development, Special Features and Criticism* (1961) 120-156. See also Some definitions also include Prophet's *sifāt*, that is, his features or physical appearance. M. M. Al-Azamī, *Studies in Ḥadīth Methodology and Literature* (2002) 6.

[155] Hallaq W B *A History of Islāmic Legal Theories* (1997) 10-15.

[156] Muhammad Taqi Usmani *The authority of the Sunnah* (nd) 75-93.

[157] See Brill E J *First Encyclopaedia of Islam* (1987) eds Houtsma M Th Wensinck A. J Gibb H A.R 555-557. See also Q. 3:164, 62:2, 2:129, 3:32, 5:92, 47:33, 64:12, 4:69, 33:17, 41:80, 33:36, 72:23, 24:56.

[158] Thus, due to the nature of Qurʾānic content it was in need of Sunnah, that is, in need of both *Deutungsbeduerftigkeit* and of a practical manifestation *in actu*. This organic link between the Message and the Messenger is captured best by often-repeated Qurʾānic phrase exhorting the believers to "Obey God *and* the Prophet".

[159]Lane EW *Arabic English Lexicon* Vol 1. See also Esposito J L *Modern Oxford Encyclopaedia of the Modern Islamic world* (1995) Vol 4 136-139. See also Usmani JMT *The Authority of the Sunnah* (1990) 6-9. See also Ahmed H *The Early Development of Islāmic Jurisprudence* (1988) 85-115.

[160] See Duderija A Evolution in the Concept of Sunnah during the First Four Generations of "Muslims in Relation to the Development of the Concept of an authentic Ḥadīth as Based on Recent Western scholarship" Arab Law Quarterly 26 (2012) 393-437.

human behaviour, in the sense of the established "way or course" of human conduct.[161] Sunnah then came to signify a manner of behaviour that a person could pursue without difficulty. An examination of classical lexicons reveal that in early Islām, the word Sunnah was used in a rather broad sense and was not restricted to the practice of the Prophet, but included in its ambit precedent, or established practice and customs of previous communities.[162] It was only towards the end of the second century when the term was exclusively used to denote the normative practice of the Prophet Muḥammad.[163]Along with the Sunnah, the term ḥadīth is also very closely related to Islāmic law. In its literal sense, it means "new", a "communication", "information", or a "statement". In the Qur'ān the word is also used to denote a tale or a story or a report relating to the historical past.[164]

As a concept, it is used in Islāmic law to denote a narrative, or statement of the Prophet and includes his judgments, rulings, and the way he conducted himself.[165] It also includes the exposition and pronouncements of the meaning of the Qur'ān by the Prophet. *Hadīth* is the medium through which the Sunnah is conveyed. Sunnah is seen as a much wider concept which embraces within its scope *ḥadīth*, actions and practices of the Prophet.[166]

2.3.4 The Locus and Nature of Sunnah and *Hadīth* in Islāmic Law

The position of the Prophet as expositor of the Qur'ān and the acceptance of ḥadīth as an integral source of law is advocated by the Qur'ān itself as previously indicated. All mentioned verses enjoin upon Muslims to accept the Sunnah of the Prophet and

[161]See M Hashim Kamali, Principles of Islamic Jurisprudence (2009) 44.
[162] Hasan A *The Early Development of Islāmic Jurisprudence* (1988) 85-114.
[163] See footnote 70. See also Yasin Dutton, *The Origins of Islamic Law: The Qur'ān, the Muwatta and Madinan 'Amal* (1999) 164–165.
[164] Q. 79:15 "Has there come to you the story / narration, or report of Mūsā." Also see Penrice J A *Dictionary and Glossary of the Koran* (1971) 32-33.
[165] "*Hadīth* may be referred to as all the pertinent information attributed to the Prophet. It is the recording in writing of everything that he is supposed to have said or done. His opinions, his reactions to events, the way in which he justified his decisions had to be put in writing so that they could be drawn upon and referred to later in order to distinguish what is right from what is wrong, whether it be with regard to the practice of power or something else… The ḥadīth sayings are in fact a veritable panorama of daily life in the seventh century, a vivid panorama, extremely varied because there are various versions of the same event". See Mernissi F *Women and Islam, An Historical and Theological Enquiry* tr Mary Jo Lakeland (1991) 34–5. See also Maghribi H *Introduction to the study of Hadīth* (1994).
[166] Hasan A *The Early Development of Islāmic Jurisprudence* (1988) 85-114. See also Doi Abdur Rahmān Introduction *to the Hadith* (1991)11-16.

his sayings since his guidance is inspired by Allah and as such is regarded as binding as the Qur'ān itself.[167] The question that arises in this regard is whether the entire corpus of the Sunnah is religiously significant and legislatively binding? Is there a distinction between his personal preferences as a human being and that which he has legislated in his capacity as a Messenger of God?[168] Early scholars have adopted various methodologies for the classification of the Sunnah, which amongst others depended upon the purpose and perspective of the particular scholar.[169] The strength of the chain of narrators, the integrity and credibility of the narrators as well as the academic acumen of the narrators were amongst factors considered by various scholars.[170]

The entire corpus of the Sunnah submits generally to the following bifurcation, namely the legal Sunnah (al tashrī'i), also referred to as ḥadīth al ahkām and secondly, non-legal or historical Sunnah (ghayr tashri'ī). The latter, namely tashrī'i, consist primarily of the Prophet's conduct insofar as it is intended to expound the Sharī'a whether, by way of word, action, or perhaps a tacit approval. The Sunnah al tashrī'i or the legal Sunnah which the Prophet had introduced in his capacity as messenger is considered to be legally binding.

To this extent, the Prophet may have clarified, or expounded upon a Qur'ānic injunction. Likewise, any matter of devotional worship performed by the Prophet is also considered to be generally binding irrespective of time and social exigencies. A number of scholars have, however, cautioned against the indiscriminate use of certain types of tradition as a source of law.

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[167] The Qur'ān states, "if you love Allah follow me" (3: 31). In another verse," We have revealed to you the Reminder that you may make clear to humankind that which has been revealed to them." (16:44). Furthermore, it also states "What the Messenger gives you accept, and what he forbids you avoid" (59:7).

[168] Hallaq W *The Origins and Evolution of Islamic Law*, (2005) 32-33.

[169] The ambiguity regarding what Sunnah is and who / what the sources of Sunnah are existed even during the second century and is clearly demonstrated in a well-known anecdote between Zuhri (51-24 AH) and Salih b. Kaisan when discussing what might and might not be considered Sunnah. It is reproduced below. Salih says: I met with Zuhri while we were both seeking knowledge. Thus we said, let us write down the Sunnah. We wrote down what was related from the Prophet. Then he [Zuhri] said: Let us write down what is related on the authority of Companions for it is also Sunnah. I told him that it is not Sunnah, therefore, we should not write it down. Zuhri wrote it down, and I did not write it. He attained success, while I met with failure; cited in Al-Azami p. 84.

[170] Maghribi H *Introduction to the study of Hadīth* (1994). See also Azami H R (1989) *The Sunnah in Islam* 29-39. See also Azami M (1977) *Rules for acceptance and Transmission in The Place of Hadith in Islam* 19-24.

Accordingly, it is stated that:

> "We must distinguish traditions of purely legal import from those which are of non-legal character. With regard to the former, there arises a very important question as to how far they embody the pre-Islāmic usages of Arabia which in some places were left intact, and in others modified by the Prophet".[171]

On the authority of Shā Walīullah, Iqbāl further asserts that the traditions in which the Prophet merely approved expressly, or tacitly, or confirmed in toto, or in partial modification thereof and the local custom of Arabia is specific and contextual and not intended for universal application, "The Sharī'a values (ahkām) resulting from this application (e.g. rules relating to penalties for crimes) are in a sense specific to that people, and since their observance is not an end in itself they cannot be strictly enforced in the case of future generations".[172]

Apart from his role as Prophet, he also had to act as head of the constitutional state and as such had to deal with matters of public and national interest. In his capacity as head of state, his conduct was beyond reproach, not only to his companions but also to his adversaries. His general conduct in this regard though binding, did not constitute general law. It is binding specifically upon those who exercise this type of authority or those who wield such authority as agents. In this category, the four Caliphal authorities are generally cited, or the appointed judges or qāḍis. Individuals are not permitted to act of their own accord. Statements which emanated from the Prophet in his capacity as head of state and judge (qāḍi) are not intended for individuals to act upon, as they do not constitute general law.[173] This type of sunnah is viewed as being specifically

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[171] Iqbāl M *Reconstruction of Religious Thought in Islām* (1989) 136.

[172] Shāh Walī Allāh, the Indian scholar 1114-1176 /1703-1762 "adopted a method of interpreting the traditions of the Prophet in which he has shown an evolutionary process in the lives of all Prophets from Ibrāhīm (Abraham) up to Muhammad, in that they received revelation gradually and commensurate with the onward progress of human civilization. He looked upon the teachings of all Prophets as a continuous commentary on the ever-unfolding process of revealed guidance." Muhammad M "Shā Walī Allāh's concept of Sharī'a" Ahmad K and Ansāri Z I eds *Islamic Perspectives* (1979) 343-358. See also Muztar AD *Sha Wali Allah A Saint Scholar of Muslim India* (1979).

[173] Kamāli MH *Principles of Islāmic jurisprudence* (1989) 63-72.

intended for the above categories of authority. Other people would require the sanction of a lawful, or judicial authority before they may act upon such Sunnah. Thus, where one party has a claim against the other, and even though there may exist a Prophetic precedent in favour of the former party, such party must obtain a judicial decree, or order and follow proper procedure to enforce such claim.

The legal Sunnah (tashrī') raises a further question relating to the judgments of the Prophet. To what extent does it allow the judicial authority to act? In other words, is the precedent binding to the extent that the judicial authority may not deviate therefrom? The question raised above is whether the Prophetic statement amounts to a general, or uniform law? Is it restricted to a particular matter, and finally an obvious corollary of the first question, that is, what is the scope and extent of its enforcement? in other words, is its enforcement restricted to judicial authority?[174]

These are some of the questions concerning which lawyers have had divergent views and approaches. As Islām developed, so did its law. It is a completely natural phenomenon. Muslim intellectual activity may cease or diminish in quantity, quality, or its values may change, but the Sharī'a process continues. This development is patent throughout Islāmic legal history where the Companions (Saḥābah) resorted to various approaches and adopted various administrative devices in developing the law and interpreting Scripture and extra-scriptural sources. To this extent, two subsidiary

[174] See for an interesting study in this regard El-Awa M S 'Approaches to Shari'a: A Response to Coulson N J's A History of Islamic Law', (1991) 2 *Journal of Islamic Studies* 143, at 146.

sources were developed as internal mechanisms, namely Ījmā'[175] and Qiyās.[176] Although classical as well as contemporary scholars have proffered different views concerning its application and validity, these two sources are widely employed in jurisdictions where aspects of Islāmic law exist and operate in constitutional dispensations and even in quasi-religious tribunals where Islāmic law is applied and enforced.

Conclusion

On the basis of the information that was explored, it becomes clear that Islāmic law has maintained a marked distinction between the terms Sharī'a and fiqh. Sharī'a is a divine and heavenly process which emanates from the sovereign and sole legislator, Allah. There is thus no human intervention except for Muḥammad who was the recipient and courier. Fiqh, on the other hand, is arrived at after a process of interpretation of the Divine will (Qur'ān). It involves an element of probabilities due to its derivative nature. Thus, due to its probable nature, it can be substituted by another probable character. This implies that fiqh is fluid and in a state of continuous flux. It is bound to inspire divergent opinions.

[175] Ijmā' is the third secondary source of *Sharī'a* and is defined as a consensus between scholars regarding specific issues. Historically, these problems emerged after the death of the Prophet, in which their solutions were neither stated directly in the Qur'ān or Sunnah. The principal of Ijmā' is that all Islāmic scholars irrespective of their nationality, race or school of thought must agree on a solution to a problem. Otherwise, disputes would have to continue until a consensus is achieved. The rule of collective consensus is derived from the Prophetic hadith that states narrated by Tirmidhi (2167): "*My followers will never agree upon an error or what is wrong*"). The solution, more importantly, must not contradict the principles of the Qur'ān and Sunnah. Finally, once the solution is agreed upon, it automatically becomes the law for all Muslims. For instance, in the days of the Prophet there was only one call (adhān) for the Friday congregational prayer. However, as the population of Madina grew over time, noise levels did as well, making it difficult for the people in the market to hear the adhān. Therefore, the third Caliph Uthmān Ibn Affān negotiated with the other companions of the Prophet to include a second adhān, and that it be called in the middle of the market. Through Ijmā', the request became the law. Therefore, Ijmā' seems to benefit Muslims by allowing Islāmic law to be contextualized according to the time and circumstances one may find him or herself in. This is to be used alongside the primary sources of *Sharī'a*, the Qur'ān and Sunnah.

[176] Qiyās is the fourth secondary source of *Sharī'a* and is linguistically defined as analogical deduction. Scholars use Qiyās when a problem occurs that is not addressed either in the Qurān, Sunnah or Ijmāin this instance, scholars find a law previously executed in any of the three sources and contextualize that reasoning, tailoring it to the problem at hand. For instance, cannabis and cocaine were not used in the Prophet's time nor, his companion's therefore, there was no law in place against drugs. However, through Qiyās scholars have made recreational and designer drugs illegal in accordance to the hadith against intoxicants where the Prophet is said, *"Whatever intoxicates in a greater quantity is also unlawful in its smaller quantity".*

It is thus not construed as the sole monopoly of a particular person, group or organization. Perfect knowledge rests with God alone. The Qurʻān and Sunnah serve as the basis of all law and morality in Islām. All Muslims tenaciously hold fast to the view that the Qurʻān is the word of God and deem the Prophet to be the recipient of this spoken word.

The Qurʻānic foundations and the Prophetic approach to legislation were shown to be deeply rooted in a reformative and liberationist movement. This is evidenced by the gradual revelation of Qurʻānic legislation. Concepts such as efficacy, ease, peace, justice and forgiveness were shown to be inherent elements and characteristics of the Sharīʼa. These notions of efficacy, ease and peace also formed the basis of Prophetic interpretation of Scripture as well as its application throughout his life. With the demise of the Prophet and the inauguration of the Caliphal authority, judicial dynamism and the movement of law continued unabated. New mechanisms and tools of interpretation were at times introduced and existing ones further developed. The Companions of the Prophet adopted a rational approach toward textual materials i.e. the Qurʻān and the Sunnah. Their understanding and interpretation of the texts were not confined to the meaning of words alone.

Against the backdrop of this conclusion, the next chapter will proceed to explore concepts such as efficacy, ease, peace and forgiveness with specific focus on ṣulḥ as a dispute resolution mechanisms and its efficacy and utility in Islām as well as its emergence and practice prior to the Prophetic era along with a cursorily glance of its development beyond the classical period of Islām into the colonial and post-colonial era.

CHAPTER THREE

QURĀNIC WELTANSHAUNG OF DISPUTE RESOLUTION: AN ENQUIRY INTO ITS ORIGIN, DEVELOPMENT AND APPLICATION.

3.1 INTRODUCTION

This chapter builds on the previous chapter by discussing the Islāmic notion of reconciliation referred to as ṣulḥ in Arabic and various classical Arabic sources. It posits the view, that Islām has within its sources i.e. the textual (Qurʻān) and extra-textual (Sunna) a robust and rich tradition of support for notions of dispute resolution mechanisms and notions of peace, nonviolence, peaceful co-existence as well as justice.[177] I explore the Islāmic origins of Alternative Dispute Resolution (ADR) and peace practices, as well as the various mechanisms of dispute resolution as developed by the various schools of Islāmic law as encapsulated in these classical sources.

Islām has often been depicted in the media as a violent faith with absolute disregard for human rights and peace. A religion of bombers, billionaires and belly dancers. It is often stated that there exists a conflict between Muslim and non-Muslim societies and that Islāmic teachings promote violence against people of other faiths.[178] Some scholars on the other hand have however argued that Islām has much to offer with regards to its teachings of peace and reconciliation, and instead of seeing the world

[177] The principle of resolving disputes amicably can be found in several places in the Qur'ān. See Qur'ān al-Baqarah (the Cow): 178, 182, 224, 228: al-Nisā (The Women): 35, 114, 128, 135, al-Anfāl (the Spoils): 1, al-Shu'rā (The Poets): 40, al-Hujurāt (the Chambers): 9. Also see Quadir Wani G "Understanding Peace and Nonviolence in Islam with Maulānā Wahīduddīn Khān" *Journal of Islamic thought and civilsation* (2017) vol 7 2 1-10.

[178] The view that Islām is a global driver of conflict can easily be dispelled by having recourse to the primary and secondary sources of Islāmic law. Those who propound this view rely and often quote extensively from the Qur'ān where the word Jihād is quoted out of context and referred to very commonly as a holy war waged against infidels. "It portrays an image of ferocity, religious dogmatic frenzies, and zealot fanaticism. It is understood as an Islamic religious policy of offensive war against non-believers that inspires killing of non-Muslims in the name of God. See Moniruzzaman 'Jihad and Terrorism An Alternative Explanation' (2008) 10 *Journal of Religion and Politics* 1 10. See also Anna Murphy *The Tyranny of the Tabloids: Identifying methods of exclusion in press coverage of British Muslims* (Thesis submitted in partial fulfilment of the requirements for the degree of Bachelor of Arts in the Middle East Studies program, 2019) 24. See also Stefano Bonino 'Violent and Non-Violent Political Islam in a Global Context' (2018) 16 *Political Studies Review* 46 59. Also Funk NC & Said A 'Islam and Peacemaking in the Middle East' (2009) 1-20.

through a monolithic lens of conflict between different religions, cultures, or civilizations, we should view it as one of common humanity and explore the commonalities instead of the differences.[179]

This chapter further explores classical Islāmic sources to demonstrate that there exists a plethora of instructions and lessons on peace and peace-making. Islāmic scripture i.e. textual (Qur'ānic) and extra-textual (Sunna) teachings provide copious basis of values, and policies that promote the harmonious, peaceful and nonviolent resolution of conflict.[180] Likewise, alertness to the message of the Qur'ān, the Prophetic tradition, is fundamental and indispensable for understanding the Islāmic dispute resolution paradigm which has hitherto been scantly explored. A study of its trajectory indicates that research of the topic only gained momentum in the past 15 years. In order to comprehend the theological background of nonviolence in Islām, it is crucial and necessary to understand how peace and conciliation (ṣulḥ) is conceptualized in Islāmic teachings, and also what other mechanisms are provided. Many allusions to peace e.g. (salām, silm, ṣulḥ, taḥkīm) in the Qur'ān suggest that peace is indeed a compelling, cogent and overriding theme in the Islāmic worldview and therefore any disturbance or, disruption of peace and harmony is viewed as abhorrent.[181] In the Islāmic tradition, conflict is recognised as a normal social phenomenon, but albeit, a deviation from our (fitra) i.e. our innate and essential disposition of goodness. The Qur'ān mentions differences between people as part of God's design for humanity, with the preference being to settle and reconcile differences where they are challenging and problematic.[182] The term "peace" in the Qurān suggest that the Islāmic

[179] See footnote 1. Also see Sinensky J *Unlocking a Narrative: Stories of Islam and Peacebuilding and Conflict Transformation* (Thesis submitted in partial fulfilment for the degree of Masters of Arts, Vermont University, 2015) 2-64. See Abu- Nimer M 'A Frame Work for Non-violence and peace building in Islam' Journal of Law and Religion' (2000) 2-45. Also see Funk NC & Said A 'Islam and Peacemaking in the Middle East' (2009) 1-20.

[180] March AF & Modirzadeh NK 'Ambivalent Universalism? Jus ad Bellum in Modern Islamic Legal Discourse' (2013) *The European Journal of International Law* 24 1.

[181] See Abu-Nimer M 'A Framework for Nonviolence and Peacebuilding in Islam' (2001) Journal *of Law and Religion* 217-265.

[182] The Quran places emphasis on the oneness of human beings. It introduces the idea of common human origin and ancestry at four different places and says that humans have their origin in a single cell or soul. *"O mankind! Reverence your Guardian-Lord, who created you from a single soul, created, of like nature, the mate, and from them twain scattered (like seeds) countless men and women; - reverence Allah, through whom ye demand your mutual (rights), and (reverence) the wombs (That bore you): for Allah ever watches over you."* Q 4:1. Also see *"It is He Who hath produced you from a single soul: here is a place of sojourn and a place of departure: We detail Our signs for people who understand."* Q 6:98.

concept of peace is a state of safety, or security, which includes being at peace with oneself, with fellow human beings, with nature and God. Viewed from the perspective of the Qurānic verses, scholars associate peace with a wide variety and range of concepts extending and including justice, mercy and forgiveness. The purport and import also refer to the overall well-being and human development, salvation, perfection and harmony.[183]This understanding of the Qur'ānic concept of peace and justice is similar to the way peace is defined by the scholars of nonviolence in other religious traditions. Justice is seen to be an essential feature of the Islāmic discourse of peace, as the Qurān clearly states that the aim of religion is to convey a sense of justice, in the absence of which a positive state of peace cannot exist. This is evident in Qurānic verses such as: *"We sent aforetime Our messengers with clear signs and sent down with them the Book and the Balance (of right and wrong), that humankind may stand forth in justice"*[184]

The Islāmic understanding of peace also alludes to the fact that justice is the dominant code and value judgment of religion.[185] Consequently, tyranny, which is a system that perpetuates injustice, is viewed as one of the greatest abominations that must be shunned. *"O ye who believe! Stand firmly for justice as witnesses to Allah to even as against yourselves, your parents, your kin, and whether it be (against) the rich and poor.*[186] A closer look at Qurānic élan and Prophetic discourse indicates that there is a clearly pronounced and articulated preference in Islām for nonviolence over violence and forgiveness ('afwu) over retribution.[187]

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[183] Ahmad Malik A Din Sheikh M *et al* 'Role of Islam towards Peace and Progress' (2012) *Research Journal of Humanities and Social Sciences* 443-449.

[184] Q 57:25. See also Pal A *Islam means Peace* (2011) 5.

[185] Khadduri M 'The Islamic conception of justice' (1984) 6. See also Ibn Manṭhūr, Lisān al-'Arab, (1968) 15 266-72.

[186] Q 4:135. The Prophet of Islām declared: "There are seven categories of people whom God will shelter under His shade on the Day when there will be no shade except His. One is the just leader. " S Muslim). The Qur'ān considers justice to be a supreme virtue. It is a basic objective of Islām to the degree that it stands next in order of priority to belief in God's exclusive right to worship (Tawḥīd) and the truth of Muḥammad's prophethood. God declares in the Qurān: "God commands justice and fair dealing..." (Qur'ān 16:90).

[187] The general character of God is portrayed as forgiving, and angels are seen as praying for forgiveness of all beings on earth Q42:5. Forgiveness combined with compensation for injury is seen to be a preferable alternative to retaliation, even where retaliation is permitted. See also Hasan S 'Islamic Concept of Social Justice: Its Possible Contribution to Ensuring Harmony and Peaceful Coexistence in a Globalised World' *Macquarie Law Journal* (2007) 7 1-17. See also Harvey R *The Qur'an and the Just Society* (2019)

This chapter, therefore, builds on the previous chapter, enunciates and explores the jurisprudential norms and judicial mechanisms, its efficacy, development and utility in Islāmic law of key notions of ṣulḥ as a mechanisms to promote peace and avoid conflict, or even transform conflict.

3.2 DISPUTE RESOLUTION PRIOR TO THE PROPHETIC ERA

The normative *grundnorm* and foundations of dispute resolution in Islām differ noticeably from the principles underpinning the Western dispute resolution paradigm in terms of approaches and processes. Association in the Muslim world are multi-faceted and administered by the general principles of law, it is also part of a complex web of loyalty, friendship, and interpersonal relations that support a particular way of life. “Due process of law, sanctity of contract, and free enterprise based on purely individual rights never became the hallowed trinities that they became in the West”.[188] Whilst Westerners know the primacy of law, the Arabs, on the other hand, know the primacy of interpersonal relationships. Associations amongst the Arabs are thus relational in the same sense that western relationships are legal.[189] Thus, leading to the paradox that the West have conceptions of discreet notions of contract, whereas the Arabs have generational and fluid notions of the same. The safeguarding and preservation of peaceful and passive relationships along with the restoration of harmony is a duty on all members of the group and family as well as the third-party intervener whether, judge (a qāḍi), arbitrator a (ḥakam), a conciliator or (wasṭa) an intercessor.[190] Therefore, collective Interests and amicable settlement (ṣulḥ) are considered the core and kernel of any dispute resolution system in order to maintain the family ties, brotherhood, and the overall well-being of the community, tribe or clan.

The Middle East, in essence, is predisposed and influenced by the textual language and interpretation of both the Qur’ān (textual) and the Sunna (extra-textual) as well as what we have referred to in the previous chapter, by secondary sources of Islamic law and also adāt (prevailing custom). This is because Islām is not just a religion (dīn), it

[188] Al-Ramahi A ‘Ṣulḥ: A Crucial Part of Islamic Arbitration’ (2008) *Law Society and Economy Working Papers* 1-24.
[189] Pely D & Luzon G ‘The Muslim Arab Sulḥa and The Restorative Justice Model Same Purpose, Different Approach’ (2018) *Cardozo Journal of Conflict Resolution* 18 289.
[190] See Armstrong K *Muhammad a Prophet of our time* (2006) 41-75. See also Phillip K Hitti *History of the Arabs From the Earliest Times to the Present* (1989) 67-80. Also see Robert G Hoyland *Arabia and the Arabs from the Bronze Age to the Present* (2002) 113-175.

is a way of life. It encompasses theology, scripture, politics, morality, law, justice, art and architecture, names and nomenclatures, and all other aspects of life connecting the beliefs, thoughts or actions of humankind. For the Muslim, religion thus, not only dominates the life of a faithful, but religion is its life.[191]

Pre and post Islām, in the Arabian Peninsula was inhabited by tribes whose lineage formed a shared ancestor.[192] The individual owed its commitment and allegiance to the tribe as a whole, and it was from the tribe that protection and security was sought. The tribe was bound by certain unwritten rules and norms which evolved alongside its historical growth as an expression and manifestation of its spirit and character. No individual could interfere or had the jurisdictive and legislative power to hinder and obstruct tribal rules and norms.[193] There also appear to have been an absence of official mechanisms and organization of law. Enforcement of the law was essentially the obligation of the private individual who had suffered injury. Tribal justice was therefore, administered by the chieftains and elders of the tribe in a manner and form adapted to their way of life.[194] This namely consisted of practices such as arbitration, conciliation and intercession which was resorted to extensively and almost exclusively. Tribal law was founded upon two simple principles, firstly, the principle of communal responsibility, and secondly, the principle of reprisal or compensation. The objective of tribal law was not to punish the offender, but to restore the stability and dignity amongst the offending and the offended families and tribes.[195]

The Dispute Resolution processes currently in vogue predated Islām. Within the tribal Arab society, chieftains (shaykhs), soothsayers and healers (kuḥān), powerful and

[191] Islam postulates a worldview that does not admit of the bifurcation between the spiritual and mundane. Its domain extends the entire gamut of life of the Muslim. It regulates the life of the individual as well as its relation with the social order so that the kingdom of God may be established on earth. See Mawdūdi A A The Islāmic way of life. (1996) 6. There is a saying oft quoted by proselytisers stating that religion is not what one formally or ritualistically practices but how one deals with others. It is therefore, not sufficient to be pious without performing deeds which demonstrate one's beliefs. It is reported that the Prophet entered a mosque and saw at prayer an old man with a long white beard. He was told that the man was in the mosque all day long, worshipping and dispensing the words of God to others. The Prophet then asked how he earned his living and was told that a merchant, not known for his piety, supported him. The Prophet remarked that of the two, the merchant was indeed the worthier. See the opinion of a leading and notable scholar regarding this saying binbaz.org.sa/fatwas (accessed on 15 November 2019)

[192] See Coulson NJ A History of Islamic Law (1964) 9.

[193] See also See Haykal M H *The Life of Muḥammad* (2005) tr by Raji al Faruqi.85-86.

[194] Sonbol A E A *Women of Jordan: Islam, Labor, and the Law*, (2003) 43

[195] Ali Z S *Marriage and Divorce in Islam An Appraisal* (1987) 1-20.

influential nobles, occupied and played an essential and indispensable role as dispute resolution practitioners in almost all disputes within the tribe or, between opposing factions. Their authority and stature extended far and was varied serving as sanctions for their verdicts.[196] The pronouncement and decision of the ḥakam were final but though not legally enforceable. It was a respected statement in respect of what the customary law was or, should be. In fact, the view of Schacht is quite informative when he refers to, and shows that a ḥakam in such situations functioned as 'a legislator and authoritative expounder of the normative legal custom or, Sunna.[197]

The objective of these third parties was basically to persuade and convince disputants and warring tribes and parties to reconcile as well as the preservation and maintenance of harmony within the clan or tribe. Some arbitrators would go to great extent to procure and produce the necessary compensation out of their own pockets in order to persuade the feuding parties to agree to a ṣulh.[198] The sons of the tribes were tutored at a very early age to refer matters to their leaders in order to help them resolve disputes. This was built into their attitudes. The youngsters referred to their father to resolve problems between them and their family or, relatives. Thus, the father was their wasṭa or, mediator between him and his relatives. As the child grows older, he starts to refer to the elders in the family whether, uncles or cousins and at times of crisis, everyone rallies around their tribal son. Tribesmen are familiar with mechanisms such as arbitration, mediation (waṣta*)*. Usually, only when disputes are complex, protracted and serious do the tribal members refer to their shaykh.[199]

When crimes are committed, shared responsibility expedites quick settlement, as the whole tribe of the offender is liable to compensate the victim's family. Compensation, in cash or in kind, is the primary means of settlement of disputes hence, the existence of elaborate procedures for compensation.[200] Third parties stood to gain much in terms

[196] There are also larger units, which may gather together in conflict that could be described as confederations of tribes, known as fakdh (sub-confederation) and qabīla (confederation). Clinton B Bedouin Law from Sinai and Negev: Justice without government (2009) 12-13.
[197] Schacht J An Introduction To Islamic Law (1964) 8.
[198] Al-Ramahi A 'Ṣulḥ: A Crucial Part of Islamic Arbitration' (2008) *Law Society and Economy Working Papers* 1-24.
[199] Furr A & Al-Serhan M 'Tribal Customary Law in Jordan' (2008) 4(2) *South Carolina Journal of International Law and Business* 17- 18.
[200] "A man's 'ḳhamsah' group consists of all male-born children who share the same great-great grandfather. The ḳhamsah is the traditional vengeance group which functions in cases of conflict,

of prestige if their intervention and wasṭa led to the settlement of a dispute. The life of an individual is considered to be an element of the collective and shared life, thus, the individual and the collective are considered to be one and the same. Therefore, any attack on the individual is deemed to be an attack on the collectivity or, tribe and vice versa. If an individual cause an injury to another then the offender's whole tribe is held responsible. Where the offended tribes claim their recompense or, revenge they direct their claims against the offender's tribe as a whole and not just the individual. The payment of compensation is treated as if from the entire tribe of the offender and is usually paid from the possessions of the relatives of the offender. The harm done is commensurate to the responsibility of the offended tribe to seek revenge. Any member of the offended tribe can discharge this obligation by killing any member of the offender's tribe and not just the offender himself. All are jointly and severally liable for the compensation, punishment or, revenge.[201]

The arbitration proceedings by the elderly in the tribe were an efficacious means of resolving disputes and safeguarding harmony between conflicting parties. Arbitrators insisted that the parties attend the proceedings which were a necessary condition for the validity of the arbitration proceedings. The process is founded upon the claimant proving his /her case, and the respondent establishing his defense on his oath (qasm). Where a claimant failed to prove and substantiate his case then he could ask the respondent to swear upon oath denying the claim. If the respondent did so, the claim would then fail.[202] Prior the advent of Islām tribes would declare their oath before the statute of hubāl, an idol in the center of the Ka'bah in Mecca.[203] One of the most prominent disputes during that time was in relation to the black stone *(*ḥajar aswad*)*.

notably blood feuds. If a tribesman is murdered, his relatives within the khamsah are required to avenge his death, and all members of the murderer's khamsah are considered to share responsibility and thus are legitimate targets for reprisal"; Centre for Naval Analyses, Cleared for Public Release "No Security Without Us": Tribes and Tribalism in Al Anbar Province, Iraq, June 2014. See also p.9 of the same report. See also, Middle East Institute, Tribal Law and Reconciliation in the New Iraq, 2011 p.13.

[201] Ali Z S *Marriage and Divorce in Islam An Appraisal* (1987) 1-20.

[202] Bin Abbadi S M *Arbitration in Saudi Arabia: The Reform of Law and Practice* (unpublished JD thesis Pennsylvania State University 2018).

[203] See Armstrong K *Muhammad: A Biography of the Prophet* (1993) 28-29. At the time of Muhammad, the Ka'ba was officially dedicated to the god hubal, a deity who had been imported into Arabia from the Nabateans in what is now Jordan. But the pre-eminence of the shrine as well as the common belief in Mecca seems to suggest that it may have been dedicated originally to al-llah, the High God of the Arabs. There were three goddesses: al-lāt, al-uzzā and al manāt who were often called the "daughters of Allah" (banāat Allah) and were very popular in the settled communities. These were represented by large standing stones. See also Hitti p100.

This was a dispute between the shaykhs or elderly of Mecca over the placing of the holy black stone. There was fierce dissent and contestation amongst the rivalry tribes as to which tribe will have the honour of choosing the location of the stone. They failed to resolve the matter amongst themselves and requested Muḥammad to find a resolution for them. He place the blackstone in the middle of his robe and asked each shaykh to hold one of the sides thereof. Together they could now all place the stone in whichever location they agreed upon collectively. This act of the Prophet resolved the protracted dispute between the various tribes.[204]

Many of the rules of conduct practiced prior to Islām continued to be honoured after the advent of Islām through a process of adaptation, especially customs relating to personal honour, hospitality and valour. The Prophet also encouraged and entrenched values such as kindness, mercy and justice, principles that are cardinal to dispute resolution practices. The moral teachings of the Prophet are summed up in a tradition ascribed to him, in which he declared that "I was sent to complete and refine principles of good character".[205] Thus, many of the positive tribal customs were incorporated into Islāmic teachings and jurisprudence. This was done through a process of adaptation where some practices were merely adapted to accord with Islāmic teachings, secondly, abrogation where certain customary practices which were contrary and offensive to Islāmic teachings were completely rejected and finally, adoption where certain customary practices were wholly maintained.[206]

The connection between violence and Islām in particular, became a central concern for scholars of dispute resolution and politicians.[207] This especially after the events on the Twin Towers and the pentagon on September 11, 2001. Extremist group, al-Qaeda (Dāesh), claimed responsibility for these attacks and averred that these attacks were justifıed by Islām.[208] Other Islāmic groups, such as Ḥamās and Islāmic Jihād in the West Bank and Gaza, have been carrying out suicide attacks since the early 1990s.

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[204] See Haykal M H *The Life of Muḥammad* (2005) tr by Raji al Faruqi p101. See also Qasim MI Prophet Muhammad's Strategies on Security and Peace Building: Lessons for the Nigerian Society (2014) *Journal of Humanities and Social Science* 18-22.
[205] On the authority of Abu Salih who said that Abū Hurayra said. See al Muwatta 1614.
[206] See Ali Z S *Marriage and Divorce in Islam An Appraisal* (1987) 1-20.
[207] See, for example, Sachedina A 'Is There a Tradition of Pacifism and Nonviolence in Islam' paper presented at the United States Institute of Peace (1993) 7-8.
[208] 'A timeline of al Qaeda attacks' available at https://en.wikipedia.org/wiki/Timeline_of_al-qaeda_attacks (accessed on 12 October 2019).

They too argue that such acts are justified in the name of Islām and that they are legitimate according to the Islāmic tradition.

As a result, Islām and violence have come to be perceived as intrinsically linked in the minds of many non-Muslims, where Islām has become synonymous with violence. The religious traditions that are used to justify violence and war have also been the foundation of inspiration for nonviolence and peace-building.[209]As a result the current representation of Islām, even the majority of Muslims are unaware of the tradition of nonviolence embedded in Islām. However, an inquiry into the Islāmic scholarship on peace would afford plenty examples to the contrary. In fact, nonviolence has been a cardinal principle of Islām since the time of the Prophet Muḥammad and has been employed on various occasions throughout history as shall be shown throughout this chapter. [210]

3.3 ṢULḤ: A CHRONOLOGICAL, HISTORICAL AND LEGAL STUDY

In its linguistic sense, it is accepted by classical Arabic lexicographers that the word originates from the Arabic root of the word ṣaluḥa or ṣalaḥa. It means to be good, right, proper, suitable or, the process of restoring or reconciling.[211]The contrary of the term ṣulḥ (reconciliation) is a state of disorder, chaos and corruption (fasād). Essentially it means termination of a dispute.[212] In Islāmic law, it is considered to be a method of restoring justice amicably among disputants in order to attain an agreed upon out of court settlement. Article 1531 of the Ottoman Civil Code (*The Majalla al Aḥkām al ‘Adliya*) provides as follows, ‘ṣulḥ is a contract of removing a dispute by consent which becomes a concluded contract by offer and acceptance. According to this definition, ṣulḥ is considered a contract concluded by offer and acceptance and consists of settling a dispute by mutual consent. It is

[209] Thistlethwaite S & Stassen G ‘Abrahamic Alternatives to War: Jewish, Christian, and Muslim Perspectives on Just Peacemaking’ (2007) United States Institute of Peace Special Report.
[210] Paige G Satha-Anand et al eds Islam and Non-violence (2001) 27. See also See also Amitabh Pal Islam means Peace (2011). Although this book is not a theological treatise, it focuses on the tradition of nonviolence in modern Muslim societies. By highlighting contemporary peaceful protest movements in Muslim communities, the book emphasises the truly global and multicultural nature of the Islamic tradition of nonviolence. Also see Al Sayed Amin Reclaiming Jihad: A Quranic Critique of Terrorism (2014).
[211] Ibn Manthūr Lisān al- ‘Arab, vol. 2 (1955). 516-517. See also Zuḥayli W Al-Fiqh al-Islami wa Adillatuhū (1989), vol. 6 at 756.
[212] Wehr HA Dictionary of Modern Written Arabic, edited by J. Milton Cowan, (1974), at 521.

further defined as, ‘a process which involves a transfer of ownership or allegation by way of accepting an alternative or, compensation offered in order to resolve or prevent a dispute from taking place.’ The Maliki school views ṣulḥ as a way of resolving past and future disputes involving disputants.[213] On the contrary, other schools of law maintained that ṣulḥ can only be applicable to past disputes, and not to future ones.[214] Under Islāmic Law, ṣulḥ is considered as complementary to litigation and highly recommended as compared to the other mechanisms. For example, Al-Shafi’i encouraged a judge to recommend parties to attempt ṣulḥ. However, if parties disagree, the judge should proceed to adjudicate the case. The Shafi’ī and Ḥanbali jurists were of the view that ṣulḥ is a kind of agreement between disputants to settle disputes amicably.

A historical analysis of the term ṣulḥ indicates that the practice was in vogue prior to Islām and that it actually played a significant role in resolving disputes of all kinds amongst Arab tribes and clans.[215] Prior to the advent of Islām, disputes were solved by using various methods. However, conciliation (ṣulḥ*)* and arbitration (taḥkīm) were the preferred and most commonly used methods, the purpose of which was primarily for the preservation of order and prevention of conflict in cases where disputants failed to achieve any agreement.[216]

Parties have recourse to ṣulḥ for amicable settlement once a dispute had occurred. However, in the event of deadlock or impasse of the ṣulḥ process, parties proceeded to arbitration (taḥkīm) or adjudication as a next step to resolve disputes. Throughout this period, the approaches dispute resolution were mostly based on tribal custom and tradition, not Islāmic Law.[217] For example, an arbitrator (ḥakam) was sometimes chosen from healers (kuhān) and soothsayers and not always people well versed in law and jurisprudence. These people were chosen to direct and manage disputes because it was often believed that these soothsayers have supernatural powers and that they could communicate with the spirits who

[213] ibn Anas M Al Umtata Kitāb al-Aqdiya (Book of Judgments) (1996).
[214] Abū ʿAbdullāh Muhammad ibn Idrīs al-Shāfiʿī kitāb al al-Umm, (1993), 6:312
[215] Hamidullah M Administration of Justice in the Early Islam, vol. 11, (1937) at 163-71.
[216] Pely D & Luzon G ‘The Muslim Arab Sulha and The Restorative Justice Model Same Purpose, Different Approach’ (2018) *Cardozo Journal of Conflict Resolution* 18 289.
[217] Kirazli S Conflict and Conflict Resolution in the pre-Islamic Arab Society *Journal of Islamic Studies* (2011) 25-33.

revealed certain things to them that were unknown to others.[218] In pre-Islāmic Arabia, arbitration (taḥkīm) was not an alternative method to the established system of custom and tradition. Rather, it was often the sole means of dispute resolution short of war if direct negotiation and mediation failed to achieve the desired outcome or settlement.

Ḥakams, soothsayers, or arbitrators were persons who played an important role and were almost indispensable to the tribe and clan, even though they did not hold any political power.[219] Most ḥakams were kāhins, (or soothsayers), whose opinions it was thought would invoke the appropriate deities and would be couched and embellished in a language indicating that they were revelations from heaven.[220] The general belief that ḥakams were divinely inspired was extremely important in bringing pressure to bear on the parties to submit a dispute to taḥkīm and to abide by the awards rendered. At the advent of Islām, the Arabian Peninsula became the geographical base for the Islāmic State. Disputes were thereafter, resolved by having recourse to the Qur'ān and ḥadīth of the Prophet.[221]

As stated previously with the advent of Islām, traditions and customs previously held and practiced were not abrogated in its entirety. Islāmic law, either adapted or adopted tribal customs where they were not in direct conflict with Islāmic law. In fact, there is a plethora of evidence to be found within the classical corpus

[218] Pely D Resolving Clan-Based Disputes Using the Sulha, the Traditional Dispute Resolution Process of the Middle East (2009) *Dispute Resolution Journal* 82.

[219] See Schacht J Law and Justice from the Cambridge Encyclopaedia of Islam, vol. II, pt. VIII/Ch. 4, beginning with pg. 539. "There was no organized political authority in pre-Islamic Arab society, and also no organized judicial system. However, if disputes arose concerning rights of property, succession, and torts other than homicide, they were not normally decided by self-help but, if negotiation between the parties was unsuccessful, by recourse to an arbitrator. Because one of the essential qualifications of an arbitrator was that he should possess supernatural powers, arbitrators were most frequently chosen from among soothsayers. The decision of the arbitrator was obviously not an enforceable judgment, but a statement of what the customary law was, or ought to be; the function of the arbitrator merged into that of a lawmaker, an authoritative expounder of the normative legal custom or sunna".

[220] "Another word used for a priest was kāhin, a term which was employed for a soothsayer as well. The priests were believed to be under the influence of the gods and to possess the power of foretelling future events and of performing other superhuman feats. In this way, their pronouncements resembled the ancient Greek oracles and were likewise vague and equivocal. In course of time, the priest who was in the beginning simply the custodian of the temple developed the character of a soothsayer as well, and thus the term kāhin came to acquire the sense of a soothsayer and seer". Taken from N.A Faris ed Pre Islamic Arabia in The Arab Heritage

[221] Abu-Nimer M & Nasser I Forgiveness in The Arab and Islamic Contexts: Between Theology and Practice, *Journal of Religious Ethics* 41 (2013), pp. 474–494.

supporting dispute management in Islāmic legal theory and history. Most of the prophetic traditions on disputes resolution, dispute management and amicable settlement of disputes form pivotal and historic precedents for the modern practice of dispute management and resolution. Islāmic law considers a number of operative dispute resolution mechanisms as part of the case management role of a judge.[222] Al Ḳhallāf provides a detailed explanation of the role of the judge (qāḍi) with regard to case management within the court system.[223] His commentary on the code of conduct of judges before and during the pre-trial procedure of a case is fairly elaborate and an indispensable understanding of the subject. Though the essence of this work relates primarily to the procedural rules in normal court adjudication, similar procedures with certain modifications where necessary may also be applicable in mediation and arbitral proceedings. The duties of the judge in Islāmic law are considered as part of the case management responsibility of the court. Court-annexed ADR is considered part and parcel of the Sharī'a court, it cannot be separated from the adjudicatory role of the judges.[224]

Ṣulḥ was practiced by the Prophet and his companions and was also endorsed and sanctioned by the Islāmic scripture. The concept of Ṣulḥ is entrenched in the Islāmic system of administration of justice. It is a concept and notion provided for by the primary and secondary sources of the Sharī'a. It has been explicitly established by the

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[222] Abdul Wahab al Khallaf A & al-Qadhi A Edited by Ziyadeh F (1978) (Commentary by 'Umar b. 'Abd al-Aziz).

[223] See also Saxon E D Peacemaking and Transformative Mediation: Sulha Practices in Palestine and the Middle East (2018) in particular Ch 3.

[224] See Goff D *et al* Under The Microscope: Customary Justice Systems In Northern Mali (2017) In Islamic law, a qādī is comparable to a magistrate or judge in contemporary Western judicial systems. As well as adjudicating disputes, the qādī performs extrajudicial functions, including mediation and managing public works. Within customary justice systems, the qāḍis and religious leaders at large imāms and the like occupy a special place. Given their social status, and their knowledge of the Qur'an, they are perceived as the key institution for the 'preservation of Muslim law. The qāḍi exercises his functions as a member of the community he serves. Indeed, it is a prerequisite of Islāmic law that any individual seeking to act as qāḍi has to first demonstrate extensive knowledge of the local traditions and practices (customs) of that community. Familiarity with local circumstances allows the qāḍi to better understand the frame of reference of litigating parties and to mediate disputes by taking into consideration the past, present and future relationships in the community. Further, as an active member of the community, living in the same social landscape as the disputants, the qādi has a strong interest in preserving harmony. Traditionally, disputants are not considered as single entities, extrapolated from their social context, but rather as an 'integral part of larger social units, such as the village. Immersed in a complex social landscape, the qādi operates at the intersection of moral and social demands and the formal legal Islamic normative. His mandate is therefore twofold, settling disputes and preserving social cohesion. As one respondent from Gao elaborated, 'we believe that we are Muslims and [the qādis' decisions are taken in accordance with the Qur'an and they maintain social cohesion.

Qur'ān and exemplified by the Sunnah of the Prophet and the consensus (ijmā') of the Muslim jurists. The Qur'ān as the principal source of the Sharī'a has emphatically mentioned the provisions relating to Ṣulḥ in several verses. The evidence for its legality have been derived from the following verses of the Holy Qur'ān. We find for instance some of the verses in the Qurān are stated as follows, "*Verily! Allah loves those who are equitable. The believers are nothing else than brothers. So make reconciliation between your brothers, and fear Allah, that you may receive mercy*".[225] Also in another verse, it is stated, "*There is no good in most of their secret talks save (in) him who orders* sadaqa *(charity in Allah's cause, or* ma'ruf *(good deeds), or conciliation between humankind, and he who does this, seeking the good pleasure of Allah, We shall give him great a reward*".[226] According to the classical Qur'ānic commentator, Ibn Kathīr, the first verse was revealed due to the long battle between the tribes of Aws and Ḳhazraj.[227] The verse highlighted the need to resort to ṣulḥ in settling a dispute between two conflicting parties. Those who resort to Ṣulḥ on equitable grounds receive blessings from the Almighty. The same interpretation can be found in the second verse, which placed ṣulḥ on par with a deed of charity, where those who apply it are entitled to a reward from Almighty.

3.3.1 The Prophet Muhammad as a Dispute Resolution Practitioner

Islāmic principles and code of conduct can largely be traced from two primary sources namely, the Qur'ān (the Holy Book) and Sunnah (actions of the Prophet Muhammad).[228] Likewise, as with the issue of conflict and peace, many instructive and

[225] Quran, al-Ḥujarāt, (49):9-10.
[226] Quran, al-Nisā, (4):114.
[227] Aws and al Khazraj were idolaters who shared their town with the Jews whom they loathed and often battled. History narrates that the Christians of al Sham who belonged to the dominant church in the East Roman Empire hated the Jews. The Christians had raided Yathrib specifically for the express purpose to kill its Jewish citizens. When they failed in their mission they sought the assistance of al Aws and al Khazraj in order to entrap the Jews of Madinah. This plan was executed and was responsible for the death of many a Jew. It disadvantaged the Jewish community of its dominion and power within the city. History further relates that once more the Madanese tried to destroy Jewish power in their city in order to extend their possessions and influence, which they succeeded in doing. The surviving Jews despised al Aws and al Khazraj intensely. Rancour and Enmity extended to the core and roots deeply entrenched in the hearts of both. Hence they altered their strategies and, instead of conquest in battle, they sought to divide and separate al Aws from al Khazraj and thereby cause perpetual warfare between the two tribes. As a result of the continuing warfare hostility of the two Arab tribes, the Jews fortified their position, increased their trade and wealth, and entrenched dominion, possession, and prestige which they had once enjoyed.
[228] See Huda Q *Crescent and Dove* ((2010) United States Institute of Peace. See also Vehapi F *Peace and Conflict Resolution in Islam: Islamic Perspectives on War, Peace and Conflict Resolution* (2016)

guiding principles are provided in these two primary sources i.e. the Qur'ān and Sunnah.[229] Muḥammad also provided a number of precedents from his own life as well as before he was endowed with prophethood where he had displayed the quality of a good arbitrator while settling the dispute that had arisen on the issue of placing the Black Stone (Ḥajar al-As-wad). He resolved the bloody conflict that would have ensued between different tribes of Mecca at the age of thirty-five. The problem emerged when the rebuilding of the Ka'ba became necessary due to flooding, and construction work was equally divided between Arab tribes. However, at the time of the erection of the Black Stone (Ḥajar al-Aswad), a disagreement emerged because every chief of the tribes wanted to enjoy the honour of placing the holy Stone in its place.

When the matter became so serious that chances of bloody clash increased and no tribe was ready to sacrifice for peace. Their attitudes became more violent instead, 'Banū Abdud Dar' brought a bowl of blood and 'Banū Ādi', and Banū Ka'b' took an oath to fight till death for this respect and soaked their hands in the blood. The situation became pressing, that the construction work was halted for a few days. At last, a decision was made, based on the advice of Abū Umayah ibn Mughīrah, that the very first person to pass through the gate of al-Suffah would be their arbitrator to resolve the issue. Muḥammad was the first man to enter through the gate. Seeing him the people at once accepted him as their arbitrator with-out any hesitation. Muḥammad considered the issue as well as the associated sensitivities. He then took his garment and attached a piece of rope at the four edges thereof and placed the holy Black Stone in the middle of it and said to the representatives of every tribe to hold the rope and take it to its place.

Finally, Muḥammad placed the black stone (Ḥajar al-Aswad) in its place.[230] This incident demonstrates how he saved the aggressive and warring Arab tribes from a violent clash. He decided the issue in a manner free from tribal prejudices which could have given rise to feelings of discontent and anger among the Quraysh and could have resulted in another violent clash. In this way, he solved the problem rationally with

[229] Abdullah A *Principles of Islamic inter personal Conflict intervention: A Search Within Islam and Western Literature* (2002)
[230] This entire story is narrated by See MH Haykal *The Life of Muḥammad* (2005) tr by Raji al Faruqi p101. See also Martin L *Muhammad His Life Based on the Earliest Sources* (2006) 32

common good and interest of peace for all Arabs as compared to tribal interests. His negotiating skill and technique of arbitration can be used to effectively settle disputes even in the modern era.[231]

Ṣulḥ was first practised by the Prophet as well as his companions during the incident which transpired at a place between Makkah and Madīnah called al-Ḥudaybiyah in the year 628.[232] This incident took place when the Prophet wanted to perform the lesser pilgrimage (‘umrah) after he had been expelled from Mecca and migrated to Medina. The incident took place towards the end of the sixth year of the migration (Hijrah). The Prophet set off from Madinah with a party which consisted of about 1400-1500 men. Upon hearing of the Prophet’s approach, the Meccans decided to deny the entry of the pilgrims with force and a show of arms under the leadership of Khalid ibn Walīd (who embraced Islām less than two years thereafter). When Muḥammad became aware of this, he turned back and settled at a place known as al-Ḥudaybiyah.[233] When the representatives of the Meccan elderly met with the Muslims, they decided to conclude a treaty, which famously became known in Islām as the treaty or ṣulḥ al Ḥudaybiyah. The following were the terms of this peace treaty;

(a) There would be a truce between the Muslims and the members of the non-Muslim Quraysh tribe for a period of 10 years.

(b) Every Muslim would be permitted to fulfill the pilgrimage (Ḥajj) commandment or, to visit Mecca freely during a time other than the pilgrimage (Ḥajj) as well any member of the Quraysh tribe was to be permitted to enter the Muslim-controlled city of Medina freely, or in passing on their way to Egypt or Damascus, Syria, Jordan, Lebanon, and Palestine).

[231] Yucel S ‘Positive Thinking and Action in Islam: Case Studies from the Sīrah of Prophet Muhammad’ *International Journal of Humanities and Social Science* 223-234. (2015)

[232] Rahman Kiran Sami FN et al ‘Medina Charter and Just Peacemaking Theory’ (2015) The Government *Research Journal of Political Science* 196-203. See also See also Yildirim, Y. ‘Peace and Conflict Resolution in the Medina Charter’ Peace Review (2006) 1-17. See also Mustafa M ‘An Analysis on the Practices of Prophet Muhammad in Resolving Conflicts’ (2011) Journal of the Bangladesh Association of Young Researchers (JBAYR) 109-125.

[233] See also Ibn Kathīr Ismail Stories of the Prophets. Trans. Muhammad M Geme'ah (1996)

(c) Any member of the tribe of Quraysh who wished to convert to Islām without the consent of his guardian would not be permitted to do so. A Muslim however, was permitted to leave Islām and join the tribe of Quraysh. Individuals who belonged to neither party were to be permitted to choose freely to join either the Muslims or the Quraysh.

(d) The Prophet Muḥammad and his companions would not be allowed to enter Mecca in the year 628. They were to be permitted to do so the year thereafter, 629 and on condition that no arms were carried, with the exception of sheathed sabers and other such weapons, and that they stayed in Mecca for no more than three days.[234]

The above is an indication that the institution of ṣulḥ as a conflict resolution, or management mechanism is recognised in Islāmic law and that it has been given religious sanction. Ṣulḥ was the favoured method of settling disputes by the Prophet who was emphatic that he was skeptical of judicial proceedings, which were devised by humankind and therefore, fallible. Parties often triumphed because of eloquence at the expense of truth and were threatened with dire sanctions.[235] Thus, the trial process is not regarded as an ultimate truth-finding mechanism that will lead to substantive justice. It can be tainted and subverted by the imperfect nature of human, therefore, it should be avoided when possible.[236]

3.3.2 Reconciliation (Ṣulḥ) in Matrimonial Dispute Resolution

Mediation is generally thought of to be loftier and even superior to litigation as a means of resolving marital disputes for several reasons. While litigants within the adversarial system often focus on fighting and winning, mediation on the other hand, encourages parties to co-operate, communicate and compromise.[237] Conciliation is generally

[234] Montgomery Watt W Muhammad Prophet and Statesman (1956) 182.
[235] Othman A 'And Amicable Settlement Is Best': Ṣulḥ and Dispute Resolution in Islamic Law' (2007) 21 *Arab Law Quarterly* 64.
[236] See Summers R "Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases" (1999) *Cornell Law Faculty Publications*. Paper 1186.
[237] '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 ṣulḥ is better. (Sūra An-Nisā (4:128). See also Othman A "And Amicable Settlement is best: Ṣulḥ and Dispute Resolution in Islamic Law" (2007) 21(1) Arab Law Quarterly 64 at 66. Ṣulḥ is viewed as a desirable form of settlement, and indeed the maxim 'amicable settlement is best' (*al- ṣulḥ khayr*) or that amicable settlement is the best verdict

considered to be less detrimental and damaging emotionally as well as financially. Courts have also generally been reluctant to interfere in disputes between spouses who live together because litigation interferes with family privacy and litigation is likely to increase the level and depth of the conflict. The same problems do not issue from mediation. Mediation preserves family dignity and privacy in that couples choose the mediators who help them to resolve their disputes in private., When mediation is resorted to disputes is not likely to intensify the conflict.[238] From an Islāmic law viewpoint, couples in a matrimonial relationship, are not expected to approach a court of law initially to settle any dispute they may experience. Instead, the Sharī'a enjoins and exhorts spouses to explore all possible reconciliatory avenues before resorting to litigation.[239]

Though ṣulḥ is available to resolve all manner of civil disputes, its use is most prevalent in domestic relationships. The ṣulḥ based relationship makes it particularly effective and efficacious to parties seeking to resolve domestic conflicts. It thus serves as the primary vehicle for resolving matrimonial disputes, especially given the unfavourable view of divorce in Islāmic law. Ṣulḥ in the matrimonial context can be slightly different from other negotiations. In matrimonial disputes members of the family often serve as facilitators in the dispute. This practice is expressly sanctioned and sanctified in the Qur'ān wherein it is stated: *"If you fear breach between them twain, appoint two arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation…"*[240] The rationale for this approach derives from Islāmic notions of family and its importance as marriage is often viewed as the union of two families rather than two people. Marital disputes therefore, represent a shared responsibility that both families have to share and cooperate to resolve. Ṣulḥ practitioners help in resolving the dispute while reinforcing the importance of Islāmic family life. Of particular importance and interest, is the Qur'ānic injunction in the

(*al-sulḥ sayyid al-ahkām*) captures the notion that, "Ṣulḥ is not only regarded as an accepted method of dispute resolution within the Islamic justice system, but for some is seen as the 'ethically and religiously superior' means of settling disputes." Ann Black, "Mediation, arbitration and Islamic alternative dispute resolution" in Black A Esmail H & Hosen N eds *Modern Perspectives on Islamic Law* (2013) 157.

[238] See Iqbal W Courts, Lawyering, and A D R: Glimpses into the Islamic Tradition, *Fordham URB. Law Journal* (2008)1017-1035.

[239]See Abu-Nimer M 'Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities' *Journal of Economics & Sociology* (1996) 35- 46.

[240] Chapter 4:35

chapter known as “The Women” (al Nisā) where assurance is given about ṣulḥ in matrimonial matters, that if those brokering a reconciliation between spouses have ventured into it with *bona fide* faith, the outcomes and success of their effort is guaranteed in terms of their consensus and agreement.[241] This gives us an indication of the extent of the Qur’ānic preference for ṣulḥ in matrimonial conflicts rather than adversarial litigation.[242]

In a matrimonial or family dispute, ṣulḥ can be exercised in a wide range of matters relating to, for example, arrears of maintenance, settlement of deferred dowry, division of matrimonial estate, or any other property claim etc. It may also involve non-property rights such as consummation (of the marriage), cruelty and ill-treatment, etc. It may also be exercised in relation to rights that arise during the marriage or, after divorce, such as conciliatory gift (matā’ah)*,* custody (ḥaḍhāna*)*, spousal maintenance (nafaqah) during the mandatory waiting period after the death of husband, or divorce (‘iddah).[243] Furthermore, matters relating to guardianship of infants/minors and domestic violence which are normally very sensitive family issues, that may not be entirely appropriate to be resolved by the court through an adversarial system. It is in this regard that it may be seen as the most rational approach and stance taken by Islāmic law at the outset of a dispute in recommending ṣulḥ in the resolution of matrimonial disputes.

Although ṣulḥ is often employed in divorce cases, it should increasingly be viewed as a tool and process for facilitating the resolution of family disputes and also as a tool for keeping them together. Ṣulḥ also aids and assist couples to identify problematic issues in their relationship and can alter their behaviour that leads to these problems. The result might be a formal agreement, or it might be an oral agreement by both parties to mend and change the way they behave. It is inevitable that during the subsistence of matrimonial life, an instance may arise where disagreement may likely arise between spouses either on the part of the husband, or on the part of the wife, or even from both of them.

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[241] Q 4:35

[242] Makhsin M & Nurul Wahida A et al. Moral Values by Al-Ṣulḥ in Family Conflict Management. *The Social Sciences,* (2016)11: 7220-7223.

[243] Mohd Zin S *et al* ‘The Effectiveness of Ṣulḥ on Matrimonial Asset Division after Death of Spouse’ *Journal of Social Science & Humanities* (2015) 143-154.

When it emanates from the side of the husband as stated in the following Qur'ānic verse "if a woman fears cruelty or desertion from her husband's part, there is no sin on them both if they make terms of peace between themselves and making peace is best …"[244] Scholars of Qur'ānic commentary interpreted the word "Nushūz" as recalcitrant or discord on the part of both parties.[245] From the plain meaning of this verse, it was made lawful to conclude ṣulḥ with all its connotations in such circumstances wherein the wife may relinquish some aspects of her conjugal rights (e.g., sexual intercourse, maintenance or the right to Sadāq, etc.).

Likewise, in some instances, the breach (shiqāq) stems from both spouses as the Almighty has described such instances in the Qur'ān in the following verse: *"And if you fear a breach between them twain (husband and wife) then appoint two arbitrators one from his family and the other from hers, if they both wish for peace, Allah will cause their reconciliation."* The word Shiqāq as mentioned in this verse of the Qur'ān, linguistically means contradiction, discrepancy, conflict, or to break apart.[246] It implies an instance where one of the spouses betrays or deprives the other of his/her marital rights. On the part of the woman, it refers to her refusal to discharge her matrimonial obligation towards the husband. From the husband's side, it refers to an instance where he neither retains the wife on honourable terms nor released her with kindness. In a nutshell, Shiqāq implies a quarrel or dispute in such a way that makes the continuance of matrimonial life difficult or unbearable wherein none of the spouses is readily identified to be at fault. From the provisions of Qur'ān 4:35, the phrase *"… if you fear a breach …"* has some important legal connotations regarding when should

[244] See surah Al Nisā 4:128. Pickthall: If a woman feared ill treatment from her husband, or desertion, it is no sin for them twain if they make terms of peace between themselves. Peace is better. But greed hath been made present in the minds (of men). If ye do good and keep from evil, lo! Allah is ever informed of what ye do.
Mohsin Khan: 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.
Arberry: If a woman fear rebelliousness or aversion in her husband, there is no fault in them if the couple set things right between them; right settlement is better; and souls are very prone to avarice. If you do good and are God-fearing, surely God is aware of the things you do.
[245] Al Hāfith Ibn Kathīr, AL-Bidāya Wa al-Nihāya, (1979), vol. 5, p.202. See also Muhammad Ibn Jarīr Al Tabari Tarīkh al Ṭabari (1988) vol. 2, p. 206. Other reports, even by al-Ṭabari and Ibn Kathīr themselves elsewhere, add the element of "disobedience" to the concept of nushūz, as presented by the Prophet in his last address.
[246] al-Ḥibri AY 'An Islamic Perspective on Domestic Violence' (2003) *Fordham International Law Journal.* 195.

effort towards matrimonial arbitration be initiated under Islāmic law and this becomes a subject of two juristic interpretations. According to Ibn ‘Abbās, it means knowledge about such a breach, i.e. when it became clearly known. The second interpretation is expectation or its likely occurrence or precaution about its occurrence.[247]

3.3.3 Ṣulḥ: An Alternative Dispute Resolution Mechanism in Islāmic Criminal Law

In Islāmic law, provision is also made for ṣulḥ to extend to criminal offences involving numerous crimes. In Islāmic Criminal Law (fiqh al Jināyah), ṣulḥ is applicable to certain criminal offences which are basically divided into three major categories. Firstly, those referred to as ḥudūd these are crimes for which the punishments are fixed and prescribed in the Qur’ān and Prophetic tradition. Secondly, there are those referred to as qisās, these are crimes against an individual or the family. The punishment for these crimes is described in the Qur’ān and Prophetic tradition as equal retaliation. Thirdly, ta‘zīr are those not specifically defined and mentioned in the Prophetic traditions and Qur’ān but are left to the discretion of the ruling authority.[248] Ṣulḥ, as applied to criminal law derives its authority from scripture, in other words, it is scripturally regulated as well as extra scripturally. There are numerous Qur’ānic verses and Prophetic tradition that establishes the legality of ṣulḥ.[249]

In Bukhāri it was narrated by Anas that the Prophet went to see ‘Abdullah bin Ubay by mounting a donkey. He was accompanied by an Ansāri man. When he reached ‘Abdullah bin Ubay, a man from ‘Abdullah’s tribe said to the Prophet that the smell of the donkey had harmed him. The Ansāri man said to ‘Abdullah that the smell of the donkey of the Prophet is better than ‘Abdullah’s smell. As a result of this remark, a man from ‘Abdullah’s tribe became angry and a fight ensued.[250] Subsequently, the

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[247] Leman Z & Nurafiqah S ‘High Rate Divorce among Muslims in Malaysia: A Study of Legal Reconciliation and Islāmic Matrimonial Dispute Remedy’ International Islamic University (nd) 1-19. See also Muḥammad Ibn Aḥmad Al-Ansāri Al-Qurtubi, Al Jāmi’ Li Ahkām al-Qur’an (1985) vol. 2. p.316; Muhammad Ibn Jareer al-Ṭabari, Jāmi’ al-Bayān Fi Tafseer al-Qur’an (1978) vol. 2. pp. 94-95.

[248] See Farhad M Principles of Islamic International Criminal Law (2011) 344. See also Mohamed A ‘Islamic Criminal Law: The Divine Criminal Justice System between Lacuna and Possible Routes’ (2018) 2 *Journal of Forensic and Crime Studies* 102. Also see Siddiqi MI The *Penal Law of Islam* (1979) 140. See also Awdah AQ Al Tashrī‘ al-Jinā’ī al-Islāmi (1987) 167.

[249] See Surah The Poets (al Shu’arā) verse 40. Also see The Chambers (al Ḥujarāt) verses 49:9, 49:10

[250] Al-Bukhāri, Book of Peace-making, chapter 49, vol. 3, hadith no. 856.

following verse was revealed; “And if two groups of Believers fall into fighting, then make peace between them.”[251] Also in another verse, it is stated; “Truly the believers are brothers. Make peace among your brothers (who are fighting); and remain conscious of Allah, so that you may be shown mercy.”[252] This verse gives a clear indication that where there are two warring groups, those who are not involved should try and reconcile between the two parties. In another verse it is stated, “And if you wish to requite, then let evil be rewarded with evil equal thereto; but he who forgives (an evil deed) and seeks reconciliation (with him), his reward rests with Allah (Who will grant him an excellent reward).”[253] Commenting upon this verse, it is stated that Islām allows victims of injury to seek retaliation from the offender. However, if the victim forgives and reconciles with the offender, the victim will be rewarded by Almighty.

3.3.4 The Fundamental Principles of Ṣulḥ in Islamic Law

In essence, there are three fundamental elements that must exist in any reconciliation process. Firstly, the disclosure of the truth. Secondly, there must be the victim(s) or the heirs of the victim and the offender(s) as the conflicting parties. The third is the neutral third party to help the conflicting parties to communicate with each other and lower the tension amongst the parties.[254] Reconciliation (ṣulḥ*)* then becomes a voluntary process without duress or coercion and promoting the balance of competing rights and obligations. Also, ṣulḥ or conciliation does not conceptually necessarily expunge the wrong-doings and mistakes that the offender has committed, but the nature of the process of ṣulḥ is to give the offender commutation, or some kind of reprieve and an opportunity to show remorse.[255]

Revealing the truth is an indispensable element of the process that the offender has to commit to. The Qur’ān, in sūrah Al- Hujarāt verse 6 clearly states that establishing and revealing the truth is indispensable to the process and must be publicized in order not to do injustice to victims, or family and to find closure. Thereafter, there are two

[251] Surah Al Ḥujarat 49 verse No 9
[252] Surah al-Ḥujarat, 49: 10.
[253] Surah al-Shura: 40
[254] Rahman M ‘Ṣulḥ Towards a More Comprehensive Understanding of the Process’ *Journal of Asian and African Social Sciences* (2018) 4,1
[255] See also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985. See also David B & Teressa Barnes *et al* Reconciliation after Violent conflict. A handbook. (2003).

primary parties in the reconciliation (ṣulḥ) process namely, the conflicting parties i.e. victim and offender and the third party as a muṣliḥ (the person directing the conflicting parties towards an amicable resolution). Finally, those who are involved in the conflict are the parties who actually have an interest in it. These are the victim (or the heirs of the victim) and the offender. The ṣulḥ process in Islām is akin to a contract, and/or agreement between the parties so that there may be an understanding between the victim and offender. Therefore, the existence of the victim and the offender is absolute.[256]

There are also precise terms and conditions for the existence of the offender and the victim. The victim in the context of Islāmic law is the direct victim, the person who suffered the harm from the crime/s committed by the offender. Apart from being a direct victim, the offender must play an active part of the ṣulḥ process and should be in a position to take responsibility for his actions. He should be an adult, not be in a state of *non-compos mentis*, inebriated, or in a state of distress or duress. The offender must be personally responsible for the crime he/she had committed. There are also specific terms and conditions for the existence of the offender and the victim. The victim in the context of Islāmic law is the direct victim, the person harmed or suffered as a result of the injustice. During the reconciliation (ṣulḥ*)* process it is not allowed for the offender to have representations. Finally, the *muṣliḥ* is the independent party who actively assist in the reconciliation and settlement between the victim and the offender.[257]

If during the process of ṣulḥ, there appears to be the possibility for conflict to escalate or, perhaps pressure from both the offender and the victim which would compromise the position of the muṣliḥ then it becomes crucial to have a muṣliḥ removed, or recuse him/herself. Persons that can act as a muṣliḥ in ṣulḥ are not limited to individuals, institutions may also be appointed to facilitate a ṣulḥ process. Furthermore, in the ṣulḥ

[256]Othman A *"'And Ṣulḥ is Best: Amicable Settlement and Dispute Resolution in Islamic Law,"* (Unpublished Ph.D. Dissertation Harvard University 2005) p. 140 See footnote 81 David B & Teressa *et al* p 14.

[257]Pely D Resolving Clan-Based Disputes Using the Sulha, the Traditional Dispute Resolution Process of the Middle East. (2009). Dispute *Resolution Journal, 63,* (4): 80-88. See also Pely D Honor: The Sulha's Main Dispute Resolution Tool. *Conflict Resolution Quarterly,* (2010) 28 (1).

process, it is not permitted to have representations for the offender by other parties.[258] The ultimate condition of the process pertains to the role of the muṣliḥ. The muṣliḥ here is the independent party who actively assist in the amicable settlement between the victim and the offender. The actual position of the muṣliḥ in the process of ṣulḥ is conditional. If during the ṣulḥ process, there is a possibility for the conflict to escalate it is better for the muṣliḥ to recuse him /herself. During the process, there must also exist a sense of balance between competing rights and obligations. The victim (or the heirs of the victim) is prohibited to demand compensation beyond the ability of the offender, and the offender himself is also prohibited to delay the payment of compensation or, decrease of indemnity or compensation that has been agreed. Islāmic law also places the entire dispute in context, in resolving the conflict or, problems that arise in society, the principle of proportionality is at all times an important consideration. This is the essence of punishment using ṣulḥ which provides a comprehensive and outcomes-based balanced solution and outcome with a goal of true peace. [259]

3.3.5 FORGIVENESS IN ṢULḤ

Forgiveness plays an important role in the ṣulḥ process.[260] Not all ṣulḥ matters can be settled or withdrawn with forgiveness as it depends on the type of offences committed and when forgiveness is given. A criminal case that has infringed the right of individuals may be withdrawn if the victim has forgiven the accused. A court cannot pardon the accused if the offence has infringed the right of individuals. In cases that involve the rights of God, the court may pardon the accused and substitute it with a reduced punishment.[261] Certain ḥudūd cases which particularly involve the rights of

[258] Tsafrir N Arab Customary Law in Israel: Sulha Agreements and Israeli Courts. (2006) *Islamic Law and Society 13* 1. See also See also Samir Saleh 'The Settlement of Disputes in the Arab World Arbitration and Other Methods – Trends in Legislation and Case Law' *Arab Law Quarterly* (1985) Vol. 1, 198. See also George E. Irani, *Islamic Mediation Techniques for Middle East Conflicts*, Middle East Review of International Affairs (1999) 2 1-12.

[259] Pely D & Luzon G 'The Muslim Arab Sulha and The Restorative Justice Model Same Purpose, Different Approach' (2018) *Cardozo Journal of Conflict Resolution* 18 289.

[260] Abu-Nimer M & Nasser I Forgiveness in the Arab and Islamic Contexts: Between Theology and Practice (2013). *Journal of Religious Ethics 41* (3) 474-494. See also al-Hibri A extensively described aspects of the Prophet's personality and character to include clemency, as well as piety, veracity, justice, liberty, humility, charm, excellent judgment, happy memory, cheerful temper and inoffensive behaviour towards his friends. al-Hibri AY Islamic and American Constitutional Law; Borrowing Possibilities or a History of Borrowing, 1 U. PA. *J. CONST. L*. 492, 500 n.43 (1999).

[261] Irene OH The Rights of GOD: Islam, Human Rights and Comparative Ethics. (2007). See also See also Awdah AQ *Al Tashrī'al-Jinā'i al-Islāmi* (1987).

individuals can be withdrawn with forgiveness when the matter has already been presented to the authority.[262] Imām Abū Ḥanīfa argues that ḥudūd *c*annot be pardoned by the accused nor, can it be exonerated by the ruler if the matter has been brought to the authority.[263] He provides the example where the ruler orders to cut off the hand of the thief, but the victim has forgiven the thief, such forgiveness is considered to be invalid. Al-Shāfi'ī says that ḥudūd can be abandoned after repentance or pardon in false accusation and robbery if the matters have not been brought before the authority, and the accused has been forgiven by the victim.[264]

Forgiveness from the victim is a meritorious act in retaliation (qisās) cases.[265] It can be seen in the ḥadīth reported by Anas ibn Mālik that he noticed that the Prophet, whenever a dispute that involved *qisās* was brought before him, he would exhort the aggrieved party to pardon the offender. In another ḥadīth, 'Aishah reported that the Prophet said: *"The disputants should refrain from taking retaliation. The one who is nearer should forgive first and then the one who is next to him, even if the one who is forgiven is a woman."*[266]

Islāmic jurisprudence also allows the heirs of the victim to waive the punishment of qisās by pardoning the offender with, or without compensation as stated in the Qur'ān.[267] Imām Mālik agrees that though the heirs of the victim have forgiven the

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[262] Al Mawardi, *Kitāb al-Ahkām al-Sultāniya,* ed. Enger (1853) 375**.**

[263] Ibn 'Abidin, *Radd al-Muhtār 'ala al-Durr al-Mukhtār* (1249 A.H), Vol III, pp. 204-205

[264] Said A Funk NC & Ayse S Kadayci, Peace and Conflict Resolution in Islam: Piece and Practice 182 (2001). See also Majid K & Liebesny HJ Edis. The Origin and Development of Islamic Law: Law in the Middle East: Origin and Development of Islamic Law (2008).

[265] See Pascoe D 'Is Diyaa A Form Of Clemency?' Boston University International Law Journal 34.149. The word qisās is derived from the Arabic word qassa and in its linguistic sense has come to mean he cut, or he followed his track in pursuit. It therefore implies the law of equality, or equitable retaliation, for the murder already committed. The treatment of the murderer should be the same as his horrible act, that is, his own life should be taken just as he took the life of his fellow man. However, this does not mean that he should also be killed with the same instrument or weapon. Diya is a punishment in form of property that is paid by the offender or his `āqilah to the victim's legal heirs. According to madhhab Shāfi`ī, `āqilah means a group of men who are mukallaf and the legal heirs of the offender on the side of his father.

[266] Kitāb Al Diyāt Sunan Abi Dawūd 4538

[267] A renowned scholar in the field, Joseph Schact, described the details of the diya tribal practices: "In most cases it is not the culprit himself but his 'dkila who must pay the blood-money. The payment is made in three yearly instalments, with the provision that each member of the 'dkila has to pay not more than 3 or 4 dirhams altogether. If the amount is less than one-twentieth of the blood-money, not the 'dkila but the culprit himself must pay. The 'dkila consists of those who, as members of the Muslim army, have their names inscribed in the list (diwāns) and receive pay, provided the culprit belongs to them; alternatively, of the male members of his tribe (if their numbers are not sufficient, the nearest related tribes are included); alternatively, of the fellow workers in his craft or his confederates; and the 'dkila of

offender, whether with diyat or without diyat, the offender is subjected to the criminal laws. Penal punishment is punishment determined by the ruler ranging from the slightest to the most severe.[268] Imām Mālik, Imām Abū Ḥanīfa and Imam al-Shāfi'ī differ with Imām Aḥmad and opine that since the heirs of the victim have forgiven the offender, penal punishment is not appropriate.

3.4 THE FIQH RULING ON MUSLIM WOMEN PARTICIPATION AS ARBITRATOR AND JUDICIAL OFFICER

Schools of Islāmic jurisprudence disagree whether it is incumbent and a pre requisite for an arbitrator to be of the male gender. The Mālikī, Shāfiʿī and Ḥanbalī jurists are of the opinion that the male gender is a condition and as a result women are not allowed to serve as an arbitrator.[269] They support their opinion by saying that the position of an arbitrator is similar to that of a judge, and that since women are not allowed to occupy the position of a judge, therefore, by analogy (qiyās) they ought not to be involved in the arbitration process.[270]

In contrast, the Ḥanafi and some Mālikī jurists, such as Ibn Jarīr al-Ṭabarī and Ibn Ḥazm al-Andalusī, opine that women have the same rights as men to preside as arbitrator or judge. Their position is based upon the view that gender of an individual does not bar or act as an impediment from understanding and resolving issues in a dispute or arguments of opponents.[271] Furthermore, Caliph Omar Ibn al-Ḵhatāb appointed a woman by the name of (Al-Shifāʾ) to serve as supervisor of the markets

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the client, both in the sense of a manumitted slave and of a convert to Islam, is his patron and the 'dkila of his patron. This institution has its roots in the pre-Islamic customary law of the Bedouins, where the culprit could be ransomed from retaliation by his tribe, and the inclusion of confederates and of client ship seems to be ancient Arabian too." Joseph Schact, An Introduction to Islamic Law (1964) 186.

[268] Al-Alfi A A Punishment in Islamic Criminal Law, in The Islamic Criminal Justice System 230 (M. Cherif Bassiouni ed. (1982). See also See Ismail S Z The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries, 26 Arab Law Quarterly 361, 364-67 (2012). See also Kamali MH Crime and punishment in Islamic Law: A Fresh interpretation (2019).

[269] Al-Mawsu'ah al-Fiqhiyah (n 64) (1982) 237. See also M. Ibn Qudāmah, Almūghni (1st edn) vol. 10 (1992) 263.

[270]See Suleiman bin Khalaf, Al-Muntaqā Sharīʿah al-Muwattaʿ Mālīk, Vol. 4 (1912) 113 Also see Al-Asbāhi, Malik bin Anas, Al-Mudawanah al-Kubrā, Vol. 5 49; Al-Shirbini 261 Ibn Abī al-Dam, Ibrahim Ibn Abdullah, Adab al-Qāḍī, Vol. 1, p. 431. See also See also Essam Fawzi, Women Occupying Judiciary Positions in Egypt, in Women Judges in the Arab Region: Point, Counterpoint Abdel Moneim Muslim ed. (2001).

[271] Yusuf Al-Qaradawi, Woman Acting as a Judge (2007), available at www.islamonline.net/servlet/Satel-lite?cid=1180421230953andpagename=IslamOnline-English-Ask_Scholar/FatwaE/>. (accessed 1 August 2020).

where she monitored the safety and trade. This position is referred to as the ombudsman (muḥtasib) in Islām.[272] This particular action and appointment by 'Umar serves as precedent of an authority to demonstrate that a woman is capable of handling the arbitration process and a judicial authority. In my view this opinion seems to be more correct and align with Qur'ānic teaching of equality and the dignity of all human beings as creation of the Almighty. With regard to women, the prohibition derives from the lesser weight given to their testimony in classical jurisprudence.[273]

It is interesting to note that the same jurists who took this position found no problem in accepting many of the Sunnah, the bulk of which were transmitted by the Prophet's wives, particularly Aisha. It is also worth noting that even though the majority of scholars have a monolithic and restrictive view of women's testimony, the position is not unanimous even in classical Islamic law.[274] This limitation of testimony which exclusively applies to men appears to be an assimilation into Islāmic law of an old custom which has now changed. In Islamic law all rules that are based upon customs change when customs change. In fact, scholars have pointed out that the marginalization of women from equal participation in society was the result of cultural

[272] Historical records show that Muslim women were involved in leadership positions in the marketplace during the reign of Umar ibn Al-Khaṭṭab (634-644), the second caliph who assumed the title "Commander of the Faithful". Shifā Abdullah as she was known was one of Prophet Muhammad's female companions whom 'Umar entrusted with a leadership role in monitoring and supervising commercial transactions in the entire marketplace of Madinah. She was responsible for ensuring that business transactions were conducted according to Islāmic law. She often patrolled the market place to ensure that proper business conducts were in place. 'Umar recognised Shifa's knowledge and understanding of Islām, and advised traders to consult with her on matters pertaining to the legality of transactions. The appointment of Shifa was so successful that 'Umar appointed another woman, Samra Nuhayk, as the market controller in Mecca.

[273] See also Amina Wadud-Muhsin, "Understanding the Implicit Qur'ānic Parameters to the Role of Woman in the Modern Context," Islamic Quarterly vol. xxxvi 2 (1992) 126: "Sincere efforts have been made to determine the Qur'ānic intent with regard to the role of women. Motivated largely by belief in the basic justice of Islam, some of these efforts have raised serious objections to the traditionally accepted, but often 'sexist' conclusions and opinions of earlier scholars. However, one major methodological shortcoming is caused by an equation which places those opinions and conclusions of scholars on an equal footing with the Qur'an, resulting in a contaminated definition of connection with the primary sources of Islam."

[274] This is a position endorsed by a growing number of prominent Islamic scholars including Ḥasan Turābi of Sudān; Rashīd al-Ghanūchi of Tunisia and Muhammad al-Ghazāli and Yusuf al-Qarḍāwi and the late Muḥammad Abdu of Egypt. Turābi for instance notes: "…the basic religious rights and duties of women have been forsaken and the fundamentals of equality and fairness…enshrined in the Shari' a, have been completely overlooked…The greatest injustice visited upon women is their segregation and isolation form the general society." H. Turabi, "The Real Islam and Women," (1993) 17:2.

and patriarchal attitudes as well as the exclusion of women from participating in the development of the Shari' a.[275]

Furthermore, an arbitrator's role is limited to the dispute at hand and matter to which s/he is assigned and, when s/he issues the award, the judge will confirm such order before it is made final. This opinion has been adopted by some contemporary scholars of fiqh, such as Zuhayli and Abdul Karim Zaydān.[276] The Sharīʿah does not prevent a woman from playing an active civic role in society and in mediation of disputes. In fact the Sharīʿah encourages civil society to adopt conciliation in general and is comprehensive for men and women without exception unless there is a clear statement from the Holy Qurʾān and the Sunnah identifying one gender rather than the other.[277]

Recently the Saudi regime also appointed its first female arbitrator.[278] This step will not only wield a positive impact in serving and helping the legal system and society, but also greatly enhance women's access to justice in the Kingdom. The new Saudi Minister of Justice, Muḥammad El-Eesa, indicated the importance of introducing the Law of Arbitration and reconciliation as a major step in the right direction when he said: "We hope to introduce a law for arbitration and reconciliation that will highlight, reduce and control the problems and family violence".[279]

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[275] One gauge of the exponential growth in scholarly attention to women in Islamic societies is a two-volume bibliography compiled by Yvonne Haddad and others. The first volume, The Contemporary Islamic Revival, which covers works published between 1970 and 1988, needed only eight of its 230 pages to list writing dealing with "Women." In the second volume, The Islamic Revival Since 1988, whose 298 pages cover works published between 1988 and 1997, the same category had swelled to 40 pages. Full citations of the volumes are: Yvonne Yazbeck Haddad, John Obert Voll, and John L. Esposito, The Contemporary Revival: A Critical Survey and Bibliography (New York: Greenwood Press, 1991); and Yvonne Yazbeck Haddad and John L. Esposito, The Islamic Revival Since 1988: A Critical Survey and Bibliography (Westport, CN: Greenwood Publishing, 1997).

[276] See W Zuhayli Al-Fiqh al-Islamī wa Adillatuhū (Islamic Jurisprudence and its Evidence), Vol. 6 (2010) 757. See also Zaydān, Abdul Karim, Al-Mufasal fī Aḥkām al-Marāʾ wa l-Bait al-Muslim Vol. 8 (2006) 421.

[277] Saneya Saleh 'Women in Islam: Their Role in Religious and Traditional Culture' *International Journal of Sociology of the Family* (1972) Vol. 2, No. 2, 193-201.

[278] A new era in the history of Saudi women was marked on May 10, 2016, when the Saudi Administrative Court of Appeal in Dammam approved the appointment (or more precisely, did not object to it) of the first Saudi female arbitrator in the field of commercial disputes. This ground-breaking woman is Ms. Shaima Aljubran. Available at http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/?doing_wp_cron=1596813377.7928140163421630859375. (Accessed on 1 August 2020).

[279] The undersecretary of Saudi Arabia's Justice Ministry and Chairman of the Appeal Court has said there is nothing which prevents women from becoming arbitrators. He was speaking during a seminar

Opinions from Religious Authorities on the Appointment of a Woman to a Judicial Post

Among classical Muslim scholars of fiqh, there seems to be agreement regarding the qualifications required for a judge (qāḍī).[280] Amongst the conditions it is stated that /she should be mature, sane, Muslim, fair-minded, free, industrious, and without any blemishes.[281] On the other hand, they disagree on the matter of the gender of a qāḍī.

The dispute arises as a result of the varied exegeses of the Qur'ānic verses and the ḥadīth of each of the four main schools of Islāmic law namely, the Shāfi'ī, Ḥanbali, Māliki and the Ḥanafi.[282] This issue has been discussed in detail in the writings of authoritative religious scholars such as Ibn Qudāma, Imam al-Qarāfi, and al-Fayrūz

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on commercial arbitration organised by Riyadh Chamber. He added mediation and arbitration should be encouraged for family disputes and said women can be commercial arbitrators but called for there to be better training of arbitrators in general. He went on to say better arbitration procedures should also be introduced to boost integrity and transparency. See https://www.lexis.ae/2018/11/17/saudi-arabia-women-can-be-arbitrators/ (Accessed on 1 August 2020).

[280] See Zuhayli W *Al-Qawāid al-Fiqhīyah Wa Tatbeeqatuhā Fi al-Mathāhib al-Arba'a: The application of Basic Principles of Fiqh in four Mathāhib* (2006) 190–196. Scholars who support the appointment of women judges (Quḍā) do not consider gender as a qualification for the post of a judge (Qādī). For them, gender does not prevent women from becoming a judge insofar as they possess the other qualifications. Hence, the majority of scholars in the Ḥanafi school allowed women judges to administer the entire Shari'ah except in criminal (ḥudūd) and retaliation (qisās) cases. Ibnul Qāsim from the Māliki school opined that women could be appointed as a judge in all cases except hudūd matters. The appointment of women as judges for Al Abāri, is permissible with the ability to make a legal decision or the ability to give a decree (fatwa). Imām Ibn Ḥazm also permitted the appointment of women judges in all affairs of Shari'a. In the contemporary context, Yūsuf al-Qardāwi agrees with the opinion that a woman can be appointed as a judge (Qādi) except in hudūd and qisās cases. He said that there is no clear evidence in shari'ah to prohibit women from attaining this position. Similarly, Muḥammad al-Ghazāli (AD.1917–1996), Abdul Kareem Zaidān (AD.1917–2014), Muhammad Baltaji and Tawfeeq al-Wāi are some of the other prominent scholars who approved the appointment of women judges.

[281] M. Ibn Qudāmah Almughni (1st ed) vol. 10, (1992) 263. Deviation from this rule was rare and scarcely ever happened in numerous Muslim countries. In Indonesia, where the Shafi'i legal jurisprudence has been prevalent for centuries, the initial appointment of female judges to the Islamic courts in particular was an uneasy process. As early as the 1960s, the Ministry of Religion and the Directorate of Religious Justice, whose main responsibility was to oversee the Islamic courts, sought to overcome this issue and enhance the quality of Islamic judges. In particular, they provided the Islamic judges with specific training on technical matters that would increase their expertise to the standard of civil judges. See Daniel S. Lev, Islamic Court in Indonesia: A Study in the Political Bases of Legal Institution (1972) 106. See also The contribution of Ibn Jarīr al-Ṭabari (AD 835–923), al-Marghīnani (AD 1135–1197), Ibn Qudāma (AD 1147–1223), Ibn Farhūn (d.1397), Muhammad Sallam Madhkūr and Muhammad Sangalāgi is exceptional as they studied the qualifications of a judge (Qādi) from various sources and compiled this in their works. Recently Ghulām Murtazā Azād compiled these scholars' discussion on the qualification of a judge (Qādi) and highlighted that some scholars quantified them to 30, while some others counted only three. See Azad, G.M. Qualifications of a Qādi in Islam Studies (1984) 23 249–263.

[282] See footnote 281. The move away from the monolithic opinions of the classical scholars regarding women.

Abādi. In addition to the Sunni schools, the Shi'ite Ja'fari school strictly forbids women from holding judicial posts. On the other hand, some adjudicators unrestrictedly allow for the appointment of women to the role of Qaḍi. These scholars believe that gender is not included in the conditions for judicial fitness, and indeed, the Andalusian sage Ibn Ḥazm allowed for the female appointment to judicial positions. A similar opinion is attributed to the jurist Ibn Jarīr al-Ṭabari who reasons as follows in his opinion, if a woman can serve as Mufti, then it is also permitted for a woman to serve as Qādī, because a Mufti presents religious opinion based on knowledge, consideration, and evaluation, and a Qādī also adjudicates according to them. If the appointment of a Mufti is not contingent on gender, this should also not be a condition for the appointment of a Qādī.[283]

In general, the Islāmic religious scholars who agree to the appointment of a woman to the role of Qādī base their claim on the absence of a prohibition in the Qur'ān and the Prophetic tradition regarding the appointment of a woman to a judicial position. The scholars of the Ḥanafi school of thought and Ibn Qāsim of the Māliki school are both of the opinion that it is permissible to appoint a woman to position of Qādī in certain areas of sharī'a.[284] For example, they allowed the appointment of a female judge to matters on which she could serve as a witness, that is to say, on any matter, except Ḥudūd (Penal Law) and Qisās (Law of retribution). According to an opinion of other Ḥanafi scholars, the appointment of a woman to a judicial position is prohibited, but if she is appointed, her rulings will be binding.[285]

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[283] Ibn Ḥazm (d. 456/1064) provides a detailed explanation of his view in favour of women judging. He presents a coherent argument that women do have authority over some matters. Because he is a Thāhiri, Ibn Ḥazm takes a literalistic approach to the Qur'an and ḥadīth. He disagrees with analogy, and he does not comment on the reasons for the doctrine. This can make it seem as though he has a more egalitarian vision of women's rights than do the other jurists. But, although his methods have a significant impact on his discourse, Ibn Ḥazm does not argue for equality between the sexes. Ibn Ḥazm's entire argument revolves around the question of women's authority. He stresses that the textual sources do not prevent women from exercising authority over some matters, including judging, and he argues that, historically, women have been put in positions of authority. He is quick to point out the inconsistency of those who claim to deny women any authority. The Māliki allow women to be guardians. For him, this proves that women are not precluded from authority in all areas, and those who claim that women cannot exercise any authority at all are being inconsistent. See also Abat i Ninet, A. The Administration of Justice in al-Andalus and the Principles of Justice in Constitutionalism. Paper Presented in Courts and Judicial Procedure in Islamic Law Conference in Honor of Roy Mottahedeh on the Occasion of His Retirement, Harvard Law School, Cambridge, MA, USA, 6 May 2016.

[284] See previous footnote 286.

[285] See footnote 274.

These scholars explain that the male gender is a required qualification of a judge, but they differ on the validity of a judgments by a female judge. They opine that her ruling is binding, even though her appointment to the position is prohibited in the first place, as long as ruling is based on Shari'a laws and as long as the ruling is not in the realm of criminal law or penal law; in these areas, she is neither entitled to judge nor to testify.

Until fairly recently this debate has still occupied the minds of scholars. The question as to whether there are consistent Islāmic doctrines that prohibit women from becoming judges in Sharia courts. Due to interpretations of religious and legal texts that comprise sharia, women have often been prevented from entering the judiciary. Palestine's recent appointment of the first female Sharia judge in modern Middle Eastern history, Kholoud al-Faqih, has caused a re-examination of Islāmic jurisprudence as it pertains to female judgeship. Although Muslims across the Middle East have mixed feelings regarding this change in the Sharia courts, many other women have now been appointed as Islāmic judges.

3.5 CONCLUSION

This research has focussed on the latest challenges and problems in implementing Dispute Resolution Practices amongst Muslims and concludes that the world has become a global village wherein the rapid growth in technology connectivity has presented humanity with greater opportunities to cultivate relationships to co-exist peacefully. This is so because Dispute Resolution may even be implemented which has been referred to as Online Dispute Resolution. Religious cohesion and pluralism are an inevitable phenomenon of the growth and interconnectedness, and whilst there are calls for racial and ethnic cleansing, this narrative has become problematic and unpopular. On a popular level, Islām has been viewed as the root cause and is seen as an essentially violent faith which propels its adherents to commit acts of terror. This thesis shows that the above view is accentuated by jihādist and narrow interpretations and is a view held by a small minority and that Muslims are essentially peace loving people. The thesis conclusively shows that religious and social pluralism are lofty ideals which the Qur'ān promotes and emphatically encourages through its teaching and that of the Prophetic ideals.

The second chapter navigates the conceptual notion of Sharī'a and shows that the Muslim worldview of Sharī'a is that it is textual as well as contextual. Contextual in the sense that it is forever evolving, fluid and dynamic. I conclude that contrary to popular belief, scriptural and extra-scriptural sources, as well as the various schools of Islāmic law, provide relevant options for dispute resolution mechanisms which have hitherto been insufficiently explored. Peace related values are central to the Muslim scripture and teachings and are reflected in the daily greeting of Muslims to one and each other, as salāmu alaykum, which means peace be upon you. In the Islāmic worldview peace (salām) is a state of, spiritual and social harmony, living at peace with God through submission. It is a belief system that renders it obligatory upon its adherents to seek peace in all aspects of their life and to render an ideal environment and society that the religion seeks to create.

Mechanisms for legal redress has existed in Islāmic law and practiced by its adherents since its inception. Classical Islāmic law texts offer various dispute settlement models, e.g. private settlement, reconciliation (ṣulḥ), arbitration (tahkīm*)* and mediation (wasṭa). In this thesis, I have shown that ṣulḥ as a dispute resolution mechanism in Islām has been widely employed as a mechanism of choice by the Prophet as well as his successors. Viewed from the perspective of the Qur'ānic regulations, scholars associate peace with a wide variety and range of concepts extending and including justice, mercy and forgiveness. The purport and import also refer to the overall well-being and human development, salvation, perfection and harmony. Justice is seen to be an integral aspect of the Islāmic discourse of peace, as the Qur'ān clearly states that the aim of religion is to convey a sense of justice, in the absence of which a positive state of peace cannot exist.

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