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### PECULIARITIES & RELIGIOUS UNDERLINING OF ADR IN ISLAMIC LAW

by

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#### ABSTRACT

ADR is part and parcel of Islamic Law since the last 1400 years. Its unique nature lies in the support that the *Quran* and *Hadith* give to it. Some of such characteristics of ADR which distinguish it from other legal systems are discussed in this paper. These include:

1. ADR in Islamic Law occupies a high religious status because of the *Quranic* origin of *sulh* (negotiation, mediation and compromise of action), *tahkim* (arbitration), a combination of *sulh* and *tahkim* (med-arb), and *muhtasib* (ombudsman).
2. Amicable settlement of dispute during arbitral proceedings is made the moral duty of the parties and arbitrator.
3. *Fatawa* given by *Muftis* is equivalent to Expert Determination.
4. Amicable settlement of every dispute be it family, neighborhood, business, political or so on is encouraged and allowed, except what may make a thing *haram* (prohibited) as *halal* (permitted) and a thing *halal* (permitted) as *haram* (prohibited). Even *Qadis* are required to go on striving for settlement during the entire course of judicial proceedings.
5. Equity, justice and fair play are integral parts of ADR. This is why *Amiable Composition* is an integral part of *tahkim* (arbitration), and is not dependant on parties' consent.
6. Revocability of arbitration agreement is a unique feature of *tahkim* (arbitration)
7. Arbitration agreement is not allowed to cover *future* disputes. Only past and present disputes are covered.

#### INTRODUCTION

It is a popular belief that ADR has emerged and originated in the West during the last few decades. But contrary to this belief, such ADR processes like Negotiation, Mediation, Arbitration, Expert Determination, Ombudsman and Med-Arab are as old as Islamic law itself, that is, 1400 years old. All of these have been not only mentioned in the Quran but

were practiced since the times of the Prophet, who was a great supporter of the idea of amicable settlement of disputes. Many historic evidences are available in support of this statement.<sup>1</sup>

A look at ADR as a whole in Islamic law and also at various ADR processes individually, brings out certain peculiar features which grant an individuality to it in the Islamic system of law. Let these features be stated here first before their explanation which is given later. These include:

1. A religious sanctity attaches with the ADR processes in Islamic law because of their origin in the Quran and the Prophetic approval given to these. The sense of obedience that the Quran and *Sunnah* (sayings, doings and tacit approvals of the Prophet) produce in Muslims, make adherence to ADR a divine obligation, elevating ADR to the higher pedestal of spirituality that demands submission.
2. The support given to the idea of amicable settlement in Islamic law is so all pervasive that it is allowed in every situation except where it makes a thing *haram* as *halal* and *halal* as *haram*, that is, it is allowed except in situations where it tends to make a “prohibited” as permitted” and *vice versa*. This idea covers judicial proceedings too, requiring the *qadis* to go on striving for settlement during the entire course of judicial proceedings.
3. Amicable settlement of a dispute which is already put to arbitration has been made a moral duty of the parties as well as the arbitrator.
4. *Amiable Composition* is freely allowed, empowering an arbitrator to use his sense of fair play, justice, equity and good conscience in making the award.
5. Parties to an arbitration agreement are allowed to revoke it at any time before award is given.
6. Future disputes are not allowed to be covered by an arbitration agreement in Islamic law, which maintains a “wait and see” attitude, that is, since a dispute may or may not arise, so what is the hurry; once it arises, the parties may agree to settle it by arbitration.
7. Expert determination comes in the form of *fatawa* of *muftis*. As *fatwa* is non-binding, verdict of a jurist consult of great religious standing in the society, on a disputed point carries the stamp of wisdom and religious

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<sup>1</sup> These evidences may be seen in the coming pages where the various ADR processes have been discussed.

piety, which compels a more ready compliance than the verdict of a 'mere' expert.

8. Ombudsman in Islamic law is *Muhtasib*, whose office is mentioned in the Quran and the first two ombudsmen that of Makkah and Medinah, were appointed by the Prophet himself. *Muhtasib* serve towards dispute resolution and dispute avoidance.

Whatever has been stated above serves as the basis of the claim regarding the novelty, posterity and religiosity of ADR processes in Islamic law. Now, let us make a brief examination of each of these points.

### 1. Religious Sanctity Attaching with the ADR Processes in Islamic Law

*Shari'ah* or Islamic law is not only law but a code of life for the Muslims encompassing his entire life from the cradle to the grave. The provisions of this law are either revealed (Quran) or based on the Prophet's *Sunnah*, (saying, doings or his tacit approvals), or jurist-made. The first of these two, that is, those which are based on the Quran or *Sunnah* are regarded as the most sacred and therefore most compliance-worthy. As the ADR processes in Islamic law are based on the Quran and *Sunnah*, so a religious sanctity demanding unquestionable compliance comes to be attached with it, conferring on it a status which is unique and unparalleled among the legal systems of the world. Once told of the real origin of a particular ADR process, a Muslim need not be convinced any further of its practical worldly usefulness; he will comply, regarding it as a religious commandment.

It is clearly stated in the Quran that "this is a Book which (Allah) has revealed as a blessing: so follow it and be righteous, that ye may receive mercy".<sup>2</sup> A Muslim again comes across in the Quran such verses which tell him about objects and benefits of the divine revelations. For example, Quran says: "Verily in this (Quran) is a message for people who would (truly) worship Allah".<sup>3</sup> And describing the objective of *Shari'ah*, Quran declares: "O mankind, a direction has come to you from your Lord; it is a healing for the ailments.....and guidance".<sup>4</sup>

About the sanctity of the Prophetic pronouncements, we have a declaration from Allah Himself in the Quran that "Nor does he (i.e., the Prophet) say of his own desire. It is no less than inspiration sent down to him".<sup>5</sup>

*Sunnah* of the Prophet has become a source of inspiration for every Muslim and a pillar, second only to the Quran, on which rests faith and life of a Muslim. No wonder, a Muslim always turns to the Quran and *Sunnah* for answers to his every problem.<sup>6</sup>

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<sup>2</sup> Quran, *Surah Al An'am* (6), *ayat* 155 [Abdullah Yusuf Ali's translation]

<sup>3</sup> Quran, *Surah Al Anbiya* (21), *ayat* 106

<sup>4</sup> Quran, *Surah Yunus* (10), *ayat* 57

<sup>5</sup> Quran, *Surah Al Najm* (53), *ayat* 3-4

<sup>6</sup> See Abdur Rahman I. Doi, *The Islamic Law*, (Ta Ha Publisher, London, 1984), pp. 48-49.

The path laid down in the Quran is to be followed by a Muslim, as commanded by Allah in the Quran:

“Verily, this is My Way leading straight: follow it; follow not (the other) paths: they will scatter you about from His (great) Path. Thus doth He command you, that ye may be righteous”.<sup>7</sup>

The Islamic literature is full of such writings based on *Shari’ah*, which explains to Muslims the importance of adhering to the Quran and *Sunnah*. It is therefore correct to say that to adopt and practice ADR processes is like a religious or sacred obligation for a Muslim. Once he becomes aware that these are based on the Quran and *Sunnah*. Today, unfortunately, a majority of Muslims are unaware of this fact.

## 2. The All Pervasive Support that ADR Finds in Islamic Law

A famous letter which the second caliph of Islam - Umar bin Khattab - wrote to Abu Musa Al-Ash’ri after appointing him as a *qadi* (judge) contained rules to guide him in deciding cases. One of these rules spelled out the wide span of coverage of amicable settlement of disputes. The exact words of Umar are:

“All types of compromise and conciliation among Muslims are permissible except those which make *haram* (unlawful) anything which is *halal* (lawful), and a *halal* as *haram*.”<sup>8</sup>

This principle is directly based on the saying of the Prophet that “if somebody innovates something which is not in harmony with the principles of our religion, that thing is rejected”.<sup>9</sup>

In fact the original support that the Quran gives to the peaceful settlement of disputes forms the basis of the widespread support that the idea finds among Muslim. For example, the Quran says:

“The believers are but a single brotherhood, so make peace and reconciliation (*sulh*) between two (contending) brothers; and fear Allah, that ye may receive mercy”.<sup>10</sup>

The Quran was here repeating the same thing it already stated in another *ayat* of the same verse, which is in the following words:

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<sup>7</sup> Quran, *Surah Al Amin* (6), *ayat* 153

<sup>8</sup> The letter is still preserved. For its authenticity, which is established with carbon dating process, see, D. Margolith, “Omar’s Instructions to the Qadi”, *Journal of Royal Asiatic Society*, (1910), p. 307 at 311-312; Asif A. A. Fyze, *A Modern Approach to Islam*, (Lahore, 1978 ed. Of the original Indian Edition), pp. 41-46; Mahmood A. Ghazi, *Adab al Qadi*, (Urdu) 2<sup>nd</sup> ed. (Islamabad, Islamic Research Institute, 1993), p. 164

<sup>9</sup> *Sahih Al-Bukhari*, vol. 3, p. 535, Eng. Tr. by Muhsin Khan (Dar Al Arabia, Beirut, n. d.)

<sup>10</sup> Quran, *Surah Al-Hujarat* (49), *ayat* 10

“If two parties among the believers fall into a quarrel, make ye peace between them.....with justice, and be fair: for Allah loves those who are fair (and just)”.<sup>11</sup>

The Prophet was so supportive of the amicable settlement of disputes that he is reported to have expressed his readiness to condone the use of an exaggeration or mis-statement if it is for the sake of *sulh* (peaceful settlement). The *hadith* is as follows:

“Narrated Um Kulthum bint Uqba that she heard Allah’s Apostle (P.B.U.H) saying ‘He who makes peace (*sulh*) between the people by inventing good information or saying good things, is not a liar”.<sup>12</sup>

This support is unique in the sense that it is not found in any other legal system, except to some extent in the present Chinese Constitution and the teachings of Confucious.

### **3. Settlement is Embedded in Arbitration**

One of the discussions among the early Islamic jurists was regarding the meaning to be given to arbitration. Should it be considered as an attempt at ‘conciliation’ or something akin to ‘judicial proceeding’ where award is binding as a judgment. The Hanafis and Shafis favoured the first view, while the Malikis and Hanbalis favoured the later view.<sup>13</sup> During the course of centuries, a synthesis of the two views evolved the law and it stands some where in the middle. That is, it is a duty of the parties and the arbitrator to strive for the settlement during the entire course of arbitral proceedings, if no settlement comes through, then the award given by the arbitrator is binding, but only if ratified by a *qadi* (judge).

This is a very healthy attitude, because the aim of arbitration is to settle a dispute and not to fight a legal battle. A settlement is always preferable over an imposed award.

### **4. Amiable Composition Comes Within the Inherent Powers of an Arbitrator**

*Amiable composition* is a principle which allows the arbitrator to take consideration his own sense of fair play, justice and equity in making the award. Islamic law of arbitration allows it, so also the civil law, but common law rejects the concept and compels the arbitrator to follow the law strictly, even if it results into inequity and unfairness. The principle in Islamic law is based on a Quranic verse which says:

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<sup>11</sup> Quran, *Surah Al-Hujurat*, (49), *ayat* 9

<sup>12</sup> *Sahih Al Bukhari*, vol. 3, p. 533, Eng. Tr. by M. Muhsin Khan, (Dar Al Arabia, Beirut, n.d.)

<sup>13</sup> Abdul Hamid El-Ahdab, *Arbitration With the Arab Countries*, (Kluwer Law&Taxation Publisher, Deventer/Boston, 1990), pp. 15, 20-22; and Abdul Hamid El-Ahdab, “General Introduction On arbitration in Arab Countries”, *International Handbook On Commercial Arbitration*, Supplement 27 (December 1998), citing *Fatawa Al-Hindiyyah*, vol. 3 at 468, and Ibn Qudama, *Al Mughni*, vol. 9, 3<sup>rd</sup> (Cairo, 1367 H.); Ibnu Abedin, *Radd Al Muhtar*, p. 483.

“Allah doth command you  
To render back your Trusts  
To those who, they are due;  
And when ye judge  
Between man and man,  
That ye judge with justice.....”<sup>14</sup>

According to Abdul Hamid El Ahdab, a leading Arab authority on arbitration in Islamic law,

“The prevailing opinion in Moslem law derived from the (above) text is that arbitrators must settle disputes according to the rules of fairness and with respect to the public order. Their position is rather close to that of the ‘*amiable compositeur*’ in, say, French law, who has to settle a dispute in an analogous spirit to that which the parties would have had, had they been able to agree on a compromise. However, judging fairly does not mean that the arbitrator does not have to apply the rules of Muslim law when the legal principles underlying the disputes are covered by these rules. Should no such rule exist, fairness guides the arbitrator in looking for the solution.....The arbitrator must also take into account those principles in commercial matters, which (Al Ghazali in his *Ihya Ulum al-Din*, vol. 2, p. 79ff) has derived from the Quran and *Sunnah* under the heading of ‘Good conduct in commercial matters’. These principles help the judge or the arbitrator when a (strict) direct implementation of the contractual provisions would seem unfair (due to change in economic circumstances and personal situation of each party), rendering the performance of contractual obligations unduely burdensome.<sup>15</sup>

The recognition of the principle of *amiable composition* in the Islamic law of arbitration nearly a thousand years ago, well before its adoption by the French law, or its recent adoption in the UNCITRAL Model Law, due to its humane nature and logical justification, is a unique feature of the Islamic law of arbitration. The arbitrator under Islamic law does not need an express written authorisation from both the parties to use *amiable composition*, as required in the UNCITRAL Model Law.

## 5. Revocability of the Arbitration Agreement

Islamic jurists have not laid down any general theory of contract. Instead, they studied individual contracts, like that of sale, mortgage, lease, etc. Any contract which relates not to a specific contract was not given much consideration. These were left to be dealt with by the parties as they wished, including revocation. As arbitration agreements do not fall

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<sup>14</sup> Quran, *Surah Al Nisa* (4), *ayat* 58

<sup>15</sup> Al Ehdab, *Arbitration with the Arab Countries*, (Kluwer Law and Taxation Publisher, 1990), pp. 50-51, citing Omar El Kadi, *L'Arbitrage International entre le Droit Musulman et le Droit Positif Francais et Egyptien*, These de Doctoral, Paris XI, pp. 190-191.

within the scope of a specific contract, hence these are considered revocable, even unilaterally by a party.

Due to the inherent revocability of the arbitration agreement, either party may take the dispute to the court for adjudication, instead of referring it to arbitration, without any fear of stay of action. Because if the other party objects to judicial determination and insists on arbitration, the party may revoke the arbitration agreement, making stay of action meaning-less.

Even though the modern arbitration laws of the Arab world do not allow revocation of the agreement without valid cause, yet it has to be admitted that the irrevocability of the agreement is only a mixed blessing. In many cases where a party is compelled to submit itself to arbitration against its free choice, ends up creating every possible hurdle in the way of smooth conduct of arbitral proceedings and ultimately in the enforcement of the award.

#### **6. Lot of Problems Are Avoided by Not Allowing “Future” Disputes to be Arbitrated**

According to Article 1847-1850 of the *Majallah Al Ahkam Al Adliyyah* (Ottoman Civil Code), which is based on the Islamic law, one of the requisites of a valid arbitration agreement is that the dispute to be arbitrated must have already arisen. *Future disputes* cannot be arbitrated. Because of the uncertainty arising out of the contingency that a dispute may arise or may not arise gives rise to *gharar*, a principle of Islamic law which strikes down any provision which is subject to an *uncertainty*. This is why in Islamic law, an arbitrator must be appointed by name. The attitude of Islamic law is: wait and see. Let the dispute arise. If parties at that given time are mutually agreeable to refer the dispute to arbitration, they may enter into an agreement, name the arbitrator and start the proceedings.

In case of future disputes, however, there may occur a very long gap between the time of entering into the agreement and the arising of the dispute. Meanwhile, either party may lose his zeal for arbitration, yet he is legally ‘forced’ into it with counter productive consequences. This way, the prohibition imposed on the arbitration of future disputes appears to be prudent. Sacrificing a little convenience may open up the possibility of big gains.

#### **7. A Very Special Kind of “Expert Determination” is Provided in the Form of *Fatwa of Mufti***

“Expert determination” is an ADR process in which the parties to a dispute seek the expertise of an expert in making a neutral evaluation of the dispute and pronounce an assessment of the relative merit of the cases of both parties. The assessment is not binding but advisory in nature. Yet, keeping in view the knowledge of the expert and his neutrality parties tend to accept the assessment as binding and settle their dispute accordingly.

*Fatawa* given by the *Muftis* closely resembles with expert determination. *Fatawa* in Islamic law are non-binding evaluative opinions given by a *Mufti* (juristconsult), regarding a specific issue affecting the whole of society (eg. birth control, etc) cloning, transplantation of human organs, etc) or a specific individual problem affecting only two a parties (eg. a business dispute, matrimonial problem, testamentary disposition, ect). Not everyone can act as *Mufti*, except those who have the same qualifications as a *qadi*.

Islamic history is full of cases in which thousands of problematic issues and disputes were referred to *Muftis* and the answers given by them constituted a collection of *fatawas*. In fact, *fatawa* have become an integral part of Islamic legal history, both past and present. The earliest collection of *Fatawa* known as *Kitab Al Nawazil* was compiled by Abu Layth al Sumaqaandi, who died in 983 AD. And the latest collection is *Fatawa Abu Zahra* published from Beirut in 1998. In many countries like Malaysia, there are government constituted *Fatawa* Committees to give verdicts on matter of general interest for every Muslim. In still other countries like India, there are *Dar ul Ifta* constituted by the religious parties to give *fatawa* on voluntary basis. These have helped in resolving thousands of disputes among Muslims.

## 8. ***Muhtasib* or Ombudsman Is As Old As Islam Itself**

The institution of Ombudsman has now become an integral part of the administration of justice in many countries of the world. Ombudsman helps to take into cognizance such public complaints against the government bureaucracy which are generally considered outside the jurisdiction of courts.

This institution emerged in Sweden in 1809 and in England in 1967 through the Parliamentary Commissioner Act. It is now considered as an important and integral part of ADR.

In Islamic law, however, the institution of ombudsman in the form of *Muhtasib* finds a mention in the Quran and hence is more than 1400 years old. Allah says in the Quran:

“Let there arise out of you  
A band of people  
Enjoining what is right  
Forbidding what is wrong  
And believing in Allah”.<sup>16</sup>

This Quranic duty of “forbidden what is wrong” did not remain a theoretical idea. The Prophet appointed two prominent persons as *Muhtasibs*: Umar bin Khattab for Madinah and Sa’ad ibn Al A’as Umayyah for Makkah. According to the famous jurist Ibn Taimiyyah, the Jurisdiction of the *Mushtasib* covered areas generally considered outside the scope of law courts.<sup>17</sup> His duty is to keep an eye on public morals, to eliminate

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<sup>16</sup> Quran, *Surah Al Imran* (3) ayat 104

<sup>17</sup> Ibn Taimiyyah, *Al-Hisab fi al-Islam wa Wazifat al Hukkam al-Islamiyyah* (*Hisbah* in Islam and Duties of Islamic Officials), (Madinah University, n. d). p. 10.

fraudulent practices of the traders and generally to ensure the good health of the civil society.

“A separate department of *Hisba* (Account taking), with full time *Muhtasib*, assisted by qualified staff (known as *Arifs* and *Amins*) was introduced by Abbasid Caliph Abu Ja’afar al Manur in 157 AH (733 AD). The Institution of *Hisba* moved along with Muslims in the Western provinces of Spain and North Africa. Similarly the office of *Muhtasib* was an important department during the rule of Fatamids, Ayyubids and Ottomans.....

The institution of *hisba* remained in vogue during the entire Muslim period of History, though it has been termed differently in various regions. For example, in the Eastern provinces of Baghdad caliphate the officer in-charge was *muhtasib*, in North Africa he was *sahib al-suq*, in Turkey, *muhtasib aghasi* and in India, *Kotwal*.<sup>18</sup>

According to Mawardi, there are three types of complaints which a *muhtasib* may entertain:

- i) complaints regarding weights and measures;
- ii) complaints against adulteration of various kinds and undue hike in prices of items sold; and
- iii) complaints against non-payment of debt even while possessing the ability to repay it.

He has authorised to take the help of the police in discharging his duties. His jurisdiction included – keeping an eye on the working of various professionals like doctors, teachers, goldsmiths, etc., in the way they conducted their business or profession. He also covered religious activities and community affairs, like keeping the roads and streets clean and lit at night. In Pakistan, there is an elaborate network of *muhtasibs* in all the four provinces of the country and a chief *muhtasib* for the whole country. There is a feeling among the common people of Pakistan that in view of the usefulness of this institution, its jurisdiction should be enlarged.<sup>19</sup>

## **Brief Conclusion**

The religious undertones of ADR and certain of its peculiarities have made it unique among the legal systems of the world. Its vast coverage is difficult to be matched by any other legal system, so also the readiness of persons professing Islam to submit themselves to the idea of amicable settlement of disputes.

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<sup>18</sup> Muhammad Akram Khan, “*Al-Hisba and the Islamic Law*” in Ibn Taimiyyah, *Public Duties in Islam*, Eng. tr by Mukhtar Holland (Islamic Foundation, Leichester, 1986, 1986)

<sup>19</sup> Information given by Justice (R) Khalil ur Rahman, retired judge of the Supreme Court of Pakistan who also worked as the Chief Muhtasib of Pakistan. See, also M. S. Naz, *Islami Riyasat Mei Muhtasib ka Kirdar*, (Urdu) (Idara Tahqiqat-e-Islami, International Islamic University, Islamabad), pp. 351-377.

It is high time that the true nature of ADR shall be explained to and popularised among Muslims. The culture of litigation imposed on Muslim societies during the colonial days must be replaced by the Islamic ways of amicable settlement of civil disputes, then gradually extend it to criminal disputes, like *qisas* (retaliation).