

FOUNDATION OF MEDIATION IN ISLAMIC LAW AND ITS CONTEMPORARY APPLICATION

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ABSTRACT

As humans are social beings, disputes among them are inevitable. Judicial settlement of disputes is unfortunately costly, time consuming and open for public. Nevertheless Islamic law provides for settlement of disputes by many ways of *ḥullī* including mediation. The purpose of the paper is to examine principles on mediation laid down in the Quran and the *Sunnah* of Prophet Muhammad (S.A.W.), which are both the primary sources of Islamic law. The paper will seek to apply the deduced principles in contemporary mediation. Reference will be made to certain incidents wherein the final Prophet (S.A.W.), the earlier prophets and the Caliphs seemed to have resorted to mediation.

There are many lessons that can be learned from the exemplary conduct of the Prophet (S.A.W.) who was a politically righteous person with highest moral and ethical values. His society wherein fighting would break out over petty matters and insignificant incidents and could linger on for generations had been successfully transformed by the Prophet (S.A.W.) to become civilised in settling their differences.

Introduction

Islam introduced the rule of law to solve disputes and ensure the smooth running of our worldly affairs, and it has encouraged and rewarded peaceful dispute and conflict settlement. In addition to texts in the Holy Qur'an, the Sunnah of Rasullullah (SAW), his Companions and their successors, Muslim jurists and administrators have consistently supported peaceful conflict settlement: within the Muslim community; between Muslim and non Muslim communities; and between non Muslim communities.

Key Words Definition:

In Islamic law, peaceful conflict settlement is to be achieved either by means of conciliation (Sulh) or arbitration (Tahkim) or mediation (Wasaata). To have a clear understanding of these concepts, it is important to define them by their similarities and differences.

Conciliation (Sulh): Al-Jurjani in his "*Taarifat*" defines Sulh as: "An accord to end a dispute¹". The Ottoman Code, "Majalla" defines "Sulh" in Article 1531 as: "A contract removing a dispute by consent. And it becomes a concluded contract by offer and acceptance²".

Sulh is also defined as: "An accord between two parties or more to resolve a specific dispute by ending its causes"³

Arbitration (Tahkim): The appointment of a judge or judges by the disputed parties to adjudicate a certain dispute or issue.

Mediation (Wasaatah): 'Wassatah' is the common term for mediation, and is used in Islamic law. Al-Jahshiyari (331A.H-943 A.D) in his book 'kitab al-wuzaraa' (The Book of Ministers), has used 'tawasut' in the case of the mediation of Muhammad Ibn Muslim to end the hardship of land tax (kharaaj) payers, and also the Mediation of Yahya between a man and the Abbasside Khalifah Harun al-Rashid (198 A.H- 814 A.D)⁴. Nevertheless the common word for mediation in Islamic law is (Al-Mashyu Bayna Al-Mutanaziinah); 'walking between the disputants'. Al-shafaa, Al-jaryu and Husnu Al-Sifara are also terms used for mediation.

As for the definition of mediation (wassatah), it is a benevolent and non binding procedure to end a dispute. It is characterized by one or more persons intervening in a dispute either of their own initiative or at the request of one of the parties. The independent mediator must then seek to achieve an amicable settlement by proposing solutions to the parties⁵.

¹ Al-jurjani. Al-Taarifaat, pg174.

² The Mejelle, p255

³ Ahmad Abu Al-Wafa. Kitab Al-I'laam Bi-qawa'id Al-Qanun Al-Dawli Wa Al-Alaaqat Al-Dawliyah Fi Shari'at Al-Islam, p39.

⁴ Al-Jahshiyari. Kitab al-wuzaraa, p142& 187.

⁵ See Fathi Kemicha. The Approach to Mediation in the Arab World, paper presented in the international conference of Mediation Geneva Switzerland 1996.

Similarities and Differences:

In terms of similarities, these are forms of alternative dispute resolution, and are conditional on the choice of the disputants, and possible, settlement of the dispute.

As for the differences, arbitration "tahkim", for instance, differs from conciliation (Sulh) in two aspects: firstly, arbitration 'tahkim' results in a binding, judicial decision, whereas conciliation "sulh" results in a non binding proposal for settlement; secondly, in conciliation 'sulh' one or both parties renounce some rights; whereas in arbitration no one renounces any of his rights.

Arbitration also differs from mediation; where the former ends in a binding judicial decision, the latter facilitates negotiation.

As for conciliation "Sulh" and mediation "Wasaatah", they are considered by some scholars to be similar in general terms, but they are, in my opinion, different in nature.

Conciliation in Islamic Law is a means of amicable dispute settlement, whereas mediation is one of the means of amicable settlement, and arbitration is another one.

Proof of Legality of Mediation

There are two categories of proof:

The first is the Syariah evidence commending assistance: Allah (SWT) says in Surah Al-Maidah Verse 2

وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ شَدِيدُ الْعِقَابِ

“(H)elp ye one another in righteousness and piety. But help ye not one another in sin and rancour” (Al-Maidah: 2)

His Messenger (SAWS) said: “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 “Ikaaf” in this mosque (Madinah Mosque) for one month”⁶.

The second category consists of Syariah evidences recommending peaceful settlement of conflict in general and mediation in particular.

With regards to the evidences recommending peaceful settlement of conflict, we can find numerous verses of the Holy Qur’an and many Hadith.

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

⁶ See Al-Tabarni . Al-Mujam al-kabir, Ibn Asakin. Al-taarikh and Al-Albani. Al-silsilah Al-sahihah.

“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, (secrecy is permissible): to him who does this, seeking the pleasure of Allah, We shall soon give a reward of the highest (value)” (An-Nisaa:114).

"وَأِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقُ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا"

"If you fear a breach between a man and his wife, appoint an arbiter from his people and another from hers. If they wish to be reconciled God will bring them together again. God is all-knowing and wise." (An-Nisaa:35)

"وَإِنْ امْرَأَةٌ خَافَتْ مِنْ بَعْلِهَا نُشُوزًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا وَالصُّلْحُ خَيْرٌ وَأُحْضِرَتِ الْأَنْفُسُ الشُّحَّ وَإِنْ تُحْسِنُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا"

“If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though human inner-selves are swayed by greed. But if ye do good and practise self-restraint, Allah is well-acquainted with all that ye do” (An-Nisaa:128)

"وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأصْلِحُوا بَيْنَهُمَا فَإِنْ بَغَتَ إِحْدَاهُمَا عَلَى الْأُخْرَى فَقَاتِلُوا الَّتِي تَبْغِي حَتَّى تَفِيءَ إِلَى أَمْرِ اللَّهِ فَإِنْ فَاءَتْ فَأصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ"

“And if two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the Command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just). (Al-Hujuraat: (Al-Hujurat: 9).

Beside these verses Hadiths of the Prophet (SAAS) are loud in supporting peaceful settlement. The Prophet says:

"الصلح جائز بين المسلمين إلا صلحا حرم حلالا أو أحل حراما"

"Conciliation between Muslims is permissible, except for a conciliation that makes lawful unlawful and unlawful lawful".

The prophet also says:

"اشفعوا تؤجروا "

“Intercede so you will be rewarded”

The second Caliph Umar Inb Al- Khataab says:

"ردوا الخصوم حتى يصطلحوا فإن فصل القضاء يورث بينهم الضغائن"

“Return the disputants till the conciliation is achieved. Verily, litigation causes rancour between disputants.

As for mediation as means to conciliation, the direct evidence is verse 85 of Surat Al-Nisaa. Allah Says:

"مَنْ يَسْتَفْعِ شَفَاعَةَ حَسَنَةٍ يَكُنْ لَهُ نَصِيبٌ مِّنْهَا وَمَنْ يَسْتَفْعِ شَفَاعَةَ سَيِّئَةٍ يَكُنْ لَهُ كِفْلٌ مِّنْهَا
وَكَانَ اللَّهُ عَلَى كُلِّ شَيْءٍ مُّقْبِلًا"

” Whosoever intercedes for a good cause will have the reward thereof, and whosoever intercedes for an evil cause will have a share in its burden. And Allâh is Ever All-Able to do (and also an All-Witness to) everything.” (An-Nisaa: 85)

As for proof of legality of mediation “wasaata” in the Sunnah, these are:

- The Prophet (SAAS)’s statement about the prisoners of the battle of Badr: “If “Mutaam Ibn Adii” was alive and intercedes to free these prisoners, I’ll do it for him”. The prophet willingness to made such favor to “Mutaam Ibn Adii”, despite being a polytheist “Mushrik”, because “Mutaam” had interceded for Rasulullah to enter Mecca from Taaif, when he was denied the entrance by the tribes of Mecca. Furthermore, he was amongst the prominent mediators to end the economic ostracism imposed on Muslims and the tribe of Bani Hashim by the tribes of Mecca in the year 4 (BH).
- In the first year of Hijrah, when Rasulullah sent the first military detachment (Sariyah Sayf al-Bahr under the command of Hamzah Ibn Abd Al-mutalib), they intercepted a trading caravan headed by Abu Jahl. It almost resulted in fighting, but for the mediation of Majdi Ibn Amr who was an ally of both parties⁷.
- The conciliation between the Prophet (SAAS) and the tribe of fadk after the battle of Khaibar (7 A.H) , where Masoud the brother of Abu al-Harith was amongst the mediators; and
- The mediation of Badil ibn Waqaa in the conciliation of Hodaybiyah made between Rasulullah and the monotheists of Mecca in the 6th A.H.

Fundamentals of Mediation in Islamic Law:

Based on the above evidences, Muslim jurists state that all means of peaceful conflict settlement including mediation are recommended in Islamic law. They further stress that the fundamentals of mediation in Islam may be derived from these texts and from the general principles of Islamic Law. These fundamentals may be summarized as follow:

⁷ Ibn Al-Qayim. Zaad Al-Maad. V3, p163.

- 1- Peaceful conflict settlement is encouraged regardless of the ideology or sects or religion of the parties involved in the conflict. The 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.
- 2- Mediation is not available 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. Rasulullah's reply to the request of Usamah Ibn Zayed was ster: "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...."
- 3- Mediation as a process of peaceful conflict settlement falls under the scope of Siyasaah Shar'iah which "includes all measures which 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 divine revelation"⁸, therefore whatever procedure applied in the process of mediation 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.
- 4- Islam permits the mediation of a non-Muslim in internal and international conflicts occurring between Muslims and non Muslims. The name of Mutaam Ibn Adi, Badil Ibn Warqaa, Majdi Ibn Umar and Muhaysah Ibn Masood mentioned above, are a clear example of such acceptance. As for mediation in conflicts occurring between Muslims or between Muslim countries many scholars are not in favor of accepting the mediation by non-Muslims based on the prohibition of the arbitration by non- Muslims in a conflict between Muslims and non- Muslims. However, many other scholars permit mediation by a non Muslim, as long as the matter it is not in a purely religious, and it is within Islamic Values (public interest; ending hardship; reaching a fair settlement etc).
- 5- Sincerity, fairness and qualification are the core conditions of a mediator. Allah says in the Holly Quran:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاَنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا اعْدِلُوا هُوَ أَقْرَبُ
لِلنَّقْوَىٰ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ

⁸ This definition of Siyasaah Shar'iyah was introduced by Ibn Aqil Al-Hanbali and adopted by Ibn Qayim Aljuziah and later adopted by the majority of contemporary scholars.

“O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to Piety: and fear Allah. For Allah is well-acquainted with all that ye do” (Al-Maidah: 9).

He also says:

"يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ إِن يَكُنْ غَنِيًّا أَوْ فَفِيرًا فَأَلَّهِ أَوْلَىٰ بِهِمَا فَلَا تَتَّبِعُوا الْهَوَىٰ أَنْ تَعْدِلُوا وَإِن تَلَوُّوا أَوْ تُعْرَضُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا"

“O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do” (An-Nisaa: 135).

The prophet (SAAS) says:

«القضاة ثلاثة: واحد في الجنة، واثنان في النار. رجل عرف الحق فقاضى به فهو في الجنة، ورجل قضى بين الناس بالجهل فهو في النار، ورجل عرف الحق فجار فهو في النار»⁹.

“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”.

6- The mediator should be of good reputation and acceptable to both parties. The Holy Quran emphasizes, for instance in the issue of witnesses to contract formation, on reputation and acceptability. Allah says:

"ممن ترضون من الشهداء" (Al-Baqarah; 282)

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

7- Although mediation is a benevolent act, authorities should encourage and assist financially mediators either they are individuals or organizations. Proof of this is that the prophet (SAAS) remunerated Majdi Bin Amr who mediated to end the conflict between the Islamic military detachment and the trade convoy headed by Abu Jahl in the first year of Hijrah. Books of Sirah mentioned that the prophet has well received the group of Majdi and rewarded them.

⁹ Narrated by Al-Tirmizi and Abu Dawood. See Al-haythami. Majmaa Al-zawa'id Wa Manbaa Al-Fawa'id. V4, p252.

Contemporary Application of Mediation

Islam as an everlasting religion applicable for all mankind and suitable to all times and places has two important characteristics absorbing and solving all incidents that may encounter Muslims Ummah: the first one is comprehensiveness; and the second one is flexibility. Furthermore it is not a literal application of mediation in prophet's era.

As such all types of mediation and all procedures applied by the mediators to end a dispute and reach a fair settlement of conflicts are welcomed as long they do not contravene Islamic principles and fundamentals, therefore, foundations of Islamic mediation mentioned above are maintained as they are basics for conflicts settlement and still valid for contemporary peaceful conflict settlement. In addition to these fundamental customs and tradition of Islamic countries are of crucial importance and sensitivity and even supported by Islamic legal maxim that says: "A matter recognized by custom is regarded as if stipulated by agreement".

Conclusion

Islam did not merely encouraged peaceful conflict settlement, but introduced a systematic and time-space consideration approach to end conflicts, however, Islam while preserving the openness of Shari'ah law to the impact of time and space dimension, also protects it from the influence of contradictory norms and laws of non Islamic provenance, or from the renunciation of fundamental of Islamic Law under the justification of time and space factor, or the pressure of globalization and international law.