

THE PARADOXICAL USE OF THE TERM *SULH*: AN ANALYTICAL STUDY FROM QURANIC PERSPECTIVE

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ABSTRACT

Dispute resolution systems are broadly divided into two sides namely Judicial Dispute Resolution (JDRS) and Non-Judicial Dispute Resolution Systems (NJDRS). The first one is more formal, and the latter is informal which is known as Alternative Dispute Resolution (ADR) all over the world. Though ADR is claimed to be a great innovation of the West, it is found to be practiced in the Islamic Judicial System from its very inception. ADR was practiced throughout the history of Islamic Judiciary as *sulh*. However, the use of the word *sulh* in the meaning of ADR needs to be explained in the present judicial context. Scholars sometimes discussed *sulh* as a system parallel to ADR and sometimes as a process, which creates confusion in its multiuse. Hence, this study aims at eliminating this confusion on the paradoxical use of the term *sulh* as a system for dispute resolution as well as a process of that system. At present, hardly any study has precisely differentiated between them. Thus, this qualitative study focuses on discussing it primarily from the perspectives of the Quran, documented sources as well as interviews. The major finding of this study is that *sulh*, comparing with present day ADR, does not need to be used paradoxically. The main contribution of the study is to propose a clarification of *sulh* in the line of ADR fruitfully. The findings of this study are not only useful in clarifying the exact meanings of the term as used in different contexts but also applicable to solve problems faced by arbitrators involved in various indigenous traditional dispute resolution systems such as *shalish* in Bangladesh and elsewhere.

Keywords: *Sulh*, *tahkim*, Alternative Dispute Resolution (ADR), *Shalish*, dispute resolution, settlement.

1. INTRODUCTION

Sulh and *Tahkim* are two necessary systems for dispute resolution in Arabian dispute resolution culture.¹ At the beginning of Islam, both systems remained in practice with some modifications. Gradually *Qada* (formal adjudication), *wali-al-Mazalim* (Public grievances tribunal), *muhtasib* (Ombudsman) were developed based on needs of the society in broader range instead of tribal limitation. According to *al-Nawawi*, the words *sulh*, *al-islah* and *al-musalahah* originated from *saluha* or *salaha*, explain the process of restoring something.² The objective of *sulh* is the restoration of relationship and ensuring justice through removing the dispute between individuals, groups or between a group and individuals by the parties themselves or by an impartial third party. The Arabic word *tahkim* means to appoint a *hakam* (arbitrator) by each disputing party to resolve a dispute arbitrarily. *Qada* is the state-backed independent formal judiciary. *Muhtasib* and *wali-al-mazalim* are also state-backed dispute resolution system under the executive organ of the state. However, for being out of formal court *muhtasib* and *wali-al-mazalim* are two institutions of mediation (ADR).

The Prophet (PBUH) himself resolved social disputes being appointed by the parties both in his pre-prophetic and prophetic life.³ 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 *shari`ah*. The prophet performed the duty as a chief executive and chief justice. He appointed governors and judges for several provinces of the then Islamic state. Thus, *qada* became official institution backed by the state for dispute resolution, and *sulh* and *tahkim* remained as the informal institutions for the same. In the pre-Islamic era, *sulh* was an amicable dispute resolution system compared with *tahkim*. After the *qada* (formal judicial institution) had been established in full fledged, both *sulh* and *tahkim* became non-official institutions for dispute resolution for the tribal or rural community. *Qada* and *sulh* become two institutions for dispute resolutions as formal and informal justice system respectively. *Tahkim* virtually becomes a tool for *sulh* (out of court settlement while used as a non-state justice system contrary to *Qada*).

Moreover, the pre-Islamic *sulh* remains as another tool under the *sulh* (informal system for dispute resolution compared with *qada*). *Sulh* becomes an umbrella term for all informal ways of dispute resolution. Researchers use both *sulh* to mean the system and its method as well. Nevertheless, hardly any research differentiated between the two. The difference is understood from the context. It needs to remove the ambiguity, which creates confusion sometimes. Hence, this study takes the challenge to remove this confusion systematically.

2. METHODOLOGY

¹ Muhammad, R. W. (2008). The Theory and Practice of *Ṣulḥ* (Mediation) in the Malaysian Shariah Courts. *IIUM Law Journal*, 16(I), 18. p. 35.

² Sa'odah, b. A. (2015). *Sulh: An Alternative Dispute Resolution And Amicable Settlement Of Family Dispute*. *UMRAN Journal of Muslim Affairs*, 1(I), p.2.

³Nadwi, A. H. A. (1993). *Muhammad the Last Prophet: A Model for All Time*. United Kingdom: UK Islamic Academy. Pp. 25-26.

This study followed a qualitative method of research exploring *sulh* as an informal dispute resolution system compared with Alternative Dispute Resolution System. It is based on both secondary and primary data; however, secondary data is dominant. Primary data has been collected through extensive discussion with some local arbitrators of rural area in Bangladesh. It has been observed that even rural dispute resolution has two forms *somajuta (sulh)* and *bichar (tahkim)*. The study lightly criticized the uses of the word *sulh* done paradoxically by some researchers and suggested to use some processes of *sulh* used in the Holy Quran like *hiwar* (dialog). For translation of the meaning of the holy Quran, <http://tanzil.net/#trans/en.sahih> has been used. To explain some related words of the holy Qur'an some prominent Islamic scholars' translation has been used from this source also.

3. DISCUSSION

A brief history of *sulh*

In the pre-Islamic era, *sulh* and *tahkim* were standard modes of dispute resolution.⁴ *Tahkim* was more formal and frequently used when disputants themselves failed to reach a settlement. *Hakams* (arbitrators) had a prominent position and were mainly chosen from healers and soothsayers of the society. They were believed to have supernatural powers. People were emotionally blackmailed because of their superstitious belief on the *hakams*. Islam modified the system eliminating the false belief about the *hakams* and advanced the *tahkim* gradually uplifting it to formal *Qada*. Regarding the rejection of soothsaying, the Quranic verse is as follows:

“O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful”⁵ ("Al Quran ", Al-Ma'idah 05:90).

The practice of *sulh* and *tahkim*, was introduced in accordance with the teaching of Islam and was recognized as a method of resolving disputes. The Prophet (PBUH) used to act not only as the head of the state but also as a mediator and arbitrator for a few cases. The role of mediator and arbitrator was sometimes delegated to other officials due to the expansion of Islam to different localities⁶. The appointment of Mu'adh bin Jabal and Ali bin Abi Talib as *qadi* in Yemen was an example of the delegation of roles from the Prophet (PBUH). *Qadi*, as it was known at that time, acted not only as a judge but also as a mediator and arbitrator because of no clear distinction between their functions. However, *qadi's* main role was to judge according to the general principles stated in the Quran and Sunnah.

During the period of *Khulafa al-Rashidin*, a *qadi* carried out the duty not only as a judge but also as an arbitrator and mediator. *Sulh* was widely applied and recognized as a tool for resolving disputes. The first caliph, Abu Bakr, for example, used mediation during the

⁴ Al-Ramahi, A. (2008). *Sulh: a crucial part of Islamic arbitration Islamic Law and Law of The Muslim World Research Paper Series at New York Law School*. New York: New York Law School. pp. 3-5.

⁵ The translation is derived from <http://tanzil.net/#trans/en.sahih/5:90>.

⁶ Wahed (2015, p. 73). *Sulh: Its Application in Malaysia*, IOSR Journal Of Humanities And Social Science. P. 73.

appointment of the successor of the Prophet (PBUH).⁷ Caliph Umar, for example, wrote to Abu Musa Al-Ash'ari appointing him as a *qadi*. There were rules regarding the administration of justice, including the rule on *sulh*. It was stated that "all types of compromise and conciliation among Muslims are permissible, except those which make *haram* anything which is *halal*, and a *halal* as *haram*". This was in accordance with another *hadith*, "If somebody innovates something which is not in harmony with the principles of our religion, that thing is rejected."⁸

Sulh in the Quran

The word *salaha* and its derivatives have appeared 179 times in the Holy Qur'an.⁹ However, the word *sulh* itself appears only once. In this verse, Allah prescribed that *sulh* is the best. There are four *Ayats* in which Allah commands us to reconcile and make peace. The translation of the meaning of the *ayat* in which the word *sulh* comes once only is:

“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. And present in [human] souls is stinginess. But if you do good and fear Allah - then indeed Allah is ever, with what you do, Acquainted¹⁰” (“Al Quran”, An-Nisa 04:128).

The word *sulh* in this *ayat* is translated by Ali¹¹ as “amicable settlement”, Asad¹² as “to set things peacefully”, Pickthall¹³ “to make terms of peace between themselves” and Maududi¹⁴ translated it “to make peace between themselves (by means of a compromise)”.

In this *ayat*, husband and wife are two parties, and the wife is the victim of the husband's contempt or evasion. The *ayat* addressed their marital problems and suggested *sulh* as resolution through negotiation by compromising on their rights. The *ayat* certified that the *sulh* (compromise of action) is the best way to solve the problem rather than going to separation or being incessantly tensed, for the family is not a place of conflict. This is a bilateral *sulh* by disputing parties themselves, and the next *ayats* coming below included an impartial third party to do *sulh*. The translations of the meaning of the *ayats* that command us to make *sulh* in a dispute are:

“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

⁷ Ibid, 73.

⁸ <https://sunnah.com>. Sunan Ibn Majah 2353, Book 13, kitab Al Ahkam, Hadith 46.

⁹ Omar (2010, p. 319). *Dictionary of the Holy Qur'an*. Hockessin: NOOR Foundation - International Inc..

¹⁰ The translation is derived from <http://tanzil.net/#trans/en.sahih/4:128>.

¹¹ Yūsuf Alī (1934). *The Holy Qur-an, Text, Translation and Commentary*. Delhi: Darul Qran. P. 220.

¹² Asad (1980). *The Message of the Qur'an*. Gibraltar: Dar al-Andalus. P. 129.

¹³ Pickthall, M. (1981). *The meaning of the glorious Qur'an*. Cairo: Dar Al-Kitab Al- Masri. P. 123.

¹⁴ Maududi, S. A. A. (1995). *The Holy Quran Translation and Brief Notes with Text* (M. A. Muradpuri & A. A. Kamal, Trans. 12th ed.). Lahore: Islamic Publications (Pvt.) Limited. P. 145.

who act justly”¹⁵("Al Quran ", Al-Hujrat 49:09).

The word *islah* in this *ayat* is translated by Ali¹⁶, Pickthall¹⁷, Asad¹⁸, Maududi¹⁹ and others as “make ye peace” avoiding fighting and “reconcile” between the parties equitably.

An impartial third party plays a vital role to settle a dispute between individuals or groups. This *ayat* addresses the neutral third party to play their role fairly and settle the dispute peacefully. If any party goes against the peaceful settlement, this impartial third party may have to go against the aggressive party to create a balance of power of the disputing parties and thus build an environment for a peaceful settlement. This *ayat* commands the impartial third party to make *sulh* two times under two separate situations. Firstly, it orders to make *sulh* between two parties when they are to fight. An impartial third party is ordained to try to make a *sulh* so that they can avoid fighting. Secondly, when the parties began fighting, the *ayat* orders the neutral third party to go against the party who denies *sulh* until they come back to *sulh*. And in this situation, the *ayat* again orders to make *sulh* justly. The *ayat* reminded that the mindset of the third party must be to do *sulh* and thus ensure the justice, for justice is the main objective of any legal treatment. In this connection, the next *ayat* focuses on the base of the relationship of Muslim society as brotherhood, and orders the third party to reconcile between two disputing parties reminding them that they are not allowed to interrupt the brotherly relationship at all.

“The believers are but brothers, so **make settlement** between your brothers. And fear Allah that you may receive mercy”²⁰("Al Quran ", Al-Hujrat 49:10).

This *ayat* reminds us all that the Muslim society is a compassionate society where respect for elders and affection for the younger will remain active. Though there is no clear blood relation, the faith-based brotherly relationship is a stronger relationship between two Muslim individuals or groups. So they are required not to fight one another during their disputes, but they should choose the way of *sulh* instead of fighting.

“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”²¹("Al Quran ", Al-Anfal 08:01).

The word *islah* in this *ayat* is translated by Al-Mubarakpuri²² as “settle all matters of difference”, Asad “keep alive the bonds of brotherhood”,²³ Ali “keep straight the relations

¹⁵ The translation is derived from <http://tanzil.net/#trans/en.sahih/49:9>.

¹⁶ Yūṣuf Alī, A. A. (1934). *Op. cit.* P. 1014. Yūṣuf Alī (1934). The Holy Qur-an, Text, Translation and Commentary. Delhi: Darul Qran.

¹⁷ Pickthall, M. (1981). *Op.cit.* P. 684.

¹⁸ Asad, M. (1980). *Op. cit.* P. 793.

¹⁹ Maududi, S. A. A. (1995). *Op. cit.* P. 833.

²⁰ The translation is derived from <http://tanzil.net/#trans/en.sahih/49:10>.

²¹ <http://tanzil.net/#trans/en.sahih/8:1>

²² <http://tanzil.net/#8:1>

²³ Asad, M. (1980). *Op.cit.* P. 237.

between yourselves”,²⁴ and Pickthall “adjust the matter of your difference.”²⁵

This first *ayat* of *sura al-Anfal* depicts a situation in which disputants were involved with getting spoils 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. Of course, the problem should get a solution by the real authority, and another revelation solved the matter of distributing the spoils latter.

Thus, the holy Quran recommended *sulh* and orders to do *sulh* to ensure justice and equity. So the ways through which *sulh* is achieved may be considered a process of *sulh* which are actually not the main things. But the main target is to reach to an agreement concluded by the consents of the parties involved in a dispute.

Use of *sulh* by Researchers

The researchers used the word *sulh* to mean mediation. In a wider sense, mediation means Alternative Dispute Resolution (ADR) and in narrower sense, it is a process or method of ADR where a third party helps the parties to settle their dispute peacefully. The word is used to affirm that the present-day Alternative Dispute Resolution (ADR) and *sulh* in Islamic legal system are same. At the same time, they defined the word *sulh* by negotiation, conciliation, mediation and compromise of action with an exception in the case of *tahkim* (Arbitration) considering it just opposite to *sulh* whereas arbitration is a simple method of ADR. Some examples of this paradoxical use are as follows:

Aziz and Hussin in their article titled "The Application of Mediation (*Sulh*) in Islamic Criminal Law" used the word mediation as Alternative Dispute Resolution system (ADR) in broader sense. In the statement, "Dispute resolution through mediation or *sulh* is encouraged in Islam in almost all disputes" mediation or *sulh* is used mainly for ADR.²⁶ Sa'odah in her article titled "*Sulh*: An Alternative Dispute Resolution and Amicable Settlement of Family Dispute" used the word in wider sense of mediation parallel to ADR. She stated that *tahkim* is a form of *sulh*²⁷.

Abdul Hak and Khan, in their article "The Application of *sulh* in Resolving Community Disputes," discussed *sulh* in the same meaning of ADR under which arbitration is a process. They set the example of the arbitration between Ali Ibn Abi Talib (r.a) the fourth caliph, and Muawiya ibn Abisufiyan by Abumusa al-Ashari and Amr-ibn-al'As as representatives from both sides as a process of *sulh*.²⁸

²⁴ Yūsuf Alī (1934). *Op. cit.* P. 415.

²⁵ Pickthall (1981). *Op.cit.* P. 225.

²⁶ Aziz, N. A., & Hussin, N. (2016). The Application of Mediation (*Sulh*) in Islamic Criminal Law. *Jurnal Syariah*, 24(I), 22. P. 115.

²⁷ Sa'odah, b. A. (2015). *Sulh*: An Alternative Dispute Resolution and Amicable Settlement of Family Dispute. *UMRAN Journal of Muslim Affairs*, 1(I), 19. P. 1.

²⁸ Abdul Hak, N., & Khan, H. A. (2013). The Application of *Sulh* in Resolving Community Disputes. *SSRN Electronic Journal*, 21. doi: DOI: 10.2139/ssrn.2346869. p.4.

Sulha is a Palestinian and Middle-Eastern peacemaking process. Gellman and Vuinovich, state that *sulha* is promoted as a technique for addressing the right to dignity within controversial multiparty discourse through the tactic of education and community exposure at both local and international levels.²⁹

Pely states, "Unlike the *Sharia* (formal) courts, the *sulh a* process is an informal conflict resolution mechanism in the Middle East." Many kinds of disputes including business, financial, and consumer conflicts, can be resolved through *sulha*. Many disputes arising out of acts of violence, including murder, injury and physical assault can also be addressed through this.³⁰

Tamdoğan in his article "*Sulh* and the 18th Century Ottoman Courts of Üsküdar and Adana" explores and compares cases of *sulh* (amicable agreement) that are documented in the records of two Ottoman courts.³¹

Wahed states, "the concept of dispute resolutions is not new in Islam. However, many believe that the concept has emerged and originated from the West, whereas it existed 1400 years ago as tools to resolve disputes". The use of *sulh* has been encouraged by the holy Quran because of its ability to resolve a dispute without affecting the existing relationship among parties. The approaches of dispute resolutions in Islam are as follows: *sulh* (negotiation, mediation, conciliation and compromise of action); *nasihah* (counseling); *qada* (court adjudication); *tahkim* (arbitration); *muhtasib* (ombudsman); *fatwa of mufti* (expert determination); *wali-al-mazalim* (Public grievances tribunal); and other hybrid mechanisms. Wahed used *sulh* as parallel to ADR and mentioned the approaches among which *sulh* is one. This dual use of *sulh* is termed as paradoxical use in this study.³²

Haroon states, "Alternative Dispute Resolution in Islamic legal system is simply known as *sulh*". Again, to discuss the process of ADR/*sulh* he mentioned four processes namely "*sulh* (Negotiation, mediation/Conciliation, Compromise of action), *tahkim* (Arbitration), *muhtasib* (Ombudsman) and *fatwa of mufti* (expert determination)". The word *sulh* in the statement of Haroon is not similar to *sulh*, which has been stated as a process. Because, the first *sulh* is a system and the second one is a process for that system.³³

Muhammad asserts that informal dispute resolution under Arab-Islamic culture is generally known as *sulh* or *sulha*. The word *sulh* can be defined as a method or mechanism to

²⁹ Gellman, M., & Vuinovich, M. (2008). From Sulha to Salaam: Connecting local knowledge with international negotiations for lasting peace in Palestine/Israel. *Conflict Resolution Quarterly*, 26(I), 127-148. doi: DOI: 10.1002/crq. P. 127.

³⁰ Pely, D. (2009). Resolving clan-based disputes using the Sulha, the traditional dispute resolution process of the Middle East. *Dispute Resolution Journal*, 63(4), 10. P. 82.

³¹ Tamdoğan, I. (2008). Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana. *Islamic Law and Society*, 15(I), 55-83.

³² Wahed, H. (2015). SULH: Its Application in Malaysia. *IOSR Journal of Humanities And Social Science (IOSR-JHSS)*, 20(6), 9. doi: DOI: 10.9790/0837-20627179. P. 71.

³³ Haroon, I. A. (2017). The Use of Alternative Dispute Resolution (Sulh) in Sharia Cases. P. 5.

settle a dispute amicably. *Sulh* can also mean “an agreement between two parties relying on the prescribed conditions, which they agreed to earlier in the process of resolving their disputes.”³⁴

ADR and *Sulh*

Alternative Dispute Resolution (ADR) based on its backup authority is of three types. These are formal ADR backed by a legal and judicial authority, quasi-formal ADR backed by legal and non-judicial authority and informal ADR backed by informal administration and customary law.³⁵ ADR is said to be the alternative methods of helping people to resolve legal problems before going to court. It is also known as external dispute resolution in some quarters.³⁶ It has emerged as a potential means of resolving disputes.³⁷ Different terms related to this system have been used in different countries based on the community culture. The term Alternative Dispute Resolution (ADR) covers all methods of resolving disputes. ADR refers to a wide range of dispute resolution processes that help parties resolve their disputes without a trial. From informal discussions to formal adjudications, there are over sixteen distinct ADR processes currently in use.³⁸

Sulh, on the other hand, literally means termination of a dispute, a compromise or to end a dispute among persons.³⁹ It is an accord, a contract between two parties or more to end a dispute by ending its causes, and it concludes by offer and acceptance. *Sulh* is a kind of agreement between disputants to settle disputes amicably.⁴⁰ *Sulh* is a settlement grounded upon compromise negotiated by the disputing parties themselves or with the help of a third party.⁴¹ It is a process of restoring justice amicably among disputants to attain the agreed settlement outside the court.⁴² According to Ibn Qudamah, *sulh* is an agreement between two disputing parties, which would lead to peace. In Islam, the process of *sulh* can be practiced in all cases except in *Hudud* cases.⁴³

Traditional *Shalish* in Bangladesh and *sulh*

Shalish is a non-state rural justice system and still the most effective procedure for quick and useful legal redress in Bangladesh. It provides a win-win situation for both parties and entails

³⁴ Muhammad, R. W. (2008). *Op.cit.* P. 35.

³⁵Rahman, M. M. (2015). Access to Justice and ADR in Bangladesh: Institutional and Legal Frameworks *ASA University Review*, 9(I), 14. pp. 246-247.

³⁶ Ahmed, B., & Islam, M. T. (2013). The Role of Union Parishad in Rural Dispute Resolution in Bangladesh: an Evaluation in the Light of People's Perception. *Studies on Asia*, 3(I), 24. P. 189.

³⁷ Ibid. p. 189.

³⁸Hyder, M. N. A. (2015). Scope of ADR for IP Rights Dispute Resolution in Bangladesh. *Bangladesh Research Publications Journal*, 11(4), 15. P.311.

³⁹Sa'odah, b. A. (2015). Sulh: An Alternative Dispute Resolution and Amicable Settlement Of Family Dispute. *UMRAN Journal of Muslim Affairs*, 1(I), 19. P. 2.

⁴⁰Bouheraoua, S. (2008). *Foundation of Mediation in Islamic Law and Its Contemporary Application*. Paper presented at the 4th Asia-Pacific Mediation Forum Conference which was hosted by Harum Hashim Law Centre, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, between 16-18. P. 2.

⁴¹ Al-Ramahi, A. (2008). *Op.cit.* p. 2.

⁴² Wahed, H. (2015). SULH: Its Application in Malaysia. *IOSR Journal of Humanities And Social Science (IOSR-JHSS)*, 20(6), 9. doi: DOI: 10.9790/0837-20627179. P. 71.

⁴³ Qddus, M. A. a. R. A. A. A. a. (1999). *Al Sulh wa al Islah fi al Quran al Karim*. (MA), Ummul Qura University. (4399). PP. 28-34.

fewer sufferings and costs. Usually, the process of a particular *Shalish* starts with interrogating the disputants to ascertain the facts. Then the *Shalishkars* (who do *Shalish*) offer their solutions and seek the opinions of disputants before coming to a final decision.⁴⁴

As the *shalishkars* know the causes and factors of a dispute more or less, they try to settle the matter through *somojuta* (compromise) or *bichar* (arbitration). *Somojuta* (compromise of action) is more informal than *bichar* (adjudication). To settle a dispute through *bichar* (arbitration), they take evidence, ask the witnesses much, make arguments or they get involved in the debate. Finally, they reach a decision unanimously. Unlike *bichar*, after hearing from both applicant and defendant, the *shalishkars* sometimes make a compromise between the disputants for it is the best-fit solution to restore the relationship of the disputing parties. This is called *somojuta*, a win-win resolution of a dispute. *Bichar* is arbitration in English and *tahkim* in Arabic. *Somojuta* may be translated as mediation, conciliation with or without the help of a third party. In turn all these informal adjudication or conciliation are informal ADR or *sulh*. For the main objective of *shalish* is to restore the relationship, not to adjudicate.

Elements of *Sulh*

Sulh as a contract has certain essential elements that form a valid *sulh* agreement under Islamic law⁴⁵. The following are the essentials of *sulh* agreement⁴⁶:

a. *Al-Mutakhasiman*

- i) *Al-MusalahLahu/Al-Mudda`e*, (one who makes a declaration of claim)
- ii) *Al-Musalahu`Alaihi/ Al-Mudda` `Alihi* (one against whom the claim is declared)

b. *Al-Musalah`Anhu* (Subject-matter in respect of which the claim is lodged)

c. *Al-MusalahBihi/Badl al-Sulh* (the object offered for the *Sulh*/Consideration)

d. *Al-Ijab* (offer)

e. *Al-Qabul* (acceptance)

a. *Al-Mutakhasiman(Al-Mudda`e, Al-Mudda` `Alaihi)*

The disputants (*Al-Mutakhasiman*) coming together to a contract to avert the dispute are called *muta`aqidan*, or *musalih* by the jurists. “The two conflicting parties (*al-Musalih*) should be persons who possess the legal capacity to surrender their rights, donate or make a gift and not otherwise. In accordance with the principle, an insane, a minor, a guardian over orphan’s

⁴⁴Delwar, J. (2005). *Shalish-mediation in Rural Bangladesh. E-journal Samaj Kantha: Voice for the Society*, 58. P. 1.

⁴⁵Haroon, I. A. (2017). *The Use of Alternative Dispute Resolution (Sulh) in Sharia Cases*. P.12.

⁴⁶Sa`di, A. H. (1988). *al Qamus al Fiqhi Lugatan wa Istilahan*. Demasqas: Dar al Fikr. P. 1/327.

property, an administrator over endowment funds (*waqf*), shall have no legal capacity to validly dispose under Islamic law⁴⁷”.

b. *Al- Musalahu`Anhu* (Subject matter of Dispute)

“The subject matter of *sulh* should be valuable property (*mal*). The subject matter of *sulh* may emanate from dispute over anything lawful- be it dispute involving monetary claims, property, issues concerning marriage and divorce and lots of civil cases with the exclusion of *Hudud* cases⁴⁸”.

c. *Al-MusalahuBihi* (Consideration)

“This is the object or thing tangible or otherwise upon which the parties to the *sulh* agree to be given as consideration in place of the right forgone by way of *sulh*. It must be *Halal*, valuable and beneficial⁴⁹”.

d. & e. *AL-Ijab and Al-Qabul* (Offer and acceptance)

“Like any other contract under Islamic law, offer and acceptance are essential ingredients of *sulh*. The offer as well as the acceptance may be conveyed in any expression that clearly illustrates the mutual consensus of the parties⁵⁰”.

ANALYSIS

It is observed from the discussion that the researchers are in a trend to show *sulh* in Islamic legal context as an inseparable and same part of judiciary and akin to ADR from their objective. Again, to discuss the processes, approaches or moods of Islamic *sulh* as ADR they mentioned the first one is *sulh* and then *tahkim*, *muhtasib* and other processes. A question may arise if *sulh* is same to ADR which is an umbrella term and *sulh* again is a process of that ADR that means there is an ADR under ADR or a smaller *sulh* under the main *sulh*. The answer is that the word *sulh* is used proportionately in the Islamic legal system. It means an agreement to avoid fighting between two independent states. For example, *sulh-al-hudaibiyah* averted the fighting between Madina and Makkah, the then two city-states. As far as *Qada* is concerned, it actually ends any conflict through formal court where win or loss is inevitable among the disputing parties; all informal processes to avoid litigation are *sulh*. So, outside the formal court, *tahkim*, med-arb, *wali-al-mazalim*, *muhtasib* are the process of *sulh*.

Fatwa had an important place associated with mufti both in formal and informal judicial system throughout the Muslim period in India both in *Sultanat* and *Mugal* period. In case of informal dispute resolutions by local notables, *tahkim* is more formal, and *sulh* is informal. *Sulh* in this stage includes *sulh* through negotiations, conciliation or mediation between the parties, by a neutral third party or not. Thus, *sulh* as a process includes negotiation, mediation and conciliation. As a system, it includes *tahkim*, *wali-al-mazalim*, *muhtasib* etc. additionally. So *sulh*

⁴⁷Haroon, I. A. (2017). The Use of Alternative Dispute Resolution (Sulh) in Sharia Cases. P. 12.

⁴⁸ Ibid. p. 12

⁴⁹Sa`di, A. H. (1988).*op.cit.* P. 1/327.

⁵⁰Haroon (2017). *op. cit.*p.12

is a system to avoid political fighting. Likewise, it is a system to prevent judicial combat avoiding litigation through *Qada* (formal judiciary by state-appointed judges). It is attached to *tahkim* (informal judiciary). Ultimately, *sulh* considering similar to ADR, may include *hiwar* (dialog), *mufawadah* (negotiation), *wasitah* (mediation), *shafa`ah* (intercession) *tanazul* (compromise of action), *mujadalah* (Dialect), *Munazarah* (debate) as processes of *sulh*, avoiding repeated utterance of the word.

Sulh, an informal system of dispute resolution, is similar to present day Alternative Dispute Resolution (ADR). Mediation, negotiation, conciliation, compromise of action, arbitration, *muhtasib*, *wali-al-mazalim* etc. are its processes. *Sulh* is an agreement reached through the processes mentioned above. In any process of *sulh*, the consent of disputants plays an active role to get an outcome amicably or arbitrarily if necessary. On the other hand, in *qada* once a case is filed, the appointed judges play the main role to reach the outcome based on evidence arbitrarily, not amicably.

Dispute resolution is a legal and judicial issue. Dispute resolution in Islam is based on Islamic *sharia`h* and hence all sources of Islamic *shari`ah* are the sources of dispute resolution in Islam⁵¹. The following table presented the dispute resolution system as a whole where *sulh* is shown as an informal system considering with present context of ADR.

Dispute Resolution in Islam

1	Sources	Primary		Secondary							
		Quran	Sunnah	Main		Additional					
				<i>Ijma`a</i>	<i>Qias</i>	<i>Istihsan</i>	<i>Mursalah</i>	<i>Ishtlah, Masalih al mursalah</i>	<i>Madhab al schabi</i>	<i>`Urf, Adat</i>	<i>Sadd al-dhara'i</i>
2	Fatwa	Fatwa (legal expert's opinion) as processing unit of <i>sharia</i> to adjust with present problem for both <i>qada</i> & <i>sulh</i>									
3	System	<i>Sulh</i>									<i>Qada</i>
4	Process	<i>Sulh</i>			<i>Tahkim</i>	med-arb	<i>Muhtasib</i>	<i>Wali mazalim al</i>	<i>Nasihah</i>		
		Negotiation	Conciliation	Mediation							
5	Proposed	<i>Mufawadat</i>	<i>Wasitah</i>	<i>Tanazul</i>	<i>Tahkim</i>	Med- arb	<i>Muhtasib</i>	x	<i>Nasiha</i>	<i>Hiwar, etc</i>	

⁵¹kambeck (2012, pp. 11-17). The Compatibility of Shari'a and Adequate Dispute Resolution - A Methodological Approach. the Orient Institute in Beirut.

The table in level 3 explains that there are two systems for dispute resolution namely *Qada* (formal judiciary) and *sulh*. In level 1, it explains that the sources for both systems are divided into two sources namely primary and secondary sources. Secondary sources again are of two types, main and additional. In level 2 it has been described that *Fatwa* of a mufti acts as a processor of *shariah* laws to make it applicable for present situation and helps judges to resolve the current disputes. *Fatwa* acts as a processing unit to adjust *shariah* (*Quran, Sunnah, Ijma`*, *Qiyas* and heritage of Islamic *fiqh*) with current situation to solve contemporary problems. *Sulhandqada* are the main two systems for dispute resolution. Researchers are in a trend to see *sulh* equivalent to ADR, but to discuss the approaches (process) of *sulh* they are not adjusting it with the process of ADR which has been displayed in level 4. In level 5, the study proposed to reshuffle the processes of *sulh* using the *Quranic terms for it* like *hiwar* and *mujadalah, Shafa`ah* (intercession) etc. keeping the processes of present day ADR in consideration.

4. RESULTS

Following the discussion mentioned above we may draw the summery saying that *sulh* is an inseparable part of a dispute resolution system in Islam. It goes hand in hand with *Qada* backed by state judiciary and *tahkim* (arbitration) backed by non-state authority. *Sulh* is an informal dispute resolution system in contrary to *tahkim* backed by non-state justice system. Likewise, it is an informal dispute resolution system compared to *Qada* (formal judiciary). All the processes that help to settle a dispute out of formal court or within the court avoiding strict judicial formalities are termed as a process of *sulh*. A distinct nature between *Qada* and *tahkim* is that state-appointed judges do the first one whereas in the later the disputants appoint the *hakams* from their own. Arbitration is a process of *sulh*, which may be proved by the ayah mentioned bellow:

“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]”⁵² (“Al Quran”, An-Nisa 04:35).

“*Fab`athu Hakaman*” has been translated by Ali⁵³, Pickthall⁵⁴ as “appoint (two) arbiters”. This *ayat* provides a mixed mood of *sulh* combining with *tahkim* (mediation-arbitration/ med-arb). It demands an ending with *sulh* (amicable settlement).

Sulh is an informal system of dispute resolution, which is similar to present-day Alternative Dispute Resolution (ADR). Mediation, negotiation, conciliation, compromise of action, arbitration, *muhtasib, wali-al-mazalim* etc. are its processes. *Sulh* is an agreement reached through the methods mentioned above. In any process of *sulh*, disputants are central figures, and their consent to achieve an outcome amicably or arbitrarily is necessary. On the other hand, in *Qadaa* once a case is lodged, appointed judges play the leading role to reach the outcome based

⁵² The translation is derived from <http://tanzil.net/#trans/en.sahih/4:35>.

⁵³ Yūsuf Alī (1934). *Op.cit.* P. 191.

⁵⁴ Pickthall, M. (1981). *Op.cit.* P. 105.

on evidence arbitrarily not amicably. Following the discussion, the study may be concluded saying that *sulh* is an inseparable part of dispute resolution used in pre-Islamic Arab and modified in Arab Islamic Culture following Islamic norms.

ADR and *Sulh* are theoretically and practically the same but in some cases, the scope of *sulh* is wider than the scope of ADR. *Sulh* is legalized both in civil and criminal cases by the holy Quran, Sunnah of the prophet, *ijma`a* and *qias*. To compare *sulh* with the modern ADR, *sulh* got much importance by the researchers. However, an obscurity is observed for using the word *sulh* for the system and approach paradoxically. As there are many terms remaining even in the holy Quran to present the several ways of *sulh*, paradoxical use of the word should be avoided. It needs more studies only to discuss *sulh* as an umbrella term equal to modern ADR rigorously. Keeping *sulh* as a system for dispute resolution, it is an alternative option of *Qada*, which is formal judiciary. The main character of *sulh* is its flexibility. It includes all the processes like negotiation (*mufawadat*) dialogue (*hiwar*), mediation (*wasitah*), compromise of action (*tanazul*), Arbitration (*tahkim*), public grievance officer (*wali-al-mazalim*), ombudsmen (*muhtasib*) and other processes. It excludes *Qada* only, for *Qada* is formal judiciary by appointed judges. *Sulh* has no access to do all types of adjudication, whereas the formal judiciary is duty-bound to administer all kinds of disputes.

RUJUKAN (REFERENCES)

- [1] Al-Quranul Karim
- [2] 'Omar, A. M. (2010). *Dictionary of the Holy Qur'an*. Hockessin: NOOR Foundation - International Inc.
- [3] Abdul Hak, N., & Khan, H. A. (2013). The Application of Sulh in Resolving Community Disputes. *SSRN Electronic Journal*, 21. doi: DOI: 10.2139/ssrn.2346869
- [4] Asad, M. (1980). *The Message of the Qur'ān*. Gibraltar: Dar al-Andalus
- [5] Aziz, N. A., & Hussin, N. (2016). The Application of Mediation (Sulh) In Islamic Criminal Law. *Jurnal Syariah*, 24(1), 22.
- [6] Gellman, M., & Vuinovich, M. (2008). From Sulha to Salaam: Connecting local knowledge with international negotiations for lasting peace in Palestine/Israel. *Conflict Resolution Quarterly*, 26(2), 127-148. doi: DOI: 10.1002/crq
- [7] Haroon, I. A. (2017). The Use of Alternative Dispute Resolution (Sulh) in Sharia Cases
- [8] <https://sunnah.com>.

- [9] Kambeck, J. (2012). *The Compatibility of Shari'a and Adequate Dispute Resolution - A Methodological Approach*. Paper presented at the Shari'a and Globalisation - Islamic Legal Theory Reconsidered, the Orient Institute in Beirut
- [10] Pely, D. (2009). Resolving clan-based disputes using the Sulha, the traditional dispute resolution process of the Middle East. *Dispute Resolution Journal*, 63(4), 10.
- [11] Pickthall, M. (1981). *The meaning of the glorious Qur'an*. Cairo: Dar Al-Kitab Al-Masri.
- [12] Sa'odah, b. A. (2015). Sulh: An Alternative Dispute Resolution and Amicable Settlement of Family Dispute. *UMRAN Journal of Muslim Affairs*, 1(1), 19.
- [13] Tamdoğan, I. (2008). Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana. *Islamic Law and Society*, 15(1), 55-83.
- [14] Wahed, H. (2015). SULH: Its Application in Malaysia. *IOSR Journal of Humanities And Social Science (IOSR-JHSS)*, 20(6), 9. doi: DOI: 10.9790/0837-20627179
- [15] Yūsuf Alī, A. (1934). *The Holy Qur-an, Text, Translation and Commentary*. Delhi: Darul Qran.