

## CHAPTER 2

### THE QURANIC APPROACHES TO DISPUTE RESOLUTION

The holy Qur'an is the last and the latest divine guidance from Allah (SWT) for every aspect of human life. Sent down upon His last Prophet Muhammad (SAAS), it serves as a record of and a guide for the activities and experiences of the Prophet and his contemporaries over the last twenty-three years of his life. It has recorded some actions and experiences of previous prophets and messengers for its lasting values. The messages of the Qur'an are timeless and universal in nature. It is replete in messages for the whole human nation until the Day of Judgment. It propounds a moral code and social guidance with a universal applicability. Pertaining from research question one this chapter is prepared to identify the significance of Quranic approach to dispute resolution.

Regarding dispute resolution the holy Quran ordered us to act justly, encourages us to settle a dispute amicably as early as possible.

﴿فَاتَّقُوا اللَّهَ وَأَصْلِحُوا ذَاتَ بَيْنِكُمْ وَأَطِيعُوا اللَّهَ وَرَسُولَهُ إِنْ كُنْتُمْ مُؤْمِنِينَ﴾

“So fear Allah and amend that which is between you and obey Allah and His Messenger, if you should be believers.”(Al-Quran, Al-Anfal 08:01).

The word *islah* in this *ayat* has been translated as Al-Mubarakpuri (2000) “settle all matters of difference”, Asad (1980) “keep alive the bonds of brotherhood”, Ali (1934) “keep straight the relations between yourselves”, and Pickthall (2005) “adjust the matter of your difference”. Khan and Khanam (2009) translated it as “set things right among you yourselves”.

Dispute resolution in this *ayat* is referred to by the word *iṣlāḥ* (*ḍhāt al bain*) derived from the verb *aṣlahā* meaning to mend, to restore something that is broken, to make something right, to make peace and to set something in order (Vehapi 2013). In reference to a previous corrupt state, it is to restore something to its original *ṣāliḥ* condition, to improve and make peace or *ṣulḥ* (Oḥmān 2005). The opposite of *iṣlāḥ* stated in the holy Qur'an is *ifsād* from which the word *fasād* comes meaning disorder, something corrupted and imbalanced. Regarding *fasād*, the Qur'an says:

﴿وَلَا تُفْسِدُوا فِي الْأَرْضِ بَعْدَ إِصْلَاحِهَا (07:56)﴾

“And cause not corruption upon the earth after its reformation” (Al-Quran, Al-A'raf 07:56).

There are four dimensions regarding the meaning of this *ayat*. These are as follow - cause not corruption upon the earth with disbelief, injustice, disobedience or by killing the believers after its reformation with belief, justice, obedience or its reformation by the believers (Al-Mawardi n.d.).

### 2.1. Defining Quranic Approach

The Quranic Approach means Quranic manner to address any social or familial issue. As the Quran addresses all aspects of human life, likewise it addresses a dispute between two individuals or groups also. In addressing a dispute, it reminds the believers repeatedly to be aware of Allah (فاتقوا الله), to refine the relationship and to amend what is between you (وأصلحوا ذات بينكم). The holy Quran, in this connection for doing the task of *iṣlah*, orders to obey Allah through obeying the Quran and His Messenger directly in his life time and following his Sunnah after his death (وأطيعوا اللهَ وَرَسُولَهُ) (al-Tbari 2000). So resolution of a dispute following Quranic instructions and Quranic norms is termed here the Quranic

Approach to dispute. The holy Qur'an affirms that all the human beings are descended from a single family (Adam and Eve) formed by the will of Allah. Therefore, the whole human being as member of that first family is in a brotherly bondage. Moreover, Muslims are for their same faith ordained not to entertain or invite any dispute that disrupt their relationship and make them weak. The Quranic approach negates violent disagreement (*ikhtilaaf*) and self-loving egotistic motivations (*hawā*), which have a tendency to develop and grow larger and larger. For, *ikhtilaf* and *hawā* penetrate deep into a person's psyche and take hold of his mind, attitudes, and feelings. Eventually, that person loses sight of the overall, total view of things (al `Alwani 1993). The Quranic approach is based on absolute truth and is explained by an objective and a refined motive. By the Quranic approach, we mean keeping the Quranic spirit, its objectives and matchless philosophy to resolve every dispute for the entire existing and upcoming humankind.

## 2.2. Importance of Quranic Revelation for Dispute Resolution and Ensuring Justice

Human intellect itself is not adequate to provide all that is appropriate for the society, for he is unaware of all beneficial and harmful consequences. In this regard, Allah (SWT) says:

لَا تَدْرُونَ أَيُّهُمْ أَقْرَبُ لَكُمْ نَفْعًا

"You know not which of them are nearest to you in benefit" (Al-Quran, An-Nisa 04:11).

In this context, Allah (SWT) further says:

﴿قَدْ أَرْسَلْنَا رُسُلَنَا بِالْبَيِّنَاتِ وَأَنْزَلْنَا مَعَهُمُ الْكِتَابَ وَالْمِيزَانَ لِيَقُومَ النَّاسُ بِالْقِسْطِ﴾ ...

"We have already sent Our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice..."(Al-Quran, Al Hadid 57:25).

This indicates that the aim of sending the messengers of Allah with clear signs and sending the scriptures down with them is that the people would uphold justice. If men were able to achieve justice through their intellect, there would have no need for the revelation. In this point Al Maududi (1981) states:

"The teachings of Islam are eternal, because they have been revealed by Allah Who knows all the present, past and future and Who Himself is eternal. It is the human knowledge that is limited. It is the human eye, which cannot see into dim vista of the future. He is God whose knowledge is above all the limitations of time and space ".

One of the miraculous natures of the holy Qur'an is that its precise wording and meaning being from Allah can address the entire human world and all aspects of their life proportionately. When it declares: "mankind may keep up justice" (لِيُقِيمَ النَّاسُ بِالْقِسْطِ) all the situations requiring justice and all those involved in it either as justice seeker or as dispenser of justice are equally included under the address of the *ayah*. Therefore, from top to bottom, the *ayah* simultaneously addresses all formal and informal judicial institutions. Justice is the core of Islam, and to ensure it the holy Qur'an is the guide.

### 2.3. Justice in the Holy Quran & Administration of Justice

The holy Quran emphasizes that the believers must refer their differences to "Allah and His Apostle".

(فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ) (Al-Quran, An Nisa, 04:59).

It means that disputes must be mediated by knowledgeable Muslims and in accordance with Islamic teachings. It requires an independent authority to settle the disputes through either formal court or any informal dispute resolution institutions. Again, to resolve a dispute, both this formal and informal authority must follow Quran and then Sunnah or both the Quran and Sunnah following the footsteps of the prophet (SAAS) (al-Tbari 2000). To follow the decision of the prophet in his lifetime was made an obligation, not an option and it remains as an obligation for the believers when they are in any dispute and a decision has been made following the Quran and Sunnah (al-Tbari 2000). The Quranic term '*Qadā'*' means judicial institution and administration of justice. It also indicates giving an order of judgment. It is a system where lies the act of deciding or providing decisions on something. The Purpose or objectives of *qadā'* or administrations of justice are as follows (Haroon 2017b, 82):

- a. To protect the weak and to punish the wrong doers in the society according to the rules revealed by Allah to His Prophet (SM)
- b. To do justice with a view to establishing peace, harmony, advancement and safety of humanity on earth
- c. To be a witness of Allah (SWT) while doing justice
- d. To convey judgment freely and fairly even though it goes against one's own self or close relatives like parents, children or it goes against the rich or the poor.
- e. To discharge the duties of *khilafah* as imposed by Allah (SWT)

Adjudication through formal judiciary under a formal court may be considered a superior mechanism for dispute resolution. However, neither the Quran nor *Hadith* stresses the virtue or necessity for *qaḍā'*. On the other hand, unambiguously both Quran and Hadith

uphold the values of conciliation and mediation etc over asserting legal rights (Islam and Alam 2018). Islamic dispute resolution system outside formal court owes its origin from the pre-Islamic tradition of dispute resolutions of Arab societies. The framework of the tribal system had provided important mechanisms for settling disputes in pre-Islamic life and in early days of Islam. General veneration for custom and precedents of the ancestors provided a semblance of social control and order (Othman 2005, 62). One of the main functions of tribal chiefs was to arbitrate in disputes, if called on to do so. A council of elders named the *majlis*, comprising the heads of the families and representatives of clans within a tribe, often acted as the chief advisors. Informal dispute resolution under Arab-Islamic culture is generally known as *sulh* or *sulhā*. The word *sulh* can be defined as a method or mechanism to settle the dispute amicably. *Sulh* can also mean an agreement between two parties relying on the prescribed conditions on which they agreed earlier in the process of settling their disputes. According to *Ibn Qudamah*, *Sulh* is an agreement between two disputing parties leading to peace. In Islam the process of *Sulh* can be practiced in all cases except in *hudud* cases (Azim 2017).

With the establishment of a distinctive Muslim polity in Medina in 622/623 C.E., issues related to the resolution of disputes and dispensation of justice ceased to lie with the individual sufferer or tribe alone, but became the new community's concern. The tribal heads and arbiters continued to serve their followers during conflicts. But they could not succeed to break up the political structure of the Madinan society and its allies' network set by the Prophet. This development made a revolutionary change over the customary social and political order, albeit still it is there within the structure of tribalism. Faith

instead of blood starts working as the social bond, and with this faith-based bond reforms were going on within the *ummah* of the blood feud and a new conception of authority remarkably replaced the old series of agreements practiced by the tribes. As the leader of the *ummah* the Prophet functioned for those who were truly converted, not by conditional and consensual authority grudgingly granted by the tribe and always revocable, but by an absolute religious prerogative. The source of authority was transferred from public opinion to God, who conferred it on the Prophet as His chosen apostle (Othman 2005, 69-71).

#### 2.4. Foundation of the Quranic Dispute Resolution System

The holy Quran commanded the Muslims to reconcile one another and maintain a peaceful relationship amongst themselves, for such is the attitude of true believers and those who fear God.

﴿فَاتَّقُوا اللَّهَ وَأَصْلِحُوا ذَاتَ بَيْنِكُمْ وَأَطِيعُوا اللَّهَ وَرَسُولَهُ إِن كُنْتُمْ مُؤْمِنِينَ﴾

“So fear Allah and amend that which is between you and obey Allah and His Messenger, if you should be believers”(Al-Quran, al-Anfal 08:01).

The cause of revelation of this *ayah* as stated by al-Tbari (2000) is that Ubada bin Samit said that the *ayah* has been revealed concerning us- the participators of the battle of Badr when we got involved in a dispute about the spoil of war and which hampered our relationship. Then Allah (SWT) had taken the issue to Him and handled the issue of distribution of the remnants of war through His prophet (SAAS). The *ayah* ordered us to reshuffle our relationship and follow the prophet regarding the remnants of war. This first *ayat* of *sura al-Anfal* depicts a situation in which disputants were involved with getting remnants of war without waiting for any instruction from the prophet (PBUH).

This attitude hampered their relationship. The *ayat* put the issue aside and asked the disputants to reconcile and keep the relationship alive.

The holy Qur'an addresses conflict and conflict resolution on numerous occasions. Based on a study of the Qu'ran, *Hadith* and other important documents of Islam, Vehapi (2013) has stated that Muslims cannot be involved in any conflict unless it is for the purpose of self-defense or self-preservation. In the face of conflict, Muslims were reminded that they would remain faithful to the teachings of the religion and accept the decision of their leader as resolution of their disputes. The holy Quran has also emphasized the need for immediate settlement of social disputes so that peace in general prevails in the society.

Allah (SWT) says:

﴿أَمَّا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ﴾

“The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy<sup>1</sup>”(Al-Quran, Al-Huzrat 49:10).

At the same time, the Qur'an indicates that Muslims are also required to be in favor of peace even with their foremost enemies. They must be prepared to the utmost in facing hostile forces and never flee from the battlefield, but if their adversaries are inclined towards peace, then they must also veer toward it and give the opposite the benefit of the doubt, even if there is possibility of treachery.

﴿وَإِنْ جَنَحُوا لِلسَّلْمِ فَاجْنَحْ لَهَا وَتَوَكَّلْ عَلَى اللَّهِ إِنَّهُ هُوَ السَّمِيعُ الْعَلِيمُ﴾

“And if they incline to peace, then incline to it [also] and rely upon Allah. Indeed, it is He who is the Hearing, the Knowing”<sup>2</sup>(Al-Quran, Al-Anfal 08:61).

1 Saheeh International, <http://tanzil.net/#trans/en.sahih/49:10>

2 Saheeh International, <http://tanzil.net/#trans/en.sahih/8:61>

This shows the preeminence of resolving dispute amicably and reestablishing a peaceful coexistence, even with the extreme enemies and those over whom one could possibly gain an upper hand. The repeated commands to obey Allah in the verses in fact mean that to persist in conflict and to disregard the reconciliatory measures amounts to a *ma`siyyah*-an insubordination to Allah, with grave consequences.

﴿قُلْ أَطِيعُوا اللَّهَ وَالرَّسُولَ فَإِنْ تَوَلَّوْا فَإِنَّ اللَّهَ لَا يُحِبُّ الْكَافِرِينَ﴾

Say, "Obey Allah and the Messenger." But if they turn away - then indeed, Allah does not like the disbelievers (Al-Quran, Al-Imran 03:32).

### 2.5. Spirits and Objectives of Quranic Dispute Resolution

Islam puts great importance on justice; indeed, the act of adjudication in Islam is considered a divine activity and a semblance of dispensing Allah's justice on earth (Hoque and Khan 2007). The main spirits and focuses of informal dispute resolution are a) on settlement and reconciliation and not on judgment, and b) on maintaining the relationship, brotherliness, and social harmony between the disputants. Because a fair judgment may resolve a dispute but may not necessarily restore relationship between disputants. The primary objectives are - a) to resolve the disputes with minimum cost and time and with utmost fairness, b) to promote attitudes of sacrifice for the sake of amicable settlement, and restoration of relationship between the disputants, and c) to pursue *maqasid al shariah* of welfare of human being and their safety from dangers through ensuring justice.

### 2.6. Qualification of an independent neutral third party

Sincerity, fairness, good reputation, acceptability to both parties and profound Islamic

knowledge are the core conditions of an independent third party for dispute resolution in both formal and informal dispute resolution system. Allah says in the Holy Quran:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَيْكُمْ أَلَّا تَعْدِلُوا أَعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَىٰ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ﴾

“O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do”(Al-Quran, Al-Maida 05:08).

He also says:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنْفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ إِنْ يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أَوْلَىٰ بِهِمَا فَلَا تَتَّبِعُوا هَوَىٰ أَنْ تَعْدِلُوا وَإِذَا لَوْا وَإِذَا لَوْا أَوْ تَعْرَضُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا﴾

“O you, who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted (Al-Quran, An-Nisa 04:135).

The Holy Quran emphasizes, for instance, the issue of witnesses to contract formation, on reputation and acceptability. Allah says: (Al-Baqarah; 02:282)

﴿مَنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ﴾

The word “*Tardawna*” is derived from “*Redha*” Which means acceptance.

The prophet (SAAS) says:

القضاة ثلاثة، واحد في الجنة واثنان في النار، رجل عرف الحق فقضى به فهو في الجنة، ورجل قضى بين الناس بالجهل فهو في النار، ورجل عرف الحق فجار فهو في النار.

“There are three kinds of judges: two are in the Fire and one in Paradise; the one in Paradise is the one who knew the truth and judged by it. The one who judged amongst people in his ignorance is in the Fire, and the one who knew the truth, but he deviated from it in his judgment, then he is in the Fire” (Hadith. al-Ash`ath. Kitab al-Aqdiyah: Bab al-Qadi Yukhti:Juz 5: #3573)

For judges in formal judiciary (*Qada*) Islamic jurists set some fundamental qualities, like:

- To have belief in Allah and His Messenger and what he came with
- To have profound knowledge of the Qur'an and the *Sunnah*

- To lead his personal life in accordance with the Islamic *Shariah*

If these qualities do not exist together, a judge will be like a blind man carrying a lamp in his hand. Neither he can benefit from it nor have others benefited. Besides, he is not safe from stumbling and the lamp be either broken or extinguished. Hence, the judges must meet these conditions. In addition to the fundamental qualifications mentioned above the judges must have also some other qualities, like:

- Maturity in age; that a minor who has still not attained the age of maturity cannot be a *Qadi*.
- Strength of memory and genius
- Soundness of wisdom and conscience
- Authenticity of justness and fairness
- Purity of birth
- To be male, though a woman may also be appointed as *Qadi* in those cases wherein her evidence is admissible
- To be a Muslim; that a non-Muslim is not eligible for holding the office of *Qadi*.
- To be away from anger, hunger and over excitement during the time of trial and judgment
- And should never get tired at litigant's lengthy arguments; but they must exhibit patience, perseverance in scanning the details, in examining points and sifting fact from fictions.

Since Islam laid down utmost importance on justice and it is dependent on the judges, they should have capability and maturity of judgment and should meet the above-mentioned conditions (Uthman 1994).

## 2.7. Dealing Cases of both Civil and Criminal Nature under *Ṣulh*

*Sulh* in the meaning of amicable settlement is just opposite to formal judiciary *al-Qada*. It is in this sense equal to present day Alternative Dispute Resolution (ADR). In Islamic judiciary system, it runs hand in hand with *al-Qada*. As an informal system in dispensing justice, it is akin to Traditional *Shalish* (a neutral third party working between two disputing parties) in Bangladesh. So it needs to discuss how *sulh* deals both civil and criminal cases under *Qada* (formal court) or outside the court independently. For this purpose, we need to understand nature of civil and criminal cases under terminology of Islamic jurisprudence.

### 2.7.1. Understanding a case of Civil or Criminal in nature

Laws are categorized from various angles under various categories. A category based on philosophical ground of benefit (*maṣlaḥa*) divides it into Public and Private Law corresponding to *ḥaqqu-Allah* (rights of Allah) and *ḥaqqul `Ibād* (rights of individual) in classical Islamic jurisprudence. The rights of Allah (SWT) (*ḥaqqu Allah*) are an obligation to Allah (SWT) and correspond to public interest, for Allah gets no benefits at all from his creation. In fact, the human being gets benefits from all that exists in the world and thus *ḥaqqu-Allah* corresponds to public interest. The violation of rights of Allah will cause *liabilities* in this world and the hereafter. The rights of Allah (SWT) are enforced by the state and do not require to accept complaint from the victim which may include rituals and worship.

The rights of individuals (*ḥaqqu al-`ibād*) are for self-interest or for the benefit of others. For instance, commercial rights, contractual rights, political rights, and social rights.

Nevertheless, there can be a combination between the rights of Allah (SWT) and the rights of the individual, but the former prevails or the right of individual prevails. For example, both the cases of suicide and wasting of property involve rights of Allah and individuals but the right of Allah is dominant. The right of individuals can be dominant if they (the victim or the heirs) suffer more detriment (Hallāq 1986).

Again based on transgression of limits of rights by an individual or a group of individuals, cases are divided into civil and criminal in nature and consequently treatment is made by civil and criminal laws. A civil case transgresses limit of rights of others in a way that it needs a remedy and the criminal cases need a punishment based on the degree of the crimes.

### **2.7.2. Crimes and Types of punishment**

A crime is an offensive action executed by an offender primarily against society. In its wider range, it goes against humanity. There is a general perception; ‘A crime should not go unpunished’. Indeed, for safety and security of the society a crime should not be left without a proper treatment. At the time of the prophet (SM), he was divinely authorized to settle all types of disputes and because of the expansion of the then Islamic state, the prophet (SM) appointed some judges on behalf of him. At the time of the *khulafā ar Rāshidīn*, the *Khulafā* continued to appoint the judges on behalf of them. The main concern of the judges was civil cases at that time (Uthman 1994, 42). The *kuhlafā* and their governors of different provinces dealt criminal cases. It shows the importance of

handling the criminal cases. Offences under the Islamic criminal law consist of *ḥudūd*, *qiṣāṣ* and *ta‘zīr*. There are three types of punishment accordingly such as:

***Ḥudūd***: Plural form of *Ḥadd* means ‘limit’ denoting fixed penalties. This is the form of punishment, which is prescribed by the Qur'an and cannot be increased, decreased, waived or modified by the human agency, because it is imposed for the sake of public interest. It denotes specific punishment for specific offences like *zina* (adultery), *saraqah* (theft), *sharab* (wine drinking), *qazaf* (defamation/ calumny) and *riddah* (apostasy). *Hudud* is considered as a crime against Allah (SWT) as it involves His rights. However, some offences such as robbery, theft, and false accusations involve both the rights of Allah (SWT) and the rights of individuals (Hallaq 1986). Its object is to deter and warn people from committing of such actions which are to be penalized by *Hadd*. It is inflicted in the same manner both on the Muslims and non-Muslims.

***Qiṣāṣ and Diya***: *Qisas* means retaliation and *Diya* means blood money. *Qisas* denotes to punish the offender in the same manner as he did to the victim. It is applied to cases of willful killing and certain types of grave wounding or maiming which are characterized as offences against human life and body. This offence infringes the rights of the individuals as well as the rights of Allah (SWT), but the rights of the individual dominate in this respect. Punishment of *qiṣāṣ* is fixed by the law of retaliation or *diyat* (blood money), but can be remitted by the victim or his heirs. *Qiṣāṣ* becomes *diya* when the next kin of the victim is satisfied with money as compensation for the price of blood. This

cannot be reduced or modified either by *Qāḍī* or the government. In cases where *Qīṣāṣ* is to be implemented, it could be exchanged with *diyya* or blood money.

**Ta`zīr:** *Ta`zīr* is another form of punishment that means prohibition and it is applicable to all crimes which are not classified under *ḥudūd* or *qīṣāṣ*. It is at the discretion of the authority to punish the offender of a *ta`zīr* offence. *Ta`zīr* offences include violating the rights of Allah such as taking *riba*, breach of trust, and false testimony of the rights of individuals such as defamation and cheating. Punishments of *ta`zīr* offences are of admonition, fine, the death penalty, imprisonment, and caning. All new offences known to the Muslim law in the progress of its development were dealt under the general head '*ta`zīr*'. In short, the doctrine of *ta`zīr* gives wide scope to the judge in inflicting punishment (Karim and Khalid 2016, Hallaq 1986).

As *ṣulḥ*, agreements could be used to resolve any kind of dispute except a *Ḥadd* crime. It may easily act to settle a dispute related to a crime punishable by *Qīṣāṣ* rather than a crime punishable by *ta`zīr*. The entire system of the Islamic Criminal law is based on the holy Qur'an and the Sunnah. The Quranic and *Sunnatic* law go against any anti-social activities and help to implement justice in all sectors of a state.

### 2.7.3. Dealing Criminal Cases under *Ṣulḥ*

Many people assume that *ṣulḥ* is only applicable to civil cases. Nevertheless, in Islamic law *ṣulḥ* is also applicable to criminal cases particularly of homicide and bodily injury (Hoque 2012). *Ṣulḥ* as ADR (Alternative Dispute Resolution) has already been

introduced to the administration of civil justice in Bangladesh. ADR is becoming popular day by day but it has not been extensively used yet in the arena of criminal justice. However, the holy Qur'an has widened the scope for criminal cases except for the *hudūd*. It is worth noting that even though *hudūd* are categorized as crimes that involve the right of Allah, there are some *hudūd* offences that are considered infringing both the right of Allah and the right of individual, such as the crime of *sariqah* (theft), *hirābah* (robbery) and *qazaf* (false accusation of *zina*). Concerning *sariqah* and *hirabah*, both are crimes that involve taking away the property of another person which, of course, infringe the right of individual. Thus, *ṣulh* can be made between the offender and the victim as long as the crime is not brought to the court (Hoque 2012). The victim and the offender may resolve offences of false accusation, theft and robbery through *ṣulh* if the cases are not brought to the court. Some examples of *ṣulh* in *hudūd* cases are as bellow-

**a) *Ṣulh* in False Accusation (*Qadhaf*)**

False accusation (*qadhaf*) is an offence when any person accuses someone else falsely of committing fornication and challenges the legitimacy of a child. A person will be liable and punished for false accusations if he accuses someone of committing adultery, but fails to produce four witnesses to support the allegation. The punishment for false accusations is stated in the Quran and comprises of flogging with eighty stripes, and ever rejecting that person's testimony in court. In this case, if the victim does not wish to lodge a complaint against the accused and forgives them, the *ḥadd* punishment will not be imposed (Hallaq 1986).

**b) *Ṣulh* in Theft (*Sariqa*)**

*Ṣulh* is encouraged in theft as the offence also involves the rights of individuals. Literally,

theft (*sariqa*) means intentionally taking away another's movable property in secret. Technically, it means taking away the property from others' custody in secret the amount of which is not less than ten *dirhams*. The punishment for theft is amputation of the hands of the offender. There is a *Hadith* where Safwan ibn Umayya's cloak was stolen while he was sleeping at a mosque. The Prophet (SAAS) ordered the thief's hand be cut off, but Safwan said that he did not intend to punish the thief and he wanted to donate the cloak to the thief. Then, the Prophet (PBUH) asked why Safwan had not done this before the matter was brought to him. This *Hadith* indicates that theft is allowed to be resolved through *ṣulh*. If the stolen property is returned to the owner before the victim takes legal action, the allegation is withdrawn and the accused will not be punished. However, if the stolen property is returned after the criminal proceeding begins, regardless of whether the property was returned before or after trial, *hudud* will be imposed upon the offender.

### c) *Ṣulh* in Robbery (*ḥirabāh*)

*Ṣulh* is also applicable in robbery. Robbery (*ḥirabāh*) is to take away property from the custody of another person with threatening or using force. *Ḥirabāh* is considered as an offence against an individual and an offence of waging war against Allah and the Prophet with arms. The punishment of robbery as mentioned in the Quran is – a) death if homicide is caused by the act of robbery b) amputation for the first offence and if the act does not cause death to the victim, c) crucifixion if the offender commits homicide and robbery, and d) banishment if the offender neither robs nor kills the victim. The offender can be exempted from *hudud* of robbery if he or she repents before being arrested. This is based on the *ayah*:

﴿إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْدَرُوا عَلَيْهِمْ﴾

“Except for those who return [repenting] before you apprehend them” (Al-Quran, al-Maida 05: 34).

Though the repentance before arrest withdraws *hudud*, the offender still carries liability. If the act causes death to the victim, the offender is responsible to the heirs as an act of *qisās*. The heirs of the victim have the option to either demand *qisās* or forgive the offender and claim compensation. If the offender takes the property, the property must be returned to the owner if the offender knows the owner. If the owner is not known, the property must be given to Bayt al-Mal. However, if the property is no longer with the offender, the offender must pay the value of the stolen item to the owner.

#### ***Ṣulḥ in Qisas and Diyah:***

The Quranic approach for retaliatory criminal cases is reflected in the verse below where the holy Quran states:

﴿وَجَزَاءُ سَيِّئَةٍ سَيِّئَةٌ مِّثْلُهَا فَمَنْ عَفَا وَأَصْلَحَ فَأَجْرُهُ عَلَى اللَّهِ إِنَّهُ لَا يُحِبُّ الظَّالِمِينَ﴾

“And the retribution for an evil act is an evil one like it, but whoever pardons and makes reconciliation - his reward is [due] from Allah. Indeed, He does not like wrongdoers (Al-Quran, al-Shura 42:40).”

In this verse, it indicates that Islam allows the victims injured to seek retaliation from the offender. However, if the victim forgives and reconciles with the offender, Allah will reward the victim. In respect of evil deeds victims are of three categories. *Al-‘Adilal Muqtasid* who maintains justice in retaliation, *Al-Sabiq-fi-al-Khairat* who forgives and reconciles with the wrongdoers and *al-Zalim li Nafsih* -wrongdoers. This ayah started with an advice to do justice, then encouraged forgiveness and reconciliation and lastly warned the wrongdoers (Ibn Kathir 1999).

*Qisās* and *diyah* are for crimes punishable with fixed punishments, which have been mentioned clearly in the text of the Quran and the Sunnah. The crimes include homicide and causing physical injury to others. *Qisās* and *diyah* differ from *ḥadd* in the context concerning the individual right. The punishment of *qisas* and *diyah* is fixed and thus the judge has no right to remove or mitigate the punishment based on his own discretion. However, since this type of offence is about the right of individual, the infliction of punishment depends on the demand of victim or his relatives. The victim or his relatives may want to demand the infliction of *qisas* or may choose to reduce it to *diyah* or to pardon the offender. It also depends on them whether considering any negotiation in determining their rights. *Sulh* can play its role in remitting or mitigating the punishment of *qisas* after the offender has been convicted or found guilty. The validity of *sulh* in *qisas* and *diyah* crimes is supported by many Quranic verses and Hadith of the Prophet (SAAS). For example in the case of murder, Allah says:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ: الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ ۖ وَالْأُنثَىٰ بِالْأُنثَىٰ ۚ فَمَنْ عُفِيَ لَهُ مِنْ أُخِيهِ شَيْءٌ فَاتَّبَاعَ بِالْمَعْرُوفِ وَأَدَّىٰ إِلَيْهِ بِإِحْسَانٍ ۗ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ ۚ فَمَنْ اعْتَدَىٰ بَعْدَ ذَلِكَ فَعَلَهُ عَذَابٌ أَلِيمٌ﴾

“O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment (Al-Quran, Al-Baqara 02:178).

There is a *Hadith* narrated by Wa'il ibn Hujr where a man who committed murder was brought to the Prophet (SAAS). The Prophet (SAAS) called the heirs of the victim and asked whether they forgave the murderer. The heirs refused to forgive. The Prophet

(SAAS) asked whether they would like to accept blood money. The heirs refused to accept the blood money. Then the Prophet (SAAS) asked whether they wanted to kill the murderer. The heirs replied “yes”. The Prophet (SAAS) asked the heir to take the life of the murderer. After repeating everything for the fourth time, the Prophet (SAAS) said:

“If you forgive him, he will bear the burden of his own sin and the sin of the victim. The heir then forgave him”(Hadith. Al-Sijistani. Kitab Al-Diyat: Bab al-Imam Yamru bi al`afw fi al-Dam: Juz 0:#4499)<sup>3</sup>

This Hadith is about the right of the heirs of the victim murdered. It can be seen that at first the heirs of the victim refused to forgive and take compensation. Even though the Prophet (SAAS) repeated the question four times, the answers given by the heirs were the same until the Prophet (SAAS) said that if the heir forgave the murderer, the murderer would bear the sin of himself and the victim. Only then, the heirs forgave the criminal. This Hadith indicates that the Prophet (SAAS) had interfered and tried to reconcile between the victim's heir and the murderer by asking the heir to forgive the murderer and offer compensation to the victim.

Relating to physical injury in a Hadith **Anas al-Rabi narrated that:**

“Ar-Rabi, the daughter of An-Nadr broke the tooth of a girl, and the relatives of Ar-Rabi` requested the girl's relatives to accept the *Irsh* (compensation for wounds etc.) and forgive (the offender), but they refused. So, they went to the Prophet who ordered them to bring about retaliation. Anas bin An-Nadr asked, "O Allah's Apostle! Will the tooth of Ar-Rabi` be broken? No, by Him Who has sent you with the Truth, her tooth will not be broken." The Prophet said, "O Anas! Allah's law ordains retaliation." Later the relatives of the girl agreed and forgave her. The Prophet said, "There are some of Allah's slaves who, if they take an oath by Allah, are responded to by Allah i.e. their oath is fulfilled). Anas added, "The people agreed and accepted the *Irsh*” (Hadith. Al-Bukhari. Kitab Al-Sulh: Bab Sulh fi Ad-Diyah:#2703)<sup>4</sup>.

3 For full text and translation please check here <https://sunnah.com/abudawud/41/6>

4 For instant check of text and translation please go to <https://sunnah.com/bukhari/53/13>

This Hadith indicates that in case of causing physical injury the victim has the right to retaliate or to forgive and receive compensation. The parties are bound to follow the agreement if they resolve the dispute through *sulh*.

Informal dispute resolution system is being recognized and legalized under the umbrella term ADR worldwide. However, for traditional informal rural justice system, practiced in different names all over the world and in the name of *shalish* in Bangladesh, has no legal recognition or statutory law to guide and control it. Though it has no legal recognition, it is socially accepted in every rural society of the world. The holy Quran addresses dispute as a real life concern issue. Based on its relationship with private or public interest (*Haqqul `Ibad* or *Haqqu Allah*), and cases of civil or criminal nature, the holy Qur'an addresses the concerned authority of every level to settle a dispute quickly and amicably.

#### 2.7.4. *Sulh* in Civil Cases

Human is a social being. Co-operation, competition and reaction are manifestations of their interaction in daily life. However, the holy Quran commands them to be co-operative with one another in every good deed and forbids them to do any un-necessary competition and baseless reaction. Commending assistance and mutual co-operation Allah (SWT) says:

﴿ وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ ﴾

And cooperate in righteousness and piety, but do not cooperate in sin and aggression (Al-Quran, Al-Maida 05:02).

﴿وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ يَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ ...﴾

The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong... (Al-Quran, At-Tawba 09:71)

The Messenger (SAAS) said:

أحب الناس إلى الله أنفعهم للناس  
وأحب الأعمال إلى الله عز و جل سرور تدخله على مسلم تكشف عنه كربة أو تقضي عنه ديناً أو تطرد عنه جوعاً  
ولأن أمشي مع أخ في حاجة أحب إلي من أن أعتكف في هذا المسجد يعني مسجد المدينة شهرًا... (رواه الأصبهاني  
واللفظ له ورواه ابن أبي الدنيا عن بعض أصحاب النبي صلى الله عليه وسلم ولم يسمه)

“The best of you in Allah’s eyes are those who are more beneficial to others and amongst the best deeds in Allah’s eyes are: creating happiness in the heart of a Muslim, or paying his debt, or satisfying his hunger”. He added: “Attending my brother’s need is dearer to me than retreat “*Itikaf*” in this mosque (Madinah Mosque) for one month”(Hadith. Al-Munziri. Kitab al-Birr wa Al-Silah wa Gairihima: At-Targib fi Qadai Hawaij al-Muslimin wa Idkhali As-Sururi `Alaihim:Juz 3#3985/#22).

Regarding dispute the holy Qur’an recommends peaceful settlement. We can find numerous verses of the Holy Qur’an and many *Hadiths* in this connection.

Allah says in Surat Al-Nisaa:

﴿لَا خَيْرَ فِي كَثِيرٍ مِّنْ نُّجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ بَيْنَ النَّاسِ وَمَن يَفْعَلْ ذَلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا﴾

“No good is there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between people. And whoever does that seeking means to the approval of Allah - then We are going to give him a great reward”(Al-Quran, An-Nisaa 04:114).

### The Quranic Approaches to Civil Dispute Resolution

Discussions below will provide some examples of Quranic approaches to Dispute Resolution for civil matters. Two verses explicitly command conciliation when conflict occurs between Muslims, in sura *Al-Anfal* 08:01 and *Al-Hujurat* 49: 09-10.

### The first one is-

﴿سَأَلُونَكَ عَنِ الْأَنْفَالِ قُلِ الْأَنْفَالُ لِلَّهِ وَالرَّسُولِ فَاتَّقُوا اللَّهَ وَأَصْلِحُوا ذَاتَ بَيْنِكُمْ وَأَطِيعُوا اللَّهَ وَرَسُولَهُ إِن كُنْتُمْ مُؤْمِنِينَ﴾

They ask you, [O Muhammad], about the bounties [of war]. Say, "The [decision concerning] bounties is for Allah and the Messenger." So fear Allah and amend that which is between you and obey Allah and His Messenger, if you should be believers (Al-Quran, Al-Anfal 08:01).

This *surah* is said to have been revealed soon after the Muslim victory at the battle of Badr in the year 624 C.E., and which establishes the larger aspects of the lessons of the event. Badr is one of the most important battles in the history of Islam that took place between the newly emerging Muslim community in Arabia and their adversaries of Makka who had rejected the message of the Prophet. Groups within the Muslim army had begun to dispute over entitlement to the spoils of war and some had made specific requests to the Prophet who was the commander of the Muslim army. According to one report, different sections of the army, having had different tasks assigned to them before the battle, argued over who had played a more significant role in the victory and were therefore more deserving of a share (Ibn Kathir 1999).

This *surah* lays down that no soldier or troop has any inherent right to booty amassed from battle: a righteous war is a community affair and any gain resulting from it belongs to Allah and the community (Othman 2005, 36).

### The Second one is-

﴿وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا فَإِنْ بَغَت إِحْدَاهُمَا عَلَى الْأُخْرَى فَقَاتِلُوا الَّتِي تَبْغِي حَتَّى تَفِيءَ إِلَى أَمْرِ اللَّهِ فَإِنْ فَاءَتْ فَأَصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ، إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ﴾

And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly. The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy (Al-Quran, Al-Hujurat 49:09-10).

Background of this *Ayat* is that an incident involving the Prophet and Abd-Allah ibn Ubayy, a nemesis, is said to have been the instigator to this significant verse on conciliation. The latter, described by the Islamic tradition as a 'hypocrite' and constant troublemaker within the early Muslim community centered in Medina, had insulted the Prophet, triggering a fight between their followers. Another report attributes the revelation of this verse to the quarrel that ensued between the relatives of a woman and those of her husband from the Ansar. He had prevented her from seeing her family and detained her in their home, causing her to seek help from them (Ibn Kathir 1999). Here reconciliation is invoked as an enforcer of a great, if not the greatest, social ideal of Islam: brotherhood.

This *surah Al-Hujrat* actually raises several factors that can cause conflict and dissension among people: rumormongering, ridiculing, backbiting and casting suspicions on others are expressly censured. In connection with this, a verse in the *surah An-Nisa*, reiterates that “there is mostly no good in most of people's 'secret talks' except those who are sincerely advocating charitable works, the doing of good or conciliation (*iṣlāḥ*) between men”. Muslims cannot allow conflicts to undermine the bond of brotherhood between them and must act to rectify the situation. The need for neutrality and objectivity is highlighted here, for conciliators are commanded to treat both sides with fairness.

However, they may take drastic measures in the case of a party that acts out of bounds and rejects a peaceful resolution. As in verse 08:01, one is reminded that the initiative to reconcile between contending people must be undertaken with a consciousness of God (Othman 2005, 36).

### **Cases of domestic (family) dispute receive considerable attention in the Qur'an:**

Family is the smallest unit of an Islamic society where men administer women. But ill-treatment or negligence may occur from both ends. Dispute in a family originates in this way and then -

a) Husbands are advised to right the wives with either counseling or minimizing intimacy with her or beating lightly. The Holy Quran says in this regard-

﴿وَالَّذِينَ يَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَأَهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَأَضْرِبُوهُنَّ فَإِنْ أَطَعْنَكُمْ فَلَا تَبْعُوا عَلَيْهِنَّ سَبِيلاً إِنَّ اللَّهَ كَانَ عَلِيماً خَبيراً﴾

“But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand” (Al-Quran, An-Nisa 04: 34).

b) When there is dissension between a husband and wife; in fact, even when tensions have only just begun between them and they are not able to minimize it themselves, Muslims are asked first to resort to an internal mechanism to settle the matter:

﴿وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَأَبْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيماً خَبيراً﴾

“If you fear a breach between them, appoint an arbiter from his family and one from hers. If they wish for reconciliation, God will reconcile between them” (Al-Quran, An-Nisa 04: 35).

c) When domestic discord arises due to the possible *nushuz* (ill-treatment or neglect) of the husband, *sulh* (settlement) is highly encouraged.

﴿وَإِنْ أَمْرَةٌ خَافَتْ مِنْ بَعْلِهَا نُشُوزًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا وَالصُّلْحُ خَيْرٌ﴾  
 “And if a woman fears from her husband **contempt** or **evasion**, there is no sin upon them if they make terms of settlement between them - and settlement is best” (Al-Quran, An-Nisa 04:128).

Al-Mubarakpuri (2000) translated the words *nushuz* and *i`arad* by ‘cruelty or desertion’ Maududi (1988) translated them as ‘ill-treatment or aversion’, Daryabadi (1971) ‘refractoriness or estrangement’, Ahmed Reza Khan Translated as ‘ill treatment or disinterest’, Pickthall (2005) ‘ill treatment or desertion’,

Asad (1980) translated the *ayat* a bit with a short explanation

“And if a woman has reason to fear **ill-treat-ment** from her husband, or that he **might turn away** from her, it shall not be wrong for the two to set things peacefully to rights between themselves: for peace is best, and selfishness is ever-present in human souls. But if you do good and are conscious of Him- behold, God is indeed aware of all that you do”.

Regarding revelation of this ayah, Ibn 'Abbas narrated

"Sawdah feared that the Prophet (SAAS) was going to divorce her, so she said: 'Do not divorce me, but keep me and give my day to 'Aishah.' So he (SAAS) did so, and the following was revealed: Then there is no sin on them both if they make terms of peace between themselves, and making peace is better (4:128). So whatever they agree to make peace in something then it is permissible (Hadith. al-Tirmidhi. Kitab Tafsir al-Quran`an Rasulillahi (SAAS): Juz 3 #3244)."

The consent of wife is needed because the law requires a polygamous man to treat his wives equally, and not to prefer one to another in terms of the number of days spent with and maintenance spent for each. According to Al-Jassas (1405 AH)"Some knowledgeable people state that (settlement is best) means it is better than the cruelty and desertion. Others say it is better than separation. It is of general application on the permissibility of *sulh* for all matters, except that which is excluded by a legal proof ".

**There is a limitation of the application of *ṣulḥ*** based on *Hadith* of the Prophet (PBUH) as reported by ‘Abd Allah, the son of Amr bin ‘Awf that:

“I heard Allah’s Messenger saying: ‘Compromise is permissible among the Muslims, except the compromise that makes the lawful as unlawful or makes the unlawful as lawful’”(Hadith. Ibn Majah . Kitab Al-Ahkam: Bab As-Sulh: Juz 2:#2353)<sup>5</sup>.

‘Umar Ibn al-Khattab also mentioned in his letter of judgment to Abu Musa al-Ash‘ari “Compromise is permissible between the people except a compromise which would make licit (*ḥalāl*) which is illicit (*ḥarām*) or make illicit (*ḥarām*) which is licit (*ḥalāl*)”(https://www.alukah.net/sharia/0/50389/).

*Sulḥ* is not allowable in cases where the law is clear and explicit e.g. Rasullullah’s rejection of the mediation of Usamah Ibn Zaid, whose honorific was ‘the loved one of Allah's Messenger’, in the case of the Makhzumi women to avoid the punishment of theft. Rasullullah’s reply to the request of Usamah Ibn Zayed was strongly negative:

“Do you intercede regarding one of the punishments prescribed by Allah?” He then stood up and addressed the people: “O people, those who have gone before you were destroyed, because if any one of high rank committed theft amongst them, they spared him; and if anyone of low rank committed theft, they inflicted the prescribed punishment upon him....” (Hadith. An-Nawawi.Kitab Al-Hudud: Bab Qat`u al-Sariq al-Sharif wa Gairihi wa an-Nahyu `an as-Shafati fi al-Hudud: Juz 3:#1688)<sup>6</sup>.

## 2.8. Development and operation of *Sulḥ* System

For everything there is ups and down. *Sulḥ* as a system has the same. Though it was a practice of pre Islamic Arab, it got a new spirit and shape after it had come under Islam.

*Sulḥ* as a system has been developed with all of its process under the stages bellow-

<sup>5</sup> For an instant check please go to <https://sunnah.com/ibnmajah/13/46>

<sup>6</sup> For details please go to <https://sunnah.com/muslim/29/13>

#### 4.8.1. Stages of Development

There are six phases of the evolution and development of *sulh* in Islamic law. These are a) *formation*- (it lasts from the advent of Islam to the end of the first Islamic Republic in 634 C.E.). b) *consolidation* (from second Republic to the end of the fourth Republic in 661 C.E.). c) *crystallization* (Umayyad and Abbasid eras, 661–1258 C.E.). d) *diminution* (Disintegration of the Caliphate and rise of independent emirates, 1258-1299 C.E.). e) *reinstitution* (Efforts to rebuild the Islamic Caliphate and reinstitute the formal institutions including the administration of justice system, 1299-1924 C.E.) and f) *renaissance* (Islamic reawakening in the 20<sup>th</sup> and 21<sup>st</sup> centuries) (Oseni 2015, 4).

#### 4.8.2. Processes of Dispute Resolution in Islam

*Sulh* and *Tahkīm* were two necessary systems for dispute resolution in pre-Islamic Arabian dispute resolution culture (Al-Ramahi 2008). At the beginning of Islam, both systems remained in practice with some modifications. Gradually *Qada* (formal adjudication), *wāli-al-Mazālim* (Public grievances tribunal), *muhtasib* (Ombudsman) were developed based on needs of the society in broader range instead of tribal limitation.

The Arabic word *tahkīm* means to appoint a *hakām* (arbitrator) by each disputing party to resolve a dispute arbitrarily. *Qada* is the state-backed independent formal judiciary. *Muhtasib* and *wāli-al-mazālim* are state-backed dispute resolution system under the executive organ of the state. However, for being out of formal court *muhtasib* and *wāli-al-mazālim* are two institutions of mediation (ADR).

After Islam had become the code of life for the Arabian Peninsula, it brought changes and developed the contemporary dispute resolution system gradually following the sources of Islamic *shariah*. The prophet performed the duty as a chief executive and chief justice as well. He appointed governors and judges for several provinces of the then Islamic state.

In the pre-Islamic era, *ṣulḥ* was an amicable dispute resolution system compared with *taḥkīm*. After the *qaḍā* (formal judicial institution) had been established in full fledge, both *ṣulḥ* and *taḥkīm* as an out-of-court-settlement became the informal institutions for dispute resolution for the tribal or rural community where the courts under formal judiciary wear weak or disappeared. *Qaḍā* and *ṣulḥ* become two institutions for dispute resolutions as formal and informal justice system respectively. *Taḥkīm* virtually becomes a tool for *ṣulḥ* (out of court settlement) while used as a non-state justice system contrary to *Qaḍā*. Moreover, the pre-Islamic *ṣulḥ* remains as another tool under the *ṣulḥ* (informal system for dispute resolution) compared with *qada*. *Ṣulḥ* as equivalent to Alternative Dispute Resolution (ADR) becomes an umbrella term for all informal ways of dispute resolution. *Qada* and *Ṣulḥ* as two systems of dispute resolution are discussed firstly and then processes of *ṣulḥ* as equivalent to the term ADR have been discussed.

### **Process of operation**

The dispute resolution processes in Islamic law are meant for different types of disputes and some are relevant to various disputes. Islamic law contains the following processes (Oseni, 2015).

- *Naṣīḥah* (Counseling);

- *Sulh* (Negotiation, mediation, conciliation, compromise of action);
- *Tahkīm* (Arbitration);
- *Med-Arb* (A process that begins with mediation and ends in arbitration);
- *Fatwa of Mufti* (Expert Determination);
- *Med-Ex* (A combination of mediation and expert determination);
- *Muhtasib* (Ombudsman);
- Wali al-Mazalim (Public grievances tribunal) and
- *Qada* (adjudication).

**Nasīhah** - Sincere advice or counseling-is a responsibility of Muslims to offer constructive advice one another (Muhammad 2016). Islam underscores the value of sincere advice in Muslim relations through recorded Prophetic sayings that state that Islam is sincere advice (Abdullah 2007, 45, Sharmin and Azad 2018). In Islam, the term counseling is known as *al-nasīhah*. It means to give sincere advice, counseling, guidance, exhortation, consultation, friendly admonition and reminder. *Al-Nasihah* is derived from the Hadith where the Prophet said, “Religion is an advice” (Sawai, Baharudin, and Mahyuddin 2012, bin Mahyuddin , Abdullah 2007).

وَعَنْ تَمِيمِ الدَّارِيِّ - رَضِيَ اللهُ عَنْهُ - قَالَ: قَالَ: صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ - الدِّينُ النَّصِيحَةُ " ثَلَاثًا. قُلْنَا: لِمَنْ يَا رَسُولَ اللَّهِ؟ قَالَ: " لِلَّهِ وَلِكِتَابِهِ وَلِرَسُولِهِ وَلِأُمَّةِ الْمُسْلِمِينَ وَعَامَّتِهِمْ أَخْرَجَهُ مُسْلِمٌ . (1994) .

Tamim ad-Dari® narrated that the Messenger of Allah (SAAS) said: “The religion is *Nasihah*.” the people said, ‘To whom should it be directed?’ He replied, “To Allah, His Book, His Messenger (SAAS), to the leaders of the Muslims and to the common folk of the Muslims.” (Hadith. al- Ash`ath. Kitab al-Adab: Bab al-Nasihah: Juz 7: #4944)

*Al-sulh* or *Musalaha* literally means “settlement” or “reconciliation”(Irani 1999). It also means to end a dispute directly or with the help of a neutral third party. It includes negotiation, mediation, conciliation and also compromise of action (Ahmed 2015).

It is a contract to terminate or avert a dispute between parties. Each of the contracting parties or *muta'āqid* is a peacemaker or *muṣālih*. The consideration for settlement is the *musalah alayh*. The *muṣālah* or subject matter of the *sulh* may be anything arising from the *ḥuquq al 'ibād* or rights of fellow human beings. Such private claims may be related with tort, family law, inheritance, and right on property. It may address community dispute, inter and intra group dispute, interpersonal and family dispute, property dispute and so on. Apart from the formal court, this system of dispute resolution nowadays is known as alternate dispute resolution (ADR).

The Prophet (peace and blessings of Allah be upon him) said that reconciling between people is better than observing fasts, offering voluntary prayers and giving charity.

Abu Ad-Darda' narrated that the Messenger of Allah (SAAS) said: "Shall I not inform you of what is more virtuous than the rank of fasting, Salat, and charity?" They said: "But of course!" He said: "Making peace between each other. For indeed spoiling relations with each other is the *Haliqah*" (Hadith. al-Ash`ath. Kitab al-Adab: Bab fi Islahi Dhat al-Bain:Juz 7:# 4919 )

The Prophet (SAAS) brought about an amicable settlement between Ka`b bin Mâlik and Ibn Abî Hadrâd in a loan dispute by having Ka`b agree to deduct half the value of the loan and by having Ibn Abî Hadrâd agree to pay the other half. The Hadith is as follows-

**Narrated `Abdullah bin Ka`b:**

“That Ka`b bin Malik told him that in the lifetime of Allah's Messenger (SAAS) he demanded his debt from Ibn Abu Hadrad in the Mosque. Their voices grew louder till Allah's Messenger (SAAS) heard them while he was in his house. So he lifted the curtain of his room and called Ka`b bin Malik saying, "O Ka`b!" He replied, "*Labbaik!* O Allah's Messenger (SAAS)!" He beckoned to him with his hand suggesting that he deduct half the debt. Ka`b said, "I agree, O Allah's Messenger (SAAS)!" Allah's Messenger (SAAS) then said (to Ibn Abu Hadrad), "Get up and pay him the rest” (Hadith. Al-Bukhari. Kitab Al-Şulh: Bab al-sulh biddain wa al-`ain : #2710).

There are numerous examples of such conciliation in the *hadîth*. Achieving reconciliation between disputing parties is one of the most useful and beneficial ways of interacting with people. It ends enmity and disputation. The Muslim Ummah is unanimously agreed that it is a lawfully sanctioned and highly virtuous endeavor (Irani 1999). One of the most important unofficial responses to conflict in Middle Eastern societies is *sulh* (settlement) and *muşālaḥa* (reconciliation), both of which are often referred to simply as "*sulh*." The Middle Eastern ritual of *sulh* (settlement) and *muşālaḥa* (reconciliation) has its origins in tribal and village contexts (Irani and Funk 1998).

*Şulh* or reconciliation is an important term in Islamic law (*shari'a*). In Islamic jurisprudence the concept of *sulh*, which includes negotiation, mediation, and conciliation, compromise of action or settlement between parties, is the oldest practice of dispute resolution. The purpose of *sulh* is to end conflict and hostility among adversaries so that they may carry on their relationships in peace and amity (Omar 2012, 2).

Its nature is like private settlement, wherein most of the parties settle a dispute among themselves without recourse or interference by the third party. The strength of *sulh* is its flexibility. The expression *sulh* confers both linguistic and legal meaning in Islam. The

textual basis comes from Quran and in the words of the prophet that “Making a settlement between Muslims is permitted, without legalizing what is prohibited or prohibiting what is legal”. It is evident from the reporting of Hadith that the prophet Mohammad supported and encouraged people to settle their dispute through *sulh*. In one of the *Hadiths*, it is reported:

خَدَّثَنَا إِسْحَاقُ، أَخْبَرَنَا عَبْدُ الرَّزَّاقِ، أَخْبَرَنَا مَعْمَرٌ، عَنْ هَمَّامٍ، عَنْ أَبِي هُرَيْرَةَ . رَضِيَ اللَّهُ عَنْهُ . قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ " كُلُّ سُلَامَى مِنَ النَّاسِ عَلَيْهِ صَدَقَةٌ، كُلَّ يَوْمٍ تَطْلُعُ فِيهِ الشَّمْسُ يَعْدِلُ بَيْنَ النَّاسِ صَدَقَةٌ " .

Narrated Abu Huraira:

Allah's Messenger (SAAS) 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." (Hadith. Al-Bukhari. Kitab Al-Sulh: Bab Fadlu al-Islahi Baina an-Nasi wa al-`Adli Bainahum: #2707)

In addition to Quran and Sunnah, 41 articles from article 1531 to article 1571 of the Ottoman Code i.e., *Mejelle* includes provisions for *sulh*. It describes in detail the procedure for *sulh* also (Oseni 2015).

*Şulh* or *şulha* refers to the process of reconciliation. *Sulh* is regarded as a contract concluded by offer and acceptance, and consists of settling dispute by mutual consent (Wahed 2015, 1). *Şulh* is a settlement based on a compromise made by the disputants themselves or with the help of a neutral third party (Al-Ramahi 2008). As a dispute resolution practice, *Şulh* draws on three normative systems: *shari'a*, *kanun* and *’orf* (Tamdoğan 2008). *Şulh* also signifies a peace agreement for ending a war between a Muslim state (*dar al-Islam*) and its non-Muslim (*dar al-harb*) enemies. Such peace agreements are valid for a period of ten years (Tamdoğan 2008). *Şulh* agreements occurs between states or rulers by modern legal definitions, to international law rather than to

private law, the legal sphere that includes most of the *ṣulḥ* settlements (Tamdoğan 2008, 63, foot note 22). *Ṣulḥ* could be used to resolve any kind of dispute except a *Hadd* crime. They were concluded between Muslim parties, non-Muslim parties or even between a Muslim and non-Muslim.

### The ritual of *ṣulḥ*

Equally the term *ṣulḥah* is utilized in some regions to refer to the “event or ritual of reconciliation rather than the process” (Gellman and Vuinovich 2008). The ritual of *ṣulḥ* begins with calling upon a delegation of neutrals or *muṣliḥ* to resolve the dispute. These *muṣliḥ* are usually village elders, notables, and local *zaim* (tribal chiefs). They call for a *hudna* or truce between the disputants and meet with them not to judge or punish, but to preserve the good names of both parties and reaffirm relationships (Furber 2011, 4, Tamdoğan 2008). Islam even tolerates a little manipulation of truth in the process of dispute resolution. The prophet permitted telling lies in order to achieve this great purpose, for example, it is permissible for a *muṣliḥ* to tell each party that the other has said good things about them and praised them so as to encourage reconciliation. This would not be termed as lies that are *Harām*. It was narrated from

وعن أم كلثوم بنت عقبة بن أبي معيط رضي الله عنها قالت سمعت رسول الله صلى الله عليه وسلم يقول: "ليس الكذاب الذي يصلح بين الناس فيمني خيراً، أو يقول خيراً" (متفق عليه)

Umm Kulthum bint 'Uqbah narrated that the Messenger of Allah said:

"One who brings peace between people is not a liar, he says something good, or reports something good" (Hadith. al-Tirmidhi. Kitab al-birr wa al-silah: Bab al-Islah Dhat al-baien: Juz 0: # 1938)<sup>7</sup>.

<sup>7</sup> Please have a look here <https://sunnah.com/tirmidhi/27/44>

### ***Taḥkīm***

Literally, *taḥkīm* means appointing somebody to give penalization or authorizing someone to give punishment or sentence (Sa'odah 2015). In its simplest form, *tahkīm* means arbitration. It has been described as “the spontaneous and more or less improvised move by two or more disputing parties to submit their case to a third party called a *hakam* or *muhakkam* (arbitrator)” (Oseni 2009, 11). *Hanafis* and *Shafiis* hold that arbitration is very close to compromise. The arbitral award is inevitable to be followed if the parties agree. Thus arbitration is like conciliation (Oseni 2009, 12). “Arbitration is the submission of a dispute by two or more parties to a third party to be addressed according to *Shari'ah*” (Oseni 2015, 3). In pre-Islamic Arabia, the concept of *tahkīm* (arbitration) was familiar and it was practiced to settle various types of civil and commercial disputes. The arbitration award was not to be enforced if parties refused it unless the trial chief was in a position to get it enforced. However, according to a writer, awards of the arbitrators appointed in the *u'kaz*, a fair held periodically in Mecca were customarily regarded obligatory for the parties. Islamic law allows people to seek the aid of arbitrators when they are quarreling and are unable to resolve personal matters among themselves. This can be proven from the Quran, Sunnah, *Ijma'* and *Qiyas*. The arbitration derived its textual basis from the Quran,

“If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything” (Al-Quran, al-Nisa 04:35).

This verse of Quran substantiates that arbitration is a recognized practice in Islam. The method of arbitration in Islam is not limited to economic, social, religious and political

affairs but it could be applied to private law as well, but it is limited to rights or obligations to specific individuals and not extended to physical punishment or any kind of retribution. However, studies have shown that in the field of family law, there is more mediation than arbitration. Further, it is also essential to have the assent of the parties before issuance of any decision by the arbitrator, and any of the party has right to withdraw from the arbitration before the pronouncement of award. The procedure for *taḥkīm* is considered to be less technical, informal, cost-effective and expeditious as compared to normal law of arbitration. However, for *taḥkīm* the pre-requisite is that dispute must have already arisen, future disputes cannot be arbitrated (Islam and Alam 2018).

It should be noted here that the position of an arbitrator is similar to the position of a *qadī* (judge) in the formal court in this sense that under Islamic law, the same jurisdiction would be given to the arbitrator as a judge in case of solving the dispute and giving an award to a dispute. However, from the beginning neither arbitration nor a compromise can be made to disputes of a *ḥudud* nature. Furthermore, matters concerning *li'an* (mutual imprecation), *talaq* (divorce), *nasab* (paternity), *fasakh nikah* (judicial abrogation of marriage), emancipation of slaves, *rushd* (adolescence), *safih* (spendthrift), *mafqud al-khabar* (a person whose whereabouts are unknown), *waqf* (endowments) and revenue matters cannot be arbitrated, as the judge alone has the discretion to decide these matters (Uthman 1994, 32). The most remarkable verse with regard to arbitration in the Quran is the following:

﴿وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَأَبْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ

بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا ﴿﴾

“And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things]” (Al-Quran, An-Nesa 04:35).

As observed by Rashid (2006), the use of word “reconciliation” in the above verse indicates that an arbitral award is not mandatory, and Imam Shafi`e also held that arbitral awards are compulsory if parties mutually agree to enforce it. According to Hanafi School, the nature of arbitration is contractual in nature and they are close to agencies and conciliation. An arbitrator acts as an agent on behalf of the disputing parties who appointed him. For this school, arbitration is closer to conciliation and hence the arbitral award is less compulsory than that of a court judgment. However, the contractual nature of the agreement would ultimately force the parties to agree to the decision of the arbitrators. According to *Maliki School*, any one of the parties can choose arbitrators, and the arbitrator cannot be revoked in the middle of the proceedings. *Shaf'ie* says that arbitration is not like a formal court proceeding and the arbitrators can be changed before they issue an arbitral award. *Hambali* is quite opposite to *Shaf'ie*. They say arbitration has the same effect as a court proceeding. Hence, the arbitrator shall need the same qualification as a judge and the parties who chose him are bound to follow the award given by him.

### **Med-Arb (a combination of sulh and *tahkim*):**

Med-Arb is an acronym of processes of dispute resolution –Mediation and Arbitration. Within the context of Islamic law, Med-Arb is the hybrid of both the *sulh* and *tahkīm* processes in order to arrive at an amicable resolution of the dispute (Oseni 2009, 13).

The arbitrator mediates first; only when it fails he should start arbitrating. The entire procedure of dispute resolution involves two steps; it starts with mediation as primary approach and gives finality to the outcome of the procedure given through arbitration. This process is different from *ṣulḥ* and *tahkim* due to its unique nature and mixed procedure (Islam and Alam 2018). Combining Mediation and arbitration is an idea which is now being universally accepted.

### ***Fatāwā and Mufti***

*Fatwa* is an act of informing a questioner a religious ruling arrived at by exercising proper scholarly judgment based on an acceptable proof (according to the rules of Islamic jurisprudence). *Mufti* is a Qualified Muslim Jurist who performs the act of *ifta* in response to a question (*Sharia* board member). It is not legally but morally mandatory if the questioner believes it is true (Ali 2016). *Fatāwā* can be described as “the issuance of nonbinding advisory opinions (*fatāwā*, or *fatwās*) to an individual questioner (*mustaftī*), whether in connection with litigation or not” (Masud, Messick, and Powers 1996). *Fatwa* is a personal non-binding opinion of an authorized Islamic Scholar, addressing any conflict or dispute at hand. *Fatwa* in itself is not a verdict or a decision, but within the meaning of the *sharīʿa* it is intended as a clarification of a point of Islamic jurisprudence

which can be of some help in reaching a verdict (Riaz 2005, 4). *Fatwa* deals the application of *shari`ah*<sup>8</sup> or *fiqh*<sup>9</sup> to Muslims' real life today (Halim 2006). Within the context of Islamic law, the expert opinion of a jurist is useful in two instances: Dispute Avoidance and Dispute Resolution (Oseni 2009, 16). The future of ADR in the modern world is a paradigm shift towards the evolution of dispute avoidance processes and not just mere emphasis on dispute resolution. Therefore, the *fatāwā* of an expert in form of non-binding evaluative opinion can be utilized to serve the golden purpose of dispute avoidance (Oseni 2009, 16). Normally, the fatwa issued would be based on the use of *ijthihad* or reasoning (Islam 2012a, 5).

According to the Islamic tradition only a great legal scholar, panel of scholars (*ulama*), in Sunni schools a *mufti*, in *Shia* school *Ayatollah* are empowered to issue a fatwa. It is generally expected that fatwa issued should be based on the application of logic and reasoning (*Ijthihad*). The findings of the fatwa are not compulsory but advisory in nature. Islamic history is full of instances where complicated situations were referred to Muftis and they gave the answers in the form of *fatwa* (expert opinion). In history, fatwa of muftis has proven to be an effective mechanism to solve disputes between the parties. What muftis normally do is that they either settle the disputes in the light of the existing cases or extend the law, if necessary, from the prevalent general principles of Islamic law or alternatively, they formulate a new principle provided that the new principle formulated will meet the conditions laid down by the jurists (Islam 2012a).

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8 the Quran & the prophetic traditions

9 The huge collection of juridical opinions that were given by various jurists from various schools of thought, in regards to the application of the shari'ah (above) to their various real lifesituations throughout the past fourteen centuries.

The validity of Fatwa depends on how the fatwa is issued. Some *fatwas* are manifestations of Islam and its moral values, and some others are simply wrong and non-Islamic. If the fatwa is copied verbatim from some classic book in the Islamic law, then it is quite flawed because it is addressing a different world with different circumstances. If the fatwa is issued on some sort of twisted interpretation of a script, with an aim to serve the political interests of some powerful people, then it is wrong and non-Islamic. If the fatwa allows the people to commit an act of injustice, discrimination, harm, or immorality, even if it were to be based on some sort of ‘interpretation,’ then it is also wrong and un-Islamic. If the fatwa is issued based on Islamic authentic sources keeping people’s welfare and the principle values/purposes of the Islamic law (*maqasid al-shari`ah*) in mind, then it is a correct and valid fatwa (Halim 2006).

The review of various commentaries on Islamic culture reflects that they have a greater focus on the Islamic judicial institution of the *qada* (court), and the role of the *qadi* (judge). It is argued by many that in Islam it is an assumption that adjudication is considered to be a superior mechanism for dispute resolution. However, neither the Quran nor *Hadith* stresses the virtue or necessity for *qada*. On the other hand, unambiguously both Quran and Hadith uphold the values of conciliation, mediation etc over the asserting legal rights (Islam and Alam 2018). All measures that bring the people closer to beneficence and furthest away from corruption, even if it has not been introduced by the Prophet (SAAS) nor regulated by any divine revelation, are accepted to Islam. The holy Quran lauds all type of peaceful conflict settlement as long as they do not contravene Islamic teachings. The Prophet practiced this directive and conciliated his

Companions, and accepted mediation between Muslims and non-Muslims. His Companions have done the same in their time of leadership. Therefore, whatever the procedure is that has been applied in the process of mediation (*Sulh*) is valid as long as it brings the people closer to beneficence, and furthest away from corruption, and as long as it does not contravene the principles of Islamic teaching (Bouheraoua 2008).

### ***Muhtasib* (Ombudsman)**

As ADR includes such alternative processes, which settle civil disputes out of court, the institution of Ombudsman is naturally included within ADR. In Islamic Law, *muhtasib* is equivalent to ombudsman (Haroon 2017a). Specific duties of a *muhtasib* include taking account (*hisbah*) of issues that relate to “weight and measures, quality of commodities on sale in markets, honesty in trade and commerce, observance of modesty in public places, and such other things both temporal and spiritual.” The unique nature of the functions of a *muhtasib* can be seen in its two important elements of dispute avoidance and dispute resolution. The origin of *muhtasib* is found in the prime sources of the *Sharī`ah* (Oseni 2009, 14). In Islam, practice of ombudsman was present from the time when Al-Quran was revealed from the Almighty Allah. It is roughly said that this practice is 1400 years old. The Prophet himself gave the charge of first two ombudsmen in Makkah and Madina to Umar bin Khattab and Sa’ad Umayyah respectively. The main purpose of ombudsman under Islamic law is to make the people be accountable to their deeds (*hisbah*). The function of the *muhtasib* covered the matters of *hisab*, religious activities of people such as offering *salat* (prayers), maintenance of mosques, etc. He also regulated community and behavior in the market such as ensuring the accuracy of weight and measures and

honesty in business deals. It also covers the municipal affairs like keeping the roads and streets clean and lit at night and preventing the building of a factory or a house which could go against the community interests. In the course of time, the institution of ombudsman has become an integral part of the administration of justice in Islamic dispute resolution system. The jurisdiction of *muhtasib* also includes keeping a watch on the functioning of various professionals like teachers, traders, doctors, gold smith etc. For discharging their duties; they could take help of the state institutions like police (Islam and Alam 2018).

***Wali al-Mazalim*** (Public grievances tribunal)

*Wali al-Mazalim* was a public officer appointed by the king (or State) to use coercive authority of the ruler and adjudicative function of a judge. His position was akin to that of chancellor who helped in the emergence of equity of situations where justice could not be achieved in the conventional Common Law Court. He handled all types of disputes (Islam 2012a). They included those which were to be ordinarily referred to a *qadi*, or a case involving bias or a case which ordinarily came within the jurisdiction of *Muhtasib*. This jurisdiction was exercised on receiving a complaint or not. The dispute settlement was done in an informal manner without conforming strictly to the rules of evidence, even calling as witness someone whom he thought should be called, or relying on his personal knowledge while deciding a case, or compelling litigants to arbitrate. The jurisdiction of *wali al-mazalim* included the following types of cases:

- complaints about the misappropriation of property
- complaints lodged by stipend holders

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

Probably due to its extra ordinary nature, the *wali of mazalim* became nonfunctioning in the Muslim countries. Nevertheless, the useful role played by *Wali al-Mazalim* in the early period of Islamic history is worth noting that could deserve some analysis (Rashid 2002, 28, Islam 2012a).

#### ***Qada* (adjudication by appointed judge)**

The most common and powerful means for dispute resolution is through an appointed judge. One of the primary linguistic meanings of “*qadā*” is passing judgment; its legal meaning is resolving a dispute between two or more parties by applying Allah’s judgment. Its textual basis comes from the Qur’an and Prophetic reports. Allah the Most High says:

﴿وَأَنْ أَحْكُمَ بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ﴾

“And judge, [O Muhammad], between them by what Allah has revealed” (Al-Quran, Al-Maida 05:49).

﴿وَإِنْ حَكَمْتَ فَاحْكُم بَيْنَهُم بِالْقِسْطِ﴾

“And if you judge, judge between them with justice” (Al-Quran, Al-Maida 05:42), and

﴿إِنَّا أَنْزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ لِتَحْكُمَ بَيْنَ النَّاسِ بِمَا أَرَاكَ اللَّهُ ۗ وَلَا تَكُنَ لِلْخَائِنِينَ خَصِيمًا﴾

“Indeed, We have revealed to you, [O Muhammad], the Book in truth so you may judge between the people by that which Allah has shown you” (Al-Quran, An-Nisa 04:105).

Narrated 'Amr bin al-'Aas (RA):

He heard Allah's Messenger (ﷺ) says, "When a judge gives a ruling, having tried his best to decide correctly, and is right (in his decision), he will have a double reward and when he gives a ruling having tried his best to decide correctly, and is wrong (in his decision), he will have a single reward". (Hadith. Al-'Asqalani. Kitab Al-Qdaa:#1287)

Imām al-Nawawī explains this narration in his commentary of *Ṣaḥīḥ* Muslim: The scholars hold that Muslims have reached a consensus that this report concerns a judge who is a scholar and qualified. If he is correct, he receives two rewards: one for exercising juridical reasoning (*ijtihād*), and one for being correct; but if he errs, he receives one reward for exercising juridical reasoning (Hoque 2012, Abu Zakari 1392 A.H.). It is not permissible for someone to judge if he is not qualified to judge. If he does, he shall receive no reward. Indeed, it will be like committing sins. His judgment is not effective, whether it agrees with the correct answer or not, because it does not originate from a legal source of *Shari'ah* and is only correct out of coincidence. Thus, he is disobedient in all of his judgments whether they agree with [*the Shari'ah*] or not. All of his judgments are rejected, and he has no excuse in any of this (Hoque 2012). A report has been transmitted in the Sunan:

Narrated Buraydah ibn al-Hasib:

"The Prophet (ﷺ) said: Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell" (Hadith. Al-Sijistani. Kitab al-Aqdiyah: Bab fi alQadi Yukhti: Juz 2: #3051)<sup>10</sup>.

This text emphasizes that there are standards that must be met before a judge and then his judgments can be considered valid. The conditions for being an Islamic judge are that one must be qualified to offer court testimony and be capable and a qualified *mujtahid*. Explanatory texts clarify these conditions. "Qualified to offer court testimony," means

<sup>10</sup> For translation please see, <https://sunnah.com/abudawud/25>

the individual is Muslim, legally responsible, free, male and upright, and he possesses the faculties of hearing and seeing. “A qualified *mujtahid*” is an individual who knows the judgments of the Qur’an, Sunnah, analogy, and the various categories within each, and who also knows the status of transmitters. The qualified *mujtahid* must also possess knowledge of the Arabic language as well as the opinions of the scholars of Sacred Law regarding matters of consensus and of differences of opinions. These are the conditions according to the *Shāfi‘ī* school. While there is some variance among the schools of jurisprudence, there is agreement among them that it is essential that the individual be Muslim, adult, rational, and free. If no individual possesses the above-mentioned qualifications and a powerful ruler appoints a Muslim who is unfit, the unfit judge’s decisions are implemented out of necessity so as not to vitiate people’s concerns and interests (Hoque 2012).

### **Summary**

The fundamental principles of the Quranic approach to dispute resolution are to control all related to a dispute as disputants, or mediators. It authorizes all justice dispensing individuals personally or collectively to dispense justice in their society, community or state proportionately and makes them accountable to Allah. The judges, arbitrators, mediators and conciliators are obviously appointed by the Government or by the disputing parties themselves. Once they (justice dispensing authority) are appointed, they will have to administer justice impartially according to the law of Allah. All the organs and functionaries of the Government should be within their jurisdiction. Even the highest

executive authority of the Government will be bound to appear in a court of law as a plaintiff or defendant (Rahim 2000, 225).

The processes of dispute resolution mentioned in the end of this chapter are in practice in various levels of the country. *Qaḍa* (formal judiciary), *Wali-al-mazalim* (*Public Grievance officer*) may be considered with anti corruption commission of our country, *hisbah* (ombudsman) are backed by state executive or judiciary authorities where as *ṣulḥ*, *taḥkim*, *med-arb*, are private in nature and backed generally by non-state authority. For rural area, the processes of dispute resolution backed by non-state authority are applicable. All non-state processes where a decision comes and an agreement is reached are called *ṣulḥ* and the form for the *ṣulḥ* is termed a *namah*, a Farsi or Urdu word. *Ṣulḥ namah* means an agreement form to be filled-up and signed by the disputing parties. This means that an agreement through *muṣāṭah* (negotiation, mediation, compromise of action or reconciliation) *Taḥkīm* (Arbitration) Med-Arb (Mediation and Arbitration) or Fatwa of Mufti is a *ṣulḥ* to avert a dispute.

Laws in modern states are well codified. Constitutional law instead of *sharīḥ* is considered as the supreme law. Constitution, presidential ordinances, judicial verdicts, parliamentary acts, and other statutory laws instead of Quran and *Sunnah* are made the primary sources. Present Bangladesh has two kinds of laws. The first one is secular law applicable for all people regardless of religion, color or culture. The second one is personal law or religious law, applicable for personal religious life of a citizen. This legal system denied Quran and Sunnah as main sources but accommodated them for some personal affairs. The Anglo *Muhammadan* Law is a part of the legal system of

Bangladesh that includes legal regulation of marriage, dissolution of marriage, inheritance and endowments (Ahmed 2015, 52).

There were several features of the Judiciary under the Prophetic period of the new Islamic state of *Madina*. The Qur'an and the Sunnah were the primary sources of Judiciary. They were declared as the primary sources of Judiciary in place of custom and tribalism that were practiced before Islam. The decision of the Prophet (SAAS) was made compulsory and obligatory. Acceptance and execution of the decision of the Prophet (SAAS) was compulsory. Rather it was a vital part of *iman* for both the plaintiff and the defendant. The Prophet (SAAS) was the head of all important organs of his government namely executive, legislative, judiciary and cultural. However, it was only for him because Qur'an was revealed for proper judgment of each case, and all the organs of the state were dependant on Quranic revelations since his time. However, the first caliph Abu Bakr (R) separated the judiciary from the control of executive and appointed Omar bin Khattab (r) as the chief justice of the state.