

**TRACING THE CONCEPT OF ADR IN  
SHARĪ‘AH AND LAW  
A COMPARATIVE STUDY**

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The paper traces the concept of Alternative Dispute Resolution (ADR) in the *Shari‘ah* and law in general. The details of various modes of ADR (Arbitration, Mediation, Conciliation Negotiation, *Tahkim* and *Sulh*) have been left aside, owing to the fact of concentration on the issue under investigation. In this work, focus, therefore, remains on ADR’s meaning, evolution, legal status, need and significance in both systems; with minute details. It also discusses the origin of ADR in the modern law, the various stages through which it has been passed, the era of invention of the phrase ‘ADR’ and the advantages of this mechanism of dispute resolution, both for the state and individual/individuals. As a complementary requirement, Pakistani Legal System has also been analyzed profoundly in the ADR perspective. It also discovers the similitude of term ‘ADR’ in the *Shari‘ah*. A comprehensive tabulated comparison between ADR and formal litigation is made in the present work, followed by a comprehensive conclusion of the issue under investigation. In addition, content analysis technique of qualitative research method has been used for the critical analysis of the secondary data, available on the concept of ADR and *Tahkim*, both in the conventional and Islamic law respectively.

### **Introduction**

Clash of interest, the core responsible stimulant of creating a dispute,

is an integral character of human society. Man, by nature, hankers after his interests. This often puts him in a conflict with his fellows.<sup>1</sup> The birth of a dispute is, therefore, natural. It would be unwise and futile as well to claim stopping of its birth or its complete eradication from the society. On the other hand, it would also be imprudent to leave a dispute unnoticed till it starts challenging public tranquillity and peace. A dispute will always evolve; nonetheless, it should not escape resolution. This evolving-resolving process has been attracting the contemporary legal scholarship to the subject.

Human history has recorded three modes of dispute resolution so far; resolution of dispute by violence,<sup>2</sup> resolution of disputes by regular formal adjudication and resolution of dispute by informal amicable means. In law, this later form is known as Alternative Dispute Resolution (ADR). In the *Shari'ah* (Islamic law), such an encompassing phraseology could not be found in the work of classical as well as contemporary jurists/*fuqahā* (Muslim jurists), nevertheless, they have dealt with the issue under the concept of *Tahkīm* and *Ṣulḥ*.

ADR means “a series of different modes of amicable, conclusive, and out of court resolution of dispute, almost resulting in a win-win situation”. It mainly includes Arbitration, Mediation, Conciliation and Negotiation. The Phrase ADR was first heard of in 1970's and reached its climax in 1990's, when Lord Woolf introduced his reforms to the civil justice system of England. Having British legal legacy, first India and then Pakistan followed suit. In the recently passed two and half decades, both the states have introduced a number of ADR-mandating provisions to their justice systems.

One may wonder why the whole world is running away from formal justice system to the informal one. A possible answer could be that that formal system was unable to keep pace with time and as such, became outdated. It is highly expensive and so keeps the majority of the litigants out-priced. Being too lengthy, it is tiresome. It is complicated and the nature of human being is inclined to simplicity. It is dead slow in getting finality and that is inconsistent with the hasty nature of man. The main defects of the state-run courts are, therefore, inordinate delays, abuse of procedure, priority of legal justice over substantial justice, unnecessary and unwanted consideration of technicalities in decision making process, and preference of fairness over justness. Skyrocketing fees of advocates,

their professional dishonesty, lethargic appearance and wanton performance further add to the problem.

On the other hand, ADR techniques are local, simple, amicable, peace-ensuring, expeditious, conclusive and inexpensive. ADR prefers resolution over adjudication. It ignores black-robed judges, well-dressed lawyers, and fine-panelled courtrooms as against ordinary sincere mediators while resolving disputes in houses made of mud or in tents built of grass fragments. ADR is a blessing in a system where keynote is law rather than justice.

Because of the popularity of ADR across the world, and its effective role in the resolution of national and international conflicts, a presumption has evolved that informal amicable modes of dispute resolution are the outcome of the contemporary think-tank of the modern world. This work first, rebuts the presumption by connecting these modes with the history of mankind. Secondly, it explores the concept of ADR in the *Sharī'ah*, and claims that the *Sharī'ah* has its own pillars of justice system, recommending peaceful settlements as first priority and warranting regular adjudication as last option. Thirdly, it explores the working of ADR in the Pakistani Legal System and its analysis on the touchstone of *Sharī'ah*.

### **ADR as a Term and Phrase**

The dispute resolution phenomena are as ancient as the history of mankind itself, nevertheless, the term ADR is hardly half century old. Even up to the end of 1970's, the term was not in common usage. Some writers are of the view that no one was using the term ADR in this decade. Other phrases such as conflict resolution, dispute settlement, mediation, arbitration and negotiation were dominating the field. A cursory study of ADR timeline would, however, reveal that the precursors of this term were heard of in late 1970's and early 1980's.<sup>3</sup>

ADR stands for Alternative Dispute Resolution. Some experts hold that 'A' stands for 'appropriate'. According to them it is the parties to choose that what technique of dispute resolution would be more appropriate for their needs and interests. In some other jurisdictions of the world like Australia and Switzerland, the process is known as

EDR (External Dispute Resolution) and DRT (Dispute Resolution Tools) respectively. It is, sometimes also called CDR (Consensual Dispute Resolution). In India, Pakistan and Afghanistan, it is named as '*Panchāyat*' and '*Jargha*'. Again there are some others who prefers CR (Conflict Resolution) and CPR (Collaborative Problem Solving).<sup>4</sup>

### **ADR as a Concept**

To comprehend the concept of ADR perfectly and to give a comprehensive definition to it, it is necessary to understand the meanings and limits of all the three components of ADR; 'alternative, dispute, and resolution.

#### *Whether Alternative or Alternate*

Strictly speaking, the word 'alternative' should not be confused with the word 'alternate'. Both words convey distinct meanings. The word "alternate" means happening of something in turn. An alternate day would mean leaving the day falling between two days. The word "alternative" means "different", "instead of", "replacement", and "on the other hand". It also means a situation where someone has an option between two things or when a second choice is offered while the first one also remains available. So it is a privilege of choosing one of the two things. In the absence of any second option, we would say that no alternative is available. It is, thus, clear that the word "alternate" signifies one after the other, whereas "alternative" denotes choice between two. In the presence of ADR, the litigants are provided an opportunity to opt one of the methods of adjudication; formal or informal. They are given the choice either to go for determination of issues through regular litigation or for resolution of differences through amicable consensual settlement. The availability of this choice is an inspiring evidence to hold that the correct phrase is 'alternative'. The appearance of the word 'alternate' in some writings, books and handouts seems mere inadvertence.<sup>5</sup>

The difference between the two is also appearing in Arabic; the language of Islamic law and Jurisprudence. In the Arabic language,

alternative means “*al-Badīl*” and “*al-kheyarī*”, whereas alternate refers to “*al-mutanāwib*”.<sup>6</sup> As I have mentioned earlier that a comprehensive phrase like ADR could not be found in any highly valuable work of classic and contemporary jurists of the Islamic Law, this distinction would really help us giving appropriate translation to ADR in the Islamic Law. This translation could be “*Alfaṣl ul Badīl lilkhuṣūmat*” or “*Al-ṭurūq Al-hasmiyah al-badīlah*”. In Pakistani legal system we may invent some suitable nomenclature such as “*Taṣfiyah ka Mutabādil Shara‘ī Ṭarīqah*”. This Urdu phraseology would also contribute to officializing of Urdu language as required by the Constitution of 1973.<sup>7</sup>

The distinction referred to above carries great significance, both in *Sharī‘ah* and Law and, therefore, should not be considered otiose. So, in connection with ADR, the word ‘alternative’ would refer to judicious but not judicial procedures of dispute resolution.

### **Dispute**

Dispute, when used as a noun, means conflict, contest, debate, controversy, quarrel, difference of opinion, subject of litigation, and disagreement between two persons, states and nations. It would also include the clashing of opposed principles, interests and benefits. The term as a verb means to put something into question or to challenge the validity of something.<sup>8</sup> In this study, only its first usage will concern us.

In Arabic, the corresponding words for dispute are “*nizā‘*”, “*khuṣūmah*”, “*khilāf*”, “*munāqashah*”, “*mushākasah*”, “*jidāl*” and “*sira*”.<sup>9</sup> These words, more or less, convey the sense of *nizā‘* and *khuṣūmah*, which mean subsistence of the disputed fact, state of continuance of adverse opinion particularly in respect of some corporeal object or some right relating to it. *Khilāf* appears to be the second nearest meaning of dispute. The reason is that *khilāf* is usually used in non-corporeal matters like beliefs, values, standards, and moralities. The remaining terms are, though analogous to the term dispute, denoting serious situations emerging from dispute, when left unnoticed.

Dispute denotes a situation where opposite interests constitute a conflict. It is the point from where the differences between opponents

originate. When a fact is viewed differently and is believed oppositely, a dispute emerges. In the civil law, the parties are considered to be at “variance” when one of them asserts the existence of a fact and the other denies the same. This assertion and denial constitute an issue: the name given to dispute by the Code of Civil Procedure 1908. It is, thus, rightly said that when court does not find the parties at variance, it shall, without delay, announce its judgment.<sup>10</sup>

Dispute, in its broad sense, also covers criminal justice. At the commencement of the trial, the tribunals frame a charge in respect of some fact asserted by the complainant and denied by the accused. In Pakistani legal system, the subject matter of the dispute is determined at the stage of framing of issues in civil cases, and at the stage of framing of charge in criminal cases. According to the Code of Civil Procedure 1908, issue arises when a material proposition of fact is affirmed by one party and denied by the other.<sup>11</sup> It means that this law uses the term “issue” instead of “dispute”. So “issue” and “dispute” almost carry the same sense in civil law and contemplate the variance in stances. If the facts, raised by plaintiff, are admitted by defendant, no issue can arise and no dispute can emerge. Consequently, court pronounces its judgment for an admitted fact need not to be proved.<sup>12</sup>

It seems that the word “issue” or “dispute” is similar to the phrase “fact in issue” in the Law of Evidence. According to Alan Tolyar, in criminal cases facts in issue are those which prosecution must establish in order to prove its case if accused refuses to admit the charge. He says further that even the accused may sometime bring a fact into issue by claiming alibi, insanity or sudden provocation. In civil cases, facts in issue may be framed from the pleading.<sup>13</sup>

The commentators of the *Qānūn-e-shahādat Order 1984* have also taken the phrase “fact in issue” in the meaning of a dispute. They maintain that, in criminal cases, the framing of charge contemplates “facts in issue” and framing of issues in civil cases exposes “fact in issue”.<sup>14</sup> In the Code of Criminal Procedure 1898, however, the word “dispute” has been expressly used. It means a reasonable dispute; dispute between parties who have each semblance of a right or supported right. Hence, dispute may either concern to immovable property such as land or to the right of use of immovable property.<sup>15</sup>

It is clear from the above discussion that, “issue”, “dispute”, and “fact in issue” are analogues and, therefore, have an interchangeable use in legal fraternity.

The word “dispute” has been discussed in numerous arbitration cases and cases of common adjudication, for example, *Halki Shipping Corporation v. Sopex Oils Ltd* [1998] WLR 726 [1998], *London and Amsterdam Properties Ltd v. Waterman Partnership Ltd* [2003]. All ER.(D) 391. Still it is a fact that the word ‘dispute’ has not been defined by any statute. A dispute, in the context of ADR, most often refers to lack of compromise between the parties. Some difference and bone of contention must do exist; otherwise, ADR cannot be attracted. This rule is, however, not hard and fast because ADR will work even in respect of such issues which have yet to attain the status of an actual dispute. For example, the business partners may concur to appoint an expert to decide an issue such as the valuation of shares.<sup>16</sup>

Worthy to mention here is that, principally, the dispute must be of civil nature; for example, disputes pertaining to ownership, property, tenancy, business, matrimonial issues and the like. Principally, criminal disputes cannot be referred to arbitration, particularly, cases of non-compoundable nature.<sup>17</sup> A reference which would stifle the prosecution of a criminal is not proper. Neither the magistrate can delegate his powers to arbitrators nor do the arbitrators confer on themselves the powers of a magistrate. So an award purporting to determine whether or not an offense has been committed has no legal cover. Cases falling within the meaning of sec. 145 the Code of Criminal Procedure 1898 [disputes as to possession of immovable property], can be referred to arbitration due to their civil origin. In *Kamini Kumar Basu v. Birendra Nath Bose*, the Privy Council held that the consideration for a reference would mater. If consideration is unlawful, such as stifling of a prosecution, the arbitration would be vitiated. But if the reference is lawful, the award would be proper even if results in the abatement of prosecution.<sup>18</sup> Similarly if an injured person is entitled to both civil and criminal remedies, his case may be referred to arbitration even if some crime as a result may be wiped out.<sup>19</sup>

According to the authors of *Mu‘jam Lughāt ul Fuqahā*, dispute is *nizā‘* which means the claiming of right by one party and the refusal

by the other to admit it.<sup>20</sup> Whether *Sharī'ah* also requires the civility of a dispute for the purpose of ADR, a diversity of opinion is found. The civil and criminal nature of a dispute is not, however, the agreed upon criterion. In this connection, the difference of opinion between *fuqahā* has been caused by the division of rights in the *Sharī'ah* and necessity of court verdict in some areas.

In the perspective of ADR, the dispute has got its own meaning. Here, it refers to a state of lack of compromise.

### ***Resolution***

To resolve means to determine, to dispose of, to make a firm decision for doing some act. For the purpose of ADR, it would denote the finding out of an acceptable solution to a dispute, also known as the amicable settlement of an issue. The word “resolution” will also cover a decision, reached by the majority of a forum.<sup>21</sup> Its loose application would also convey the sense of adjudication which may be either formal or alternative. The resolution can be achieved by the disputants themselves or by any neutral person like a judge and an arbitrator. In law, resolution means the official expression of opinion or will of a legislative body.<sup>22</sup> The conclusion of findings is also known as resolution. The contents of resolution are considered as a kind of soft law.

In the Arabic language the word “resolution”, in the context of ADR, will correspond to “*faṣal*” or “*ḥasm*”, nonetheless the latter is more appropriate. “*Faṣal*” is nearer to regular adjudication in the current Arabic usage. It means the decision of a dispute by fixation of guilt or liability through evidence whereas the *ḥasm* carries the sense of uprooting a dispute. Resolution means “solution of a problem whereas decision means determination of the causer to problem”.<sup>23</sup> To resolve and to decide should be thus differentiated inter se. These words, as already pointed out, would help us in giving proper terminology to ADR in the *Sharī'ah*.

Besides, the factor of “acceptability” there is another line of demarcation between “Resolution” and “Adjudication”. For this reason, the word “resolution” was given to amicable settlements and the word “adjudication” was avoided. Resolution must be acceptable to both sides



but this is not necessary in case of formal adjudication. Hence, the difference between “Adjudication” and “Resolution” is of effect and should not be presumed otiose. In the context of ADR, resolution would mean an out of court, consensual and conclusive settlement.

The above details of all the three components of ADR would help us understanding the concept in the following manner.

ADR is an alternative to settlement of issues by regular courts and tribunals, by use of force and by resorting to the violence or by any other mean resulting in an unfair adjustment. Most interesting is the fact that some practitioners of ADR claim that not the ADR, but courts are, actually, the alternative dispute process. So according to them, ADR represents usual conflict resolution processes.<sup>24</sup> Giving a weight to historical aspect, this stance seems to be more agreeable to reason because, principally, the subsequent process should be considered as an alternative. The regular court system is undoubtedly later in time as compared to informal modes of dispute resolution. We add that, historically, ADR techniques are, no doubt, alternatives but not to the courts rather they are alternatives to resolution of disputes by quarrel and violence. In the present scenario of actual existence of states and state-run courts, ADR is an alternative to regular formal litigation.

ADR refers to the various amicable modes in which dispute can be settled by disputants themselves directly or by the intervention of neutral third person. These modes are known as arbitration, mediation, negotiation and conciliation. Early evolution, collaborative law or collaborative divorce, restorative justice and ombudsman are comparatively less known modes of ADR. Amongst them, mediation and arbitration are analogous to “*Jargah*” and “*Punchāyat*” in the Sub-continent of India. To a great extent, they correspond to the concept of “*Tahkīm*” in the *Shari’ah*. “*Islāh*” would cover all modes leading to amicable settlement whereas conciliation would mean “*Ṣulh*”.

ADR is, therefore, the name of various methods of resolving civil disputes; leaving aside normal adjudication. Its subject may be individual’s problems, disputes between nations, groups, trade disputes and marital issues. Settlement through ADR is not only helpful in eradication of the bone of contention but it also instigates the participants to build a nice and smooth relationship for the future. ADR encompasses a wide range of mechanisms for settling differences avoiding costly, hard in getting

finality adjudication process.<sup>25</sup> It is, sometime, referred to as “appropriate resolution” for the reason that option should be more appropriate to the disputed cause and to the disputants. In some countries like Australia, the abbreviation EDR (External Dispute Resolution) is preferred. In Switzerland, ADR is named as DRT (Dispute Resolution Tools).<sup>26</sup>

The textual books, however, while defining ADR, refer to mediation, conciliation, arbitration, expert determination and ombudsman scheme, as the main process involving third party role. In a seminar on Access to Justice and ADR, held on 22nd May, 2004, the then Chief Justice of Pakistan, Mr. Nazim Hussain Siddiqi, said that ADR was out of court settlement of disputes through various modes, such as arbitration, mediation, conciliation, early neutral evaluation, and facilitation. ADR is relatively a new term for dealing with an age-old problem, the problem of heavy backlog, the problem of delayed resolution of the disputes, and the problem of expensive litigation.<sup>27</sup>

The inductive analysis of what has been stated would result in the following definition of ADR.

“ADR is a series of different modes of amicable, conclusive, and out of court resolution of dispute, almost resulting in a win-win situation”. The definition is, now, comprehensive and objective-based. It provides that ADR is a generic collective phrase, encompassing various procedures. Its objective is permanent, meaningful and peaceful settlement of a dispute, through non-judicial forums, persons and institutions. The word “amicable” would not exclude arbitration because, in this case, amicability refers to the agreement and choice of the parties in appointment of an arbiter, and to the acceptance of his award. It covers the resolution of disputes with the intervention of a third party and without such intervention, and as such encloses “negotiation”. Hence, it is hard to agree with those who, by one way or the other, exclude “Arbitration” and “Negotiation” from the ambit of ADR.

### **Need and Justification for ADR**

Progress, prosperity and productivity of a nation depend upon the law and order situation. Public tranquillity plays a significant role in the rising up of the stature or position of a nation. For achieving this objective,

rule of law is emphasized in all the civilized states. So, the ways that are more efficient to bring peace, establish tranquillity and promote harmony should be, naturally, more welcomed. The system which will ensure these objectives in a quickest, cheapest and simplest manner, shall gain universal acceptability. Pendency of disputes and advancement cannot run together.

Admittedly, behind every dispute, there is an effective cause. Suspension of dispute is not the success rather the resolution of dispute should be the goal. Formal adjudication is but mere disposal or suspension. It cannot eliminate the stimulant cause of the conflict. It is rightly presumed that adversarial adjudication, at maximum, declares one party victorious and the other vanquished. This does not provide an end to the dispute rather it may lead to a series of disputes and social tensions. Keeping this end in view, second caliph ‘Umar (R.A.), while issuing judicial directives to the *qādīs* said, “Return the litigants to affect compromise for adjudication will bring hatreds to the masses”. On another occasion he pointed out, “Enable the litigants, particularly, when they are relatives, to make an amicable settlement, for adjudication would create enmities amongst them.”<sup>28</sup>

On the other hand, ADR strikes at the very root of conflict on the basis of no bamboo no flute. It believes in resolution instead of mere disposal. Here, both are victorious and no one is vanquished. There is less consumption of time, wealth and exertion. It is advisable for a *qādī* to refer the litigants to ADR, before the commencement of trial. The Prophet Muḥammad (ﷺ) said, “Compromise is permissible amongst Muslims provided it does not turn the unlawful to lawful and lawful to unlawful”.<sup>29</sup> If the *qādī* apprehends the adjudication will worsen the situation and will amount to bloodshed between the disputants, recourse to ADR becomes imperative.<sup>30</sup>

Litigation is a reaction which deepens the differences whereas ADR is a response which uproots the dispute. The former promotes resistivity and the later encourages adjustment. There can be no life without adjustment rather “adjustment itself is life”, as emphasized by the famous poet Dasarathi Rangacharya. Edmond Burke, while delivering a speech in the House of Commons, on conciliation with the American Colonies round about 1775, said that all human benefits and enjoyments, every virtue and every prudent act, is founded on compromise and barter.

ADR is not meant to settle the national and international disputes only rather it answers the problems of middle class and to resolve the conflicts of the rich with the poor. ADR thus ensures social justice.<sup>31</sup>

Fixation of liability and establishing the fault and guilt is not necessary in each and every case. Approximately, 90 per cent cases fall within the category which need not regular adjudication. Such cases remain sub-judice for irrational and cumbersome length of time, destroying the wealth and time of the parties. The precious time of the court is wasted and the national exchequer is burdened with useless expenditure. A large portion of population daily remains indulged in uncertain litigation which adversely affects their productivity. How and up to what time, this state of affairs can be left unnoticed? What answer, except ADR, may be given to this challenge?

There is strong need to consider ADR before going for formal litigation. The courts of England and Wales, after Lord Woolf's reforms, are cautious in this regard. Failure to adopt techniques of ADR is fatal. In *Cowl and others v. Plymouth city Council*, while hearing appeal against the decision of the High Court, the apex court dismissed the appeal on the ground that the petitioner had failed to consider methods of Alternative Dispute Resolution. The court held that no sufficient attention was paid to the requirement of avoiding litigation wherever possible, as suggested by Lord Woolf.<sup>32</sup> Similarly in *Dunnett v. Railtrack*, the Court of Appeal decided in favour of Railtrack but penalized him for costs for the only reason that he had flatly refused to consider mediation despite the recommendation of the court of first instance. In another case *Hurst v. Leeming*, when Justice Lightman disclosed to the claimant that his case is of no merit and apprehension of costs was there. The claimant suggested that no costs should be awarded against him because he had proposed mediation and that it was the defendant who had turned it down.<sup>33</sup>

In India, the modern concept of *Loc 'Adalat* is based on the fact that Anglo-Saxon courts could not deliver sufficiently. The Lord Woolf's report also confirmed that civil justice system of England had lost the confidence of the litigant public. The leaders of the justice system of the United States, while expressing their low inclination towards formal justice, drew the attention of the Americans towards ADR and emphasized avoidance of litigation. The former chief Justice of America Warren

Burger was a long-time supporter of ADR. His successor, William Rehnquist, took the mission a step ahead. Their efforts made it possible that the number of criminal cases that went for trial fell to 5 percent in 2002 from 15 percent in 1962. Similarly, 11.5 percent of Federal criminal cases went for trial in 1962. In 2002, the ratio fell down to 1.8 percent only.<sup>34</sup> Regular trial, in the US, is considered a total failure of society. Samuel R. Gross, a law professor at the University of Michigan, said, “If a trial occurs, it usually means a whole lot of efforts by a whole lot of people have failed”.<sup>35</sup> It was only the ineffectiveness of the US Civil Justice system that compelled the Congress to enact Civil Justice Reform Act (CJRA) of 1990, enabling all the federal district courts to promote ADR methods to overcome the insufficiency of the adversarial system. They have also introduced the ADR Act 1998. Now, in US, 90 percent cases are decided through ADR. The American President Abraham Lincoln once said:

“Discourage litigation. Persuade neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser; in fees, expenses and a waste of time. As a peacemaker, the lawyer has a superior opportunity of becoming a good man”.<sup>36</sup>

The situation is not different in Canada, Japan, Australia, South Africa, Singapore, and so many other states, where ADR is getting overwhelming acceptability and is becoming the usual and customary method of Dispute Resolution. In Sri Lanka, mediation failure certificate from the Mediation Board is a pre-requisite for filing a suit. In China, mediation is rooted in history and culture. In the Muslim World, Egypt and Jordan have already introduced ADR. In Bangladesh, the former chief justice, Kamal Mustafa, has caused effective amendments for introducing ADR in family and commercial laws. The situation in Pakistan is tenuous and the miseries of the formal justice system have given birth to a proverb in KP Province which says, “May Allah (God) not indulge you in a hospital or in a court”. The Law and Justice Commission of Pakistan has conducted a number of seminars on the significance of ADR. Time Bound Delay Reduction (TBDR) plan was introduced by the National Judicial Policy Making Committee (NJPMC), where special value has been given to the amicable settlement. The Civil

Procedure Code 1908 has also been amended in this regard. The judges of the Supreme Court as well as the senior advocates are writing papers in support of ADR. The Arbitration and Conciliation Bill 2009 is also waiting the assent of Parliament. In more than 20 enactments like Land Revenue Act 1967, Electricity Act 2003, Income Tax Ordinance 2001, Custom Rules 2001, Custom Act 1969, Sales Tax Act 1990, Federal Excise Act 2005, Family Laws and Banking Act, separate provisions are available for informal amicable settlements. *Muṣāliḥātī Anjuman* (conciliation council) is the salient feature of Local Government Ordinance 2001.

The question is why the whole world is running away from formal justice system to an informal one? The answer is that formal system could not keep pace with time, and as such, it has become outdated. It is expensive and so keeps the majority of the litigants out-priced. It is too lengthy and is, therefore, tiresome. It is complicated though the nature of human being is inclined to simplicity. It is dead slow in getting finality and that is inconsistent with the hasty nature of mankind. Though not physical, but a sort of fighting takes place in the dock and fighting is usually taken as last resort, as it is said in a Persian-Urdu proverb, “When no effort remains unexhausted, man begins to fight”.

The main defects of the state courts are inordinate delays, procedural requirements, abuse of procedure, and priority of legal justice over substantial justice, unnecessary and unwanted consideration of technicalities in decision making process, preference of fairness over justness, problems of execution, and above all, highly belated finality. Skyrocketing fees of advocates and their professional negligence are other fatigues.

### **Pitfalls in Court Ways of Dispute Resolution**

#### ***Huge Pendency***

There are two reasons for increased filing of law suits: increase in population and awareness in the masses regarding rights and obligations. No one can stop filing suits, particularly, in the situation where doors of the court are open for every person believing himself aggrieved. Fair trial

and reason-based judgments have made the people reposing higher confidence and faith in judiciary. For the reason that various departments including the other two pillars of the state are not performing their duties properly, the Judiciary has been compelled to be more intervenient. All these factors have overburdened the courts and they cannot bear this burden alone. In an environment like this, the chief justice of India R.C. Lahoti has rightly said:

“Now it is clear that the inlet (of water store) cannot be totally stopped. Can we at least increase either speed of outlet or increase the number of outlets? One such new outlet is ADR, which includes arbitration, mediation and conciliation”.<sup>37</sup>

It may be added that the safe way is the increase in the number of outlets, meaning thereby, increase in the forums of settlements of disputes because increase in the speed of the outlet (speedy and hasty hearings) would lead to mere disposal of cases, leaving aside dispensation of justice. This is what actually happened twice in Pakistan. The directives of previous chief justice, Mr. Irshād Hassan Khān (2000-2002), to all the state courts, for concluding all pending family cases within a short span of three months, was counterproductive to a larger extent. It amounted to meaningless and sometime even injurious disposals. What to say of the vanquished, the victor was unhappy with the decision in a considerable number of cases. The judges of family courts took the pre and post-trial conciliation just as the completion of a formality. In this regard, sincere efforts were intentionally avoided. Consequently, the cases which were instituted only for the purpose of compelling the husband for good behaviour, ended with dissolution of marriage. In so many cases, the spouses requested the local religious scholars to declare such decrees as revocable divorce. Majority of the judges could not differentiate between hasty hearings and expeditious hearings.

The following details show the current pendency of Peshawar High Court. In the first three months of 2013, the cause list of the chief Justice Peshawar High Court exceeded the figure of 100.<sup>38</sup> Despite this number of cases on cause list, in writ petitions, where, as a policy, short dates of hearing are fixed, the petitioner has to wait for months. When the date arrives, the case is adjourned due to lengthy cause list or some other

reason. This is what happens in the writ petitions what to say of criminal and particularly civil appeals. The appellants has to wait for years and yet they are not certain whether proceedings would take place or their cases would be adjourned for one reason or the other. It would be injustice to call it dispensation of justice. Delay of justice means denial of justice.

### *Litigation Between State and Citizens*

Beside the Services Tribunal, the other civil courts and the apex courts have been burdened with cases in which state is either claimant or defendant. The heads of concerned departments, giving priority to their vested interests rarely show their interest in resolving disputes. They don't apprehend expenses because the state fights against citizens at the cost of the citizens. The government functionaries are bound to deal with the citizens and government servants judiciously but they don't. On account of malfeasance, they intentionally do some acts which create cause of action. Consequently, the burden shifts to courts where they neither withdraw the cases nor allow it to get resolved. They file a second appeal even in cases where the first appellate court has upheld the decision of the court of first instance. They don't hesitate in filing a review petition with the last appellate forum. The issues which they raise at the process of execution, is another problem. Currently, more than 1600 cases against KP Department of health only are pending in courts.<sup>39</sup>

### *Behaviour of the Advocates*

In countries like ours, where legal ethics are confined in the books and professional dishonesty has become general, the performance of the advocates is too poor to be described. No doubt the situation in the Supreme Court is comparatively better, nonetheless, majority of the clients are unhappy with the behaviour of their counsels regarding their non-appearance in the courts. It has been observed in so many cases that a counsel is sitting in his chamber or in bar-room but does not attend the court. Sometimes, he pays no proper attention to his client and ignores his beseeching to appear before the court. In this situation, the poor



litigant turns into a shuttle cock between the judge and the advocate. With great difficulty, and after waiting for a long time, when this counsel appears, the counsel of the other party disappears either surreptitiously or under the pretext of appearance in some other court. If the advocate apprehends losing of case, he tries to adjourn the case by hook or crook. This often happens during the stage of recording evidence or when the case is fixed for final arguments. To achieve their goal, they even don't hesitate to file unwanted petitions of revision.

### *Service of Process*

The appearance of the parties consumes extra-ordinary time. Sometime the plaintiff fails to provide true and complete address of the defendants or fails to the process fees in time and sometimes the defendant or a witness intentionally conceals himself. Most of the process servers are untrained. Their emoluments are small and cannot meet their basic needs. Their strength also is usually insufficient for the area they are supposed to cover. Hence an effective service of summons and notices cannot be expected. In cases where the defendant's house can be traced by some additional efforts, he would report that the house of the defendant could not be traced due to its location in thickly populated area and the non-mentioning of the number of the house by the plaintiff. He, sometimes writes that the summons could not be served due to the rush of work and shortage of time. If a summon is served, it suffers from injurious mistakes and the court is to issue summons afresh. Interestingly, at times, he requests the court that no one in the area knows the defendant, therefore, the plaintiff be directed to make the defendant shown, on spot, to the process server. In these circumstances, the plaintiff waits that when his next door neighbour defendant would appear in the court. Often too late, he comes to know that it is the money which makes the mare go.

### *Adjournments*

There may be adjournments on reasonable grounds. The Civil Procedure Code 1908 itself carry provisions for it such as power of

the court to enlarge a fixed date for some act under section 148. Adjournments may be on grounds of emergencies but frequent adjournments on frivolous grounds are really bad. Delay in submission of written statements, list of witnesses, replications, depositing of various fees, production of witnesses and documents and above all non-appearance of the counsel under the excuse of being busy in some other forum, are very common. Granting for hormonal relations between the bench and the Bar, judges accept requests of advocates for adjournments. It is nothing else but a compromise at the cost of clients. In the process, the interest of the litigants is crushed and the judiciary fails to provide speedy justice to the aggrieved. It is quite clear that adjournments always go in favour of the aggressor. Imagine that whom the bar and bench help? Again imagine whom they harm?

### ***Abuse of Procedure***

It is an admitted fact that procedure is aimed to promote justice. Its utilization in a way to defeat justice is its abuse. This abuse, sad to say, is often made both by the judge and a counsel. The judge should keep in mind that mere technicality should not defeat justice; the real and ultimate goal. Any discretion provided by procedure should be used judiciously and equally. Though it is really bad on the part of the judiciary, yet it occurs. The situation is worse on the part of the bar. The Counsel often indulges the court in meaningless petitions just for the purposes of getting time, prolonging the proceedings, teasing the opponent and obtaining interlocutory orders for taking the case to Appellate Courts and Forums of Revisions. The original issue is, thus, put to dormancy, a new issue is created and a series of judicial reviews commence, leaving the real issue aside.

In the process of execution, 95 percent of the objection petitions are filed with mere intention of delay and resistance in the satisfaction of the decree. The abuse of section 47 and Order XXI rules 99,100 and 101 is rampant. Section 47 the Civil Procedure Code 1908 is aimed to determine the questions naturally arising between the parties. It never speaks that a party should deliberately raise questions as of right and the court be bound to determine them by recording pro and contra evidence. How it can be called dispensation of justice if execution of decree takes

larger time than the obtaining of a decree in the suit. Sometimes, if a suit takes two years, the execution takes four. In a number of cases, if a plaintiff succeeds to be alive at the time of getting decree, he passes away long before the satisfaction of decree. It is rightly said that the miseries of an aggrieved person begin at the time when the trial court passes a decree in his favour. Does it not amount to an open deprivation? It does amount to it. An Indian judge, while commenting on delays in execution, observed that Order 21 had been the despair of an honest litigant and haven for unscrupulous judgment-debtors, as it gives uncontrollable freedom for raising technical objections and manipulating the skills of the trade.<sup>40</sup>

Insertion of section 12(2) in the Civil Procedure Code 1908 has opened another window to the abusers.<sup>41</sup> In a number of cases, the petitioner, being in conspiracy with the appearing defendants, does not attend the court in the hearing of the original suit. As soon as the suit gets resolved, he suddenly appears with a petition under the said sub-section claiming that the decree has been obtained by fraud, misrepresentation or want of jurisdiction. The sub-section was aimed to bar a fresh suit and to avoid the repetition and multiplicity of proceedings. Now, the same thing is done though under another cover. Preliminary arguments are heard. Only and hardly 01 percent petitions are dismissed. In 99 percent cases the court orders the framing of issues, the submission of the list of witnesses and the production of pro and contra evidence. If it doesn't mean hearing of a regular suit then what else does it mean? The purpose of the section is thus defeated.

### ***Other Causes of Delay***

Besides those mentioned above, the following are other causes of delay.

- 1) Lengthy and meaningless cross-examination only for pleasing the clients.
- 2) Lengthy arguments just to impress the client that his counsel is of a high caliber.
- 3) Unnecessary citations just to combat the opponent counsel.
- 4) Half-hearted attention of a judge in the framing of issues, creating grounds for reversal of proceedings.

- 5) Strikes of advocates on various occasions.
- 6) Meetings of judicial officers as well as of advocates during court hours.
- 7) Numerous judicial reviews.
- 8) Reluctance of courts to refer cases to ADR experts.
- 9) Concentration of work with few senior advocates.
- 10) Lack of required sincerity on the part of the judge during pre and post-trial conciliation in family cases.
- 11) Rawness or inexperience of the reader of the court, resulting in unsuitable fixation of dates of hearings.

The above list is not exhaustive in nature under any stretch of explanation, but the above-mentioned facts are sufficient to establish the need for ADR. Moreover, there are so many examples where civil litigation has given birth to serious crimes. ADR saves lives, protects time, wealth and honour, ensures peace, security and tranquillity, and leads towards prosperity. On the other hand, litigation travels in the opposite direction. This reality could be seen in the statement about Singapore which flows as under:

“We introduced mediation primarily because of the understanding that adjudication is not always the most appropriate process, as disputes differ widely in nature. The courts must be able to offer the most effective, responsive and appropriate methods for resolving disputes. They must be able to offer alternatives to the traditional resolution path. With a variety of dispute resolution mechanisms available, disputants can then match the forum to their particular dispute rather than being required to fit their dispute to the adversarial forum. The subordinate courts have taken the lead and set the pace for the use of mediation as a dispute resolution process. Unlike some other court jurisdictions where it had its genesis as a diversionary measure to deal with backlogs and delays, our motivation was different as the problem was absent. Rather we saw an opportunity to reintroduce into our culture a process to which it was not a stranger. In fact, our own mediation roots can be traced back to the early 19th century.”<sup>42</sup>

### Status, Need and Justification of ADR under the Islamic Law

It is already noticed that ADR corresponds to the word *Iṣlāḥ* as it appears in the Holy Qur'ān and *Sunnah*. Here, further explanation is given to support this claim. *Ṣulḥ* is the name of a contract between two parties which refers to a state of restored peace. Its antonym is dispute/*niza' /fasād*. *Iṣlāḥ* means a process where efforts are made for reformation. So every act which leads to amicability, sobriety and ensures the restoration of peace is *Iṣlāḥ*. A *muṣliḥ* is a reformer whereas *muṣāliḥ* is a party to the compromise. The antonym of *Iṣlāḥ* is *ifsād* which covers every act amounting to out-breaking of peace, disturbing of public tranquillity, creating, havoc and horror, and making mischief and chaos.<sup>43</sup> There are many verses of the Holy Qur'ān that describe *Iṣlāḥ* and *ifsād* as juxtaposed concepts. The following few verses of the holy Qur'ān provide are sufficient evidence in this regard:

وَإِذَا قِيلَ لَهُمْ لَا تُفْسِدُوا فِي الْأَرْضِ قَالُوا إِنَّمَا نَحْنُ مُصْلِحُونَ

When it is said to them: “Make not mischief on the earth” they say: “Why we only want to make peace!”<sup>44</sup>

وَقَالَ مُوسَى لِأَخِيهِ هَارُونَ اخْلُفْنِي فِي قَوْمِي وَأَصْلِحْ وَلَا تَتَّبِعْ سَبِيلَ الْمُفْسِدِينَ

And Moses had charged his brother Aaron (before he went up): “Act for me amongst my people: do right and follow not the way of those who do mischief.”<sup>45</sup>

أَوْفُوا الْكَيْلَ وَالْهَيْزَانَ وَلَا تَبْخَسُوا النَّاسَ أَشْيَاءَهُمْ وَلَا تُفْسِدُوا فِي الْأَرْضِ  
بَعْدَ إِصْلَاحِهَا

Give just measure and weight nor withhold from the people the things that are their due; and do no mischief on the earth after it has been set in order;<sup>46</sup>

وَلَا تُطِيعُوا أَمْرَ الْمُسْرِفِينَ ○ الَّذِينَ يُفْسِدُونَ فِي الْأَرْضِ وَلَا يُصْلِحُونَ

“And follow not the bidding of those who are extravagant, who make mischief in the land and mend not (their ways).<sup>47</sup>

وَكَانَ فِي الْمَدِينَةِ تِسْعَةٌ رَهْطٍ يُفْسِدُونَ فِي الْأَرْضِ وَلَا يُصْلِحُونَ

There were in the City nine men of a family who made mischief in the land and would not reform.<sup>48</sup>

Imām Rāghib, while interpreting the word ‘*hakam*’, says that it means the staying of some action for the purpose of a *Iṣlāḥ* (reform). In the case titled *Saeeda Khānam v Muḥammad Samī*, Justice A.R. Cornelius held that *hakam* means a person of such social influence who could stay the wrong performance of an act.<sup>49</sup> So doing such an act is *Iṣlāḥ* not *ṣulḥ*. Even the relevant verse of the Holy Qur’ān adopted the word *Iṣlāḥ* instead of *ṣulḥ*. *Iṣlāḥ bain al-nāss* (conciliation between people [al-Qur’ān, IV:114]) also refers to peace making process. *Aṣloḥū zāta bainikum* (keep straight the relations between yourselves [al-Qur’ān, VIII:I]) conveys the same sense.

Now, the distinction between *ṣulḥ* and *iṣlāḥ* is clear. So *ṣulḥ* is a contract whereas *iṣlāḥ* is a procedure. *Iṣlāḥ* is the modus operandi and *ṣulḥ* is one of its products. The jurisprudential relationship between *ṣulḥ* and *iṣlāḥ* is that of *sharṭ* and *mashrūṭ lahu*. No *ṣulḥ* without *iṣlāḥ* but not the vice versa. The conclusion is that the concept which is commonly known as ADR is nothing else but the concept of *iṣlāḥ* under Islamic law. This theory should not be made cloudy under the pretext of interchangeable use of *ṣulḥ* and *iṣlāḥ* in common parlance.

The directives of ‘Umar (R.A.), as mentioned in the beginning of this topic, are also suggestive of the fact that efforts for amicable settlement should have the priority and that recourse to the litigation should be made as a last resort. No one from the *mujtahidīn* has dissented with the opinion which makes *ṣulḥ* mandatory in case of apprehension of serious consequences. The saying of the Prophet Muḥammad (ﷺ) also recommends amicable settlement within the limits of the *Sharī‘ah*. Nevertheless, we would like to clarify the *Sharī‘ah*’s ruling for ADR in the light of principles of *Uṣūl al-Fiqh*.

- 1) “Command creates Obligation unless the context demands otherwise” is the well-known rule of Islamic Jurisprudence.<sup>50</sup> Allah says, “so fear Allah and keep straight the relations between yourselves”.<sup>51</sup> So, there is command of Allah regarding the removal of the bone of contention. Nothing in the context appears to divert this obligation into recommendation rather other commands in the context

also demands obligation. Same is the case with these commands, “If two parties among the Believers fall into a quarrel make ye peace between them” and “make peace between them with justice and be fair”.<sup>52</sup>

- 2) A number of commands render dispensation of justice mandatory. Take these verses for example, “Allah commands justice the doing of good”<sup>53</sup> and “Judge in equity between them”.<sup>54</sup> Now a considerable number of cases pending in the court are not appropriate for formal litigation (*qaḍā*). The resolution of such cases may only be obtained through ADR techniques. At this stage, we are supposed to apply another rule of Islamic Jurisprudence and i.e., “An act essential for complementing an obligatory act becomes an obligation itself”.<sup>55</sup>
- 3) Under the rule of *Fatḥ al-zaraʿ*, it is incumbent upon the chief executive to open all such sources that lead to prosperity. Steps towards prevention of harms {offences, torts and other civil injuries} and steps for the removal of inflicted harms, is the foremost duty of the ruler. So the chief executive is duty bound to open as many forums and modes for resolution of disputes, as possible.

All the above facts would reveal that:

- 1) ADR may be directed for use in ordinary situations.
- 2) ADR is mandatory if the case is fit only for it.
- 3) ADR is the integral part of trial procedure of the *Sharīʿah*.

### **Discovery of the Alternative for the Phrase ADR in the *Sharīʿah***

The point that needs to be noted here is the use of word “*iṣlāḥ*” in so many provisions of the primary transmitted sources of Islamic Law. It denotes and includes all the human efforts towards an amicable settlement and reforming strained situations. *Ṣulḥ*, on the other hand, is the name of a justice-restored situation. A *musliḥ* means reformer.<sup>56</sup> So *Iṣlāḥ* is a generic name like ADR; covering negotiations, mediations, conciliations and, above all, the consent-oriented arbitration. Besides, *ṣulḥ* is a contract under the Islamic Law whereas *iṣlāḥ* is a procedural phenomenon. The following lines would further clarify this stance.

It is noticed from the above discussion that ADR corresponds to the word *iṣlāḥ* as it appears in the Holy Qur'ān and *Sunnah*. Here, further explanation is given to support this claim. *Ṣulḥ* is the name of a contract between two parties which refers to a state of restored peace. Its antonym is dispute/*nizā'*/*fasād*. *Iṣlāḥ* means a process where efforts are made for reformation. So every act which leads to amicability, sobriety and ensures the restoration of peace is *iṣlāḥ*. A *muṣliḥ* is a reformer whereas *muṣāliḥ* is a party to the compromise. The antonym of *iṣlāḥ* is *ifsād* which covers every act amounting to out-breaking of peace, disturbing of public tranquillity, creating, havoc and horror, and making mischief and chaos.<sup>57</sup> Enough number of the verses of the Holy Qur'ān describe *iṣlāḥ* and *ifsād* as juxtaposed concepts. The previously mentioned verses are sufficient evidence in this regard.

Clothing *iṣlāḥ* with the meaning of ADR, it becomes justifiable to hold that the Islamic Law is pioneer in the field. It introduced ADR long before any other system. What has been covered by ADR in law; has been covered by *iṣlāḥ* under Islamic Law. Law describes four basic modes of ADR; Arbitration, Mediation, Conciliation and Negotiation. The *Sharī'ah* describes two modes; *taḥkīm* and *ṣulḥ*. The difference is in form only. Law gives effect to technical differences between the various modes and thus makes it four. For example arbitration differs from the remaining on the basis of its binding nature. A third neutral person plays a role in mediation and conciliation but his role in the later is more proactive than his role in the former.<sup>58</sup> Negotiation refers to the direct communication between the parties.<sup>59</sup> The *Sharī'ah* differentiates *taḥkīm* from *ṣulḥ* for its quasi-judicial in nature and considers mediation, conciliation and negotiation as various modes leading to a contract of *ṣulḥ* between the disputants.

### ***Taḥkīm and Ṣulḥ***

Here, we would give a cursory touch to these concepts and would avoid details. *Taḥkīm* means arbitration and *ṣulḥ* means conciliation. The term "*iṣlāḥ*" literally means reforming but technically refers to efforts for restoration of peace, by removing differences through an amicable settlement,<sup>60</sup> nevertheless, its interchangeable use with conciliation (*ṣulḥ*)



is allowed. To be more specific, *ṣulḥ* is objective and *iṣlāḥ* is means towards such objective.

Islam, since its emergence, encouraged arbitration. Actually the customs that were prevailing in the pre-Islam Arab Society were recognized by Islam provided they were found in consistency with the express provisions of *Sharī'ah*. These customs include *Qiṣās* (retaliation), *Qasāmah*, *Mudārabah*, *Salam*, *Rahan* (mortgage) and much more. *Taḥkīm* was one of such customs. It should be noted here that Arab civilization is older than any other ancient civilization of Europe. The state of Yemen existed long before Athens and Rome.<sup>61</sup> The famous battle *al-Basūs*, began with the death of a camel and continued for forty (494-534 C.E.) years.<sup>62</sup> It claimed hundreds of lives. The dispute was eventually settled by the process of *taḥkīm*. Similarly, another famous war “*Dahis and Ghabra*” came to an end as a result of *taḥkīm*.<sup>63</sup> In the north of *Ka'bah*, a town hall was built and named as *Dār al-Nadwah*. The grand grandfather of Quraish Quṣṣai has been reported to be its founder.<sup>64</sup> It was a community center where the decision-makers used to hold consultations, dialogues and to conduct meditation.<sup>65</sup> Matters of serious concern only could find a place on agenda of the meeting.<sup>66</sup> The unsacred unsuccessful plan of assassination of the holy Prophet Muḥammad (ﷺ) was also approved in the *al-Nadwah*.<sup>67</sup>

In the Charter of Madinah; the first ever written constitution of the world, the Prophet Muḥammad (ﷺ) was unanimously accepted as the final forum of arbitration.<sup>68</sup> Besides, earlier during the reconstruction of *Ka'bah*, a dispute arose between the leaders of local tribes of Makkah on the point that who would have the honour to reinstall the sacred Blackstone (*al-Ḥajr al-Aswād*). Just before a conflict was likely to happen, Muḥammad (ﷺ) was requested to arbitrate. The Prophet (ﷺ) used a wonderful tactic by placing the stone on a piece of cloth. He, then, directed the chiefs of every clan to hold the cloth from specified area and to take it to the designated place. When they did so, the Prophet (ﷺ) himself placed the stone at its place.<sup>69</sup>

As for as amicable settlement (*ṣulḥ*) is concerned, so numerous verses of the Qur'ān and a large number of *Aḥādīth* speak for it. *Ṣulḥ*, its cognates and collocations can be found in more than 175 verses of the Holy Qur'ān.<sup>70</sup> Most of the jurists of Islamic Law have specified independent chapters in their voluminous books for *ṣulḥ*. The

Ḥudabiyah Pact was the outcome of a peaceful settlement. Actually, a great deal of conversations, negotiations, information sharing, exchanging of promises and other diplomatic efforts preceded the Pact. Similarly composite dialogues, comprehensive deliberations and a package of binding promises regarding liabilities of each side contributed towards framing of the Charter of Madinah\*.<sup>71</sup>

The point that needs to be noted here is the use of word “*iṣlāḥ*” in so many provisions of primary transmitted sources of the Islamic Law. It denotes and includes all human efforts towards an amicable settlement and reforming strained situations: whereas *ṣulḥ* is the name of a justice-restored situation. A “*muṣilḥ*” means reformer.<sup>72</sup> So “*iṣlāḥ*” is a generic name like ADR; covering negotiations, mediations, conciliations and above all consent-oriented arbitration. Besides, “*ṣulḥ*” is a contract under the Islamic Law whereas “*iṣlāḥ*” is a procedural phenomenon. This point would be more clarified later but we should maintain that the distinction between “*iṣlāḥ*” and “*ṣulḥ*” is not useless.

Negotiation is one of the modes of ADR. The history of negotiations is older than that of mediation. The first ever negotiation, for which an evidence could be available, is the negotiations that had taken place between the prophet Noah (نوح) and his people. The text of the above-referred negotiations has been narrated by the Holy Qur’ān. It flows as below:

“The people of Noah rejected the apostles.”

“Behold their brother Noah said to them: “Will ye not fear (Allah)?”

“I am to you an apostle worthy of all trust”

“So fear Allah and obey me.”

“And no reward do I ask of you for it; my reward is only from the Lord of the worlds.”<sup>73</sup>

### **Woolf Report and Reforms: A Contemporary March towards ADR**

Since long, the people of England and Wales were complaining against the civil justice system. To them, the system was adversely contributing due to its complex adversarial nature. They shouted that the

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\*There is no evidence showing any discussion on the terms of the Charter – *Ed.*

system was outdated, complicated, unable to answer, snail-moving, unwelcoming and above all deadly expensive. In 1995, the National Consumer Council conducted a survey which explored that every three out of four (75%) litigants were extremely unhappy with the civil justice system. In order to defuse the situation, so many attempts were made but the government utterly ignored all reports and recommendations. CLR report, report of Civil Justice Review in 1988, and the Heilbron Hodge Report 1993 went in vain. Consequently, during 1990's, the situation became so tense that it could not be left unnoticed any further. In March 1994, Lord Chancellor Lord Mackay had to appoint Lord Woolf; Master of the Rolls, to work out the ways for overhauling the civil justice system. In 1995, he submitted an interim report under the caption of "Access to justice" containing 124 recommendations. In July 1996, he gave his final report with 303 recommendations. Complexity of procedure, uncertainty of expenses and time, and the role of the parties were found to be the main causes of no confidence upon the system. He, inter alia, emphasized on encouragement of out-of-court settlement (ADR) to such an extent that exposed the report to the drastic criticism of lawyers. In response, the Labour Government asked Sir Peter Middleton to review the Woolf's reforms. In September 1997, Sir Peter submitted his report and endorsed Woolf's reforms. In April 1999, Woolf reforms were officially introduced that resulted in overhauling the Civil Procedure Rules (CPR) and bringing about radical changes to the Civil Justice System. Evidence suggests that, in the post-reform era, the number of civil actions launched in the High Court has fallen massively. During 1990 and 1991, more than 350,000 cases were instituted in the Queen's Bench Division. By 2002 this had fallen to below 20,000 - and this descending trend has continued growing. "Judicial Statistics reveal average waiting time from issue of a claim to trial has reduced from 85 weeks in 1998 to 52 weeks in 2005 in the county courts".<sup>74</sup>

### **ADR in Pakistani Legal System**

The Constitution of Pakistan 1973 provides foundation for Alternative Dispute Resolution. It does not mention ADR directly by its current nomenclature like Indian constitution; nevertheless it provides general guidelines for it. Article 2A, inter alia, requires that the Muslims shall be

enabled to order their lives in accordance with the teaching of Islam and that social, economic and political justice shall be guaranteed by the state. If Article 2A is read with the historic Objective Resolution adopted by the Constituent Assembly of Pakistan on 12th April 1949 and section 4 of Enforcement of Shariat Act 1991, it would keep the Islamic Laws at a superior level than other general laws of the country. “Justice for all” particularly “social justice” is the main theme of Articles 2A, 18 and 25. State is, therefore, bound to take steps for securing the ends of social justice. It is already explained that ADR ensures social justice under the topic “Need and Justification of ADR”. Similarly, the status of ADR under the Islamic Law has also been explained. Article 37 enshrines the promotion of social justice and eradication of social evils. Claus (d) of the article ensures “inexpensive” and “expeditious” justice. These two phrases are of great significance as far as quicker and cheaper justice is concerned. It is the duty of the state to make proper legislation in this regard and to set up necessary machinery therefore. No doubt the provisions of article 37 occurs in the “Principles of Policy” and is, therefore, not directly enforceable at law, nevertheless, they have been described as “fundamental to the governance of the state” and that Article 9 of the constitution requires all state’s functionaries to act in accordance with those Principles.

The constitution itself provides for the appointment of arbitrator for the resolution of differences between the Federation and the Provinces.<sup>75</sup> The Arbitration Act 1940 is the law that deals with the civil and commercial arbitration. The objective of this Act is to provide expeditious remedy to the litigants; regardless the rules and procedure contained in the Code of Civil Procedure 1908 and the Qānūn-i Shahādat Order 1984. Section 89 (Arbitration) of Civil Procedure Code 1908, which was omitted by the Arbitration Act 1940, was again inserted as 89(A) , under the heading of Alternative Dispute Resolution.<sup>76</sup> The object of the section has been set out in the wording itself. It flows as under:

“The court may, where it considers necessary, having regard to the facts and circumstances of the case with the object of securing expeditious disposal of the case, or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method including mediation and conciliation”.

Order X Rule 1 of CPC has also been amended accordingly:

The institute of Ombudsman (*Muhtasib*) has been effectively working since 1983, through Presidential Order.<sup>77</sup> Principal seat is at Islamabad and its regional offices are working at Lahore, Karachi, Peshawar, Multan, Quetta, Faisalabad and Dera Ismail Khan. At present, there are 09 institutions of ombudsman; four provincial *muhtasibs*, and five federal *muhtasibs* i.e. Federal Tax Ombudsman Pakistan, Federal Banking Muhtasib, Federal Insurance Ombudsman, Federal Ombudsman against harassment of Women at Work Place. Vast powers, for an amicable resolution of a pending dispute, have been given to the *wifaqi muhtasib* (federal ombudsman) under section 33 of the Order. The Order has overriding effect by virtue of section 37. Provisions for peaceful resolution of the dispute are also available to all the remaining ombudsmen offices. The Federal Ombudsman institutional Reforms Ordinance 2013 has further enhanced the powers of ombudsman in connection with expeditious disposal of complaints. In addition, the Conciliation of Courts Ordinance 1961 is also in the field. It provides for establishment of a court at the level of each union council. Its jurisdiction is to hear cases of civil nature and offences mentioned in the schedule attached to the said law.

In 2002, Small Claims and Minor Offences Courts Ordinance, was promulgated. Its inter alia objective is to achieve amicable settlements through a “*Thālith*” (arbitrator) by means of arbitration (other than under the Arbitration Act 1940), conciliation and mediation. All courts of Senior Civil Judges/A’lā’ *Ilāqah Qādīs*, Civil Judges-cum-Judicial Magistrates/ *Ilāqah Qādīs*, in the district headquarters and sub-divisional headquarters have been notified as courts of small claims and minor offence, in accordance with section 4 of the Ordinance. Our experience, however, reveals that these courts have not contributed up to the expectation due to their own original burden. It is very hard, and to some extent humanly impossible, for an individual judge to act in so many capacities; as Family Court, small Causes and Minor Offences Court, Juvenile Court, Court of Wards and Guardians and much more. Permanent and separate judges, like banking judge, labour judge and anti-Corruption Judge, should be appointed for the purpose.

The previous Arbitration (Protocol and Convention) Act 1937 has recently been repealed by the “Recognition and Enforcement (Arbitration agreements and foreign Arbitral Awards) Ordinance 2006”. Under this

piece of legislation, an arbitration council, consisting of representative of each party and the chairman of the concerned Union Council, resolves the disputes through mediation and conciliation. The Ordinance is particularly useful for commercial and industrial community. The Family Courts Act 1964 makes it obligatory for a judge of Family Court to make efforts for reconciliation between the litigating spouses at pre trial and post trial stages. Sections 10 and 13 of the Act can be utilized for the purpose. Industrial Relations Ordinance 2002 also provides for the use of ADR techniques. The concept of “shop stewards” and “joint works council” under sections 23 and 24 of the Ordinance has inter alia been based on the philosophy of amicable settlements.

To encourage ADR, necessary amendments have been introduced to laws pertaining to customs, excise duties, sales tax, and income tax and banking matters. In 2001, all the four provinces promulgated Local Government Ordinances that contain provisions for settlement of disputes at the union council levels. “*Insāf Committees*” and “*Muṣāliḥat Anjumans*” had been established. The objective of these institutions was to provide justice at doorsteps through cordial settlements. The Ordinance has been repealed. Now, all the four provinces have their own Local Government Acts. Each provides mechanism for amicable dispute resolution.<sup>78</sup> Shar‘i Nizām-i ‘Adl Regulation 2009 and rules framed therein has empowered the court to appoint *muṣliḥ* or *muṣliḥīn*, subject to the consent of parties, for resolution of dispute.

What has been stated above is a brief discussion about the present status of ADR in Pakistani Legal System.

For the future status of ADR in Pakistani Legal System, the recommendations of International Judicial Conference 2012 provide sufficient evidence. The Ex-Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, has also participated in all the working groups. Judges of Supreme Court, Chief Justices, Judges of Federal Shariat Court and High Courts, foreign delegates, Supreme Court Bar Association, Pakistan Bar Council, Bar Councils and Bar Associations from all over the Pakistan are participating in the event. Law and Justice Commission of Pakistan, while giving its report on International Judicial Conference 2012, made the following recommendations:

- 1) All the commercial contracts must incorporate mediation clause.

Prior to invoking arbitration or approaching the Court, they shall attempt to settle through mediation.

- 2) All stakeholders, including the Judges, Advocates and corporate bodies must take a pragmatic approach to resolve the problems of the litigating public, by encouraging ADR and attempting to resolve disputes through mediation.
- 3) Stakeholders, at all levels, must be educated about ADR and Internal Arbitration. The judges should be trained to deal with the cases in a manner that would encourage litigants to settle their disputes through methods of Alternative Dispute Resolution.
- 4) The High Court Rules and other appropriate rules should be amended to remove caps on costs awarded to a winning party. Costs of litigation should normally follow the event and the award of costs should reflect the actual legal costs incurred by a party. This would act as a deterrent to litigation and would encourage ADR.
- 5) As a matter of policy, Courts should be instructed to ask the parties to consider mediation in matters before them at the preliminary stage. Each High Court may set up a committee to explore any administrative changes that can be made in applicable Rules to facilitate or encourage mediation at this stage.
- 6) The Government and its corporations should insert standard mediation clauses in their contracts; this would help avoid significant portion of litigation.
- 7) The Supreme Court of Pakistan should declare 2012 as the ADR year.
- 8) The Bar Associations should motivate the advocates to attempt resolution of their clients' dispute through ADR.
- 9) The Court should use Order 10 Rule 4 CPC more effectively and in a manner that gives effect to its objective, in order to restrict and control the conduct of litigation cases.
- 10) It has been noted that a good number of cases have been disposed of through Court mediation; therefore, the Court should maintain the data in this regard. Each High Court should frame the Rules to make mediation compulsory in appropriate matters.
- 11) ADR should be made a part of the syllabus of legal education, with law students being taught the importance of ADR, as well as expertise

in effectively resorting to methods of ADR. Furthermore, ADR should not only be introduced as an academic subject at law schools but also in institutions imparting business studies.

- 12) The Supreme Court of Pakistan may support efforts of Karachi Centre for Dispute Resolution (KCDR) in institutionalizing ADR/mediation. A memorandum of understanding can be executed between the Federal Judicial Academy and KCDR to avail the services of KCDR's faculty to train judicial officers in ADR/mediation.
- 13) KCDR should be encouraged to open its setups at Lahore, Quetta, Peshawar and Islamabad.

### **Classification of ADR**

Classification here means kinds or modes of ADR. In the beginning of this study, it is noticed that ADR is a generic name that encompasses a number of different procedures that lead to the common objective of amicable peaceful settlement. An acceptable resolution of a dispute may be obtained by mediation, conciliation, arbitration and negotiation. Some argue that arbitration doesn't come within the meaning of ADR due to its binding and adversarial nature. Some others hold that conciliation should not be included in ADR. They consider it as a form of mediation. According to majority of writers, collaborative divorce or collaborative law is an independent mode of ADR. Restorative Justice, early evaluation, Family group conference, Neutral fact-finding, Ombudsman, moderated settlement conference, summary jury trial, early neutral evaluation, mini-trial and Conflict resolution are comparatively less known modes of ADR. No doubt, these terms have some similarities, yet they differ inter se. For example, when each side presents a summary of its case to an audience of the clients and lawyers, it would be called mini-trial. If each side states his case to a panel of attorneys, it would be known as moderate settlement conference. It would be summary jury trial if the parties are to present their cases to a jury and magistrate. In early neutral evaluation the evaluator has to study the brief summaries of the case and then discover the expected consequences.<sup>79</sup>

Those who exclude arbitration from the ambit of ADR should know that the philosophy behind ADR is a peaceful resolution that terminates the issue in a final way. This objective is well achieved in arbitration



despite its adversarial nature. As far as its binding nature is concerned, it should not be forgotten that it is a consent-based and will-generated compulsion.

Conciliation and mediation are, no doubt, similar but not the same. As the role of a third neutral makes them similar, exactly the role of a third neutral makes them distinct. In mediation, the mediator facilitates only and rarely offers his opinion whereas a conciliator, besides facilitation, often offers his own proposals to the disputants. So as compared to mediator, conciliator plays relatively direct role in resolution of a dispute.<sup>80</sup> Furthermore, mediation and conciliation have been separately used in the process of legislation. In section 89(A) and order X rule 1(A), III of the Code of Civil Procedure 1908 (reproduced above) conciliation and mediation have been distinctly mentioned. West Pakistan Family Court Ordinance 1964, in sections 10 and 12, speaks for a pre and post-trial reconciliation.<sup>81</sup> In Indian legislation, both words have been used in different senses. According to Madabhushi Sridhar, section 89 of the Indian Civil Procedure Code (Amendment) Act 1999 speaks of conciliation and mediation as different concepts. Mr. Sridhar has also quoted the statements of Justice Jagannatha Rao that differentiate between mediation and conciliation.<sup>82</sup> In UK, conciliation is considered a more proactive process whereas mediation is understood as a more passive phenomenon.<sup>83</sup>

The rules of interpretation and construction will further clarify the situation. It says that no word of a legal provision should be left meaningless or redundant. Every word should be given its due weight. Courts should avoid construction that may render any word inoperative.<sup>84</sup> Even in case of repetition of the same word, presumption as to identical meaning is not of much weight. The same word may be used in different meanings in the same statute and even in the same section.<sup>85</sup>

Consequent upon the above details, we may classify the modes of ADR in two categories:

- 1) Main and known modes.
- 2) Less known modes.

The first kind would include:

- 1) Arbitration.
- 2) Mediation.

- 3) Conciliation.
- 4) Negotiation.

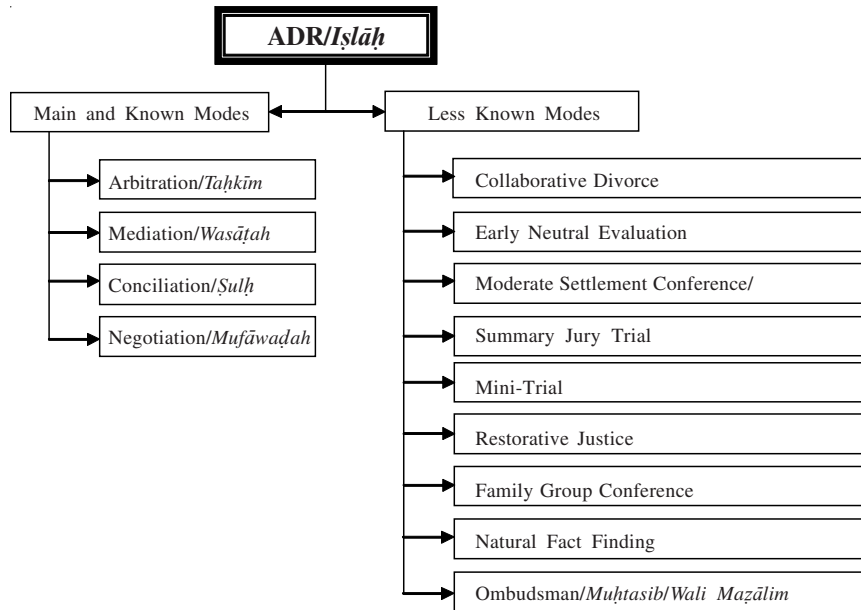
The second kind would include:

- 1) Collaborative divorce or Collaborative Law, also known as Family Dispute Resolution (FDR).
- 2) Early Neutral Evaluation.
- 3) Moderate Settlement conference.
- 4) Summary Jury Trial.
- 5) Mini-Trial.
- 6) Restorative Justice.
- 7) Family Group Conference.
- 8) Natural Fact Finding.
- 9) Ombudsman.

Dispute Resolution Directory, published by Martindale-Hubbell, in cooperation with the American Arbitration Association, in 1995, also mentions thirteen processes of ADR.<sup>86</sup> The above diagrammed list, in respect of less known kinds of ADR, is not exhaustive. Other terms such as expert appraisal, expert determination, counseling, facilitation, private judging, med-arb and MEDOLA (kinds of Hybrid Arbitration), conflict coaching, victim-offender mediation and on-line dispute resolution (ODR) also refer to various modes of alternative dispute resolution.<sup>87</sup>

In the *Sharī'ah*, in view of the verse, “And adjust the matter of your difference”,<sup>88</sup> efforts for an amicable settlement come within the category of *Wājib Kifāyah*. It means an act, whose performance is compulsorily required from the community as a whole and not from an individual specifically.<sup>89</sup> But in what mode this communal obligation should be carried out, is not fixed. So in the absence of any specific *modus operandi*, the matter would fall in the category of *Mubẓḥ* (permissible/optional). Consequently, any mode that leads to the peaceful settlement is allowed under the Islamic Law; provided it goes in consistency with the text of Qur'ān and *Sunnah*. On this analogy, the above classification of ADR is quite good. It is, nonetheless, evident that the *Fuqahā'* (jurists), both classical and contemporary, have discussed only two modes of ADR; *tahkīm* (arbitration) and *ṣulḥ* (compromise). To them, rest of the

modes are nothing else but efforts towards peaceful resolution. So, almost all of these modes along with *tahkim* and *ṣulḥ* would come within the meaning of *Iṣlāḥ*.



### ADR Vs Litigation: ( Advantages of ADR)

First of all, regard should be made to the fact that an act/thing cannot be absolutely good or absolutely bad. Every act is beneficial to some extent and injurious to some other. The dominant factor decides the fact. The greater in benefit is the higher in legality and the voice versa. In English Jurisprudence, Bentham's theory of utilitarianism (the doctrine that the value of an action or an object lies in its utility or usefulness) has been based on this principle. In the Islamic Jurisprudence, the theory of *Maṣlahah* (Public Good) carries the same sense. So in legislation under the Islamic Law, predominance of the good and predominance of the evil are to be necessarily considered. In this regard consequentialist approach is adopted for validity of a certain act. In the *Sharī'ah*, the phenomenon is known as "*Ai'tibār al-M'ūmalāt*". It plays significant role in legislation as well as in construction of legal provisions. The role of consequences becomes more effective when *Iṣlāḥ* "Restrictive Construction" is needed. So the purpose of a law or procedure and the consequences that its

application would bring, are the standards whenever a comparison is required between two constructions or even between two phenomena.<sup>90</sup> On the bases of this preface, we would compare ADR with litigation.

S.No.	Alternative dispute resolution	Regular litigation
1.	The procedure is simplest and easy-to-understand. No room for and no consideration of technicalities. One can state his case himself.	The procedure is highly complicated. Technicalities plays effective role. Non-hiring of the services of an expert could prove fatal.
2.	Principles of equity are regarded and thus equitable justice ( <i>Qist</i> ) is the out-come.	Rules of common law are applied and thus <i>de jure</i> justice (' <i>Adl</i> ') is the product.
3.	Focus is on the substantial justice. Justness precedes fairness.	Focus is on legal justice. Fairness precedes justness.
4.	ADR experts are usually elders of the locality of the disputants. Chances of misrepresentation and fraud are, therefore, rare to the extent of nil. Social pressure keeps the disputants away from practices disregarded by the society generally.	Chances of misrepresentation and fraud are always there. An aggrieved person is supposed to bear one of the curses; either to slaughter his rights and remain calm on such decrees or to file a petition for cancellation of the decree and <i>de novo</i> trial.
5.	Personal knowledge of the elders and experts of ADR are helpful and it may be easily utilized in reaching to an acceptable settlement. The proceedings, thus, become shorter.	Personal knowledge of the judge cannot play any role in proceedings before him rather it will provide a ground for transfer of the case to some other judge, prolonging it further.

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S.No.	Alternative dispute resolution	Regular litigation
6.	Hearings are conducted in a single day or on few consecutive days. The data remain fresh in the minds of all concerned. The resolution, therefore, leaves no aspect unconsidered.	Hearing of the whole case on a single day or even on consecutive days is hard to the extent of impossibility. The court is supposed to maintain its diary under case-management policy. It becomes very hard for a judge to recall all the events of the hearings, while he is making the decision.
7.	The nature of the case, sometimes, demands inspection of the spot or suit-property. The elders, while conducting ADR, either already know the spot or they may easily arrange a visit to the spot. Neither there is any apprehension of security nor do the parties bear additional expenses.	The courts are reluctant in arranging spot inspections themselves. The reasons, inter alia, are rush of work and security problems. Appointment of commissions prolongs the hearing on one side and subjects the parties to additional expenses on the other side. In so many cases, it has been observed that either one of the parties or each of them refuses the appointment of commission for their inability to pay the fee.
8.	The decider remains the same. Being local and being non-official, there is no apprehension of his transfer. He deals the case from beginning to the end. Arriving to a justifiable solution is more probable.	There are unexpected, immature and frequent transfers of judges. Sometimes, the transfer of 09 or 10 judges takes place and the hearing is yet to complete. This piece-meal hearing hardly amounts to a right decision.

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S.No.	Alternative dispute resolution	Regular litigation
9.	ADR conductors can express their opinions just to test its acceptability to the disputants. They can put different proposals to the parties.	A judge cannot express his opinion and if he does so, he becomes <i>functus officio</i> . Besides, it is not advisable for him to make proposals though it may be beneficial for both parties.
10.	Disputants are before their chosen resolvers. They state their case in a free and relaxed environment. There is no fear of contempt and no apprehension of technical mistake.	Disputants are before a court, having some rules to be followed by the parties. They are usually hesitant and reluctant to speak. Even their counsel precludes them from speaking before the court for their expressions may lead to a technical knock-out.
11.	Chances of adjournment are rare. Official meetings, strikes, and law and order situation do not affect the job. Time-work is not confined to particular hours.	Unexpected adjournments are frequent due to casual leaves of judges and magistrates, their lengthy official meetings, in-service trainings, national holidays, summer and winter vacation, strikes, non-availability of counsel for one reason or the other and above all limited official time.
12.	A single case is fixed for hearing. Due care and full attention is given. They hear the issue with the required patience.	A number of cases are fixed for hearing. It becomes humanly impossible to give the required attention to each case. Hasty hearings are frequent.

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S.No.	Alternative dispute resolution	Regular litigation
13.	It is inexpensive. Sometimes, the elders refuse honoraria and even necessary expenditure of travelling, entertaining and stationery. It has also been observed that, a matter of honour and courtesy, they contribute from their own pockets while compensating a party.	It is highly expensive. Poor litigants are out-priced. Fees of the advocates are sky-rocketing. Poor litigants prefer not to file a suit even in highly fit cases for hearing. Court fees, process fees, commission fees, expenses on production of witnesses especially the official ones, expenses on the production of official records, fees of the clerks of counsel ( <i>munshiānah</i> ) and fees of the attested copies of the record of the court break the spine of the litigants. Very often, the expenditure of a case highly exceeds the real value of the suit. There are pains for no gains.
14.	The issue gets finality soon due to a win-win situation. No doubt each side loses to some extent but it occurs on account of their own consent. So it is not a defeat but a sort of consented withdrawal.	Finality in decision comes in excessively belated stages. Even interlocutory orders create grounds for appeals and revisions. Petitions of appeal, review and revision against the full judgments are filed in 99% cases. One can find a lot of instances where the suitor passes away and the suit is yet to get finality.

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S.No.	Alternative dispute resolution	Regular litigation
15.	Execution is easy rather the decision and execution come simultaneously. No petition for execution and no petition for objection are filed.	Execution is harder than the obtaining of decree in the suit. Objection petitions know no end. The abuse of section 47 and order XXI CPC is common. Decree in hands of decree-holder becomes just a receipt of expenditure of the case and a certificate of completion of trial.
16.	The real and effective cause of dispute is uprooted. Hormonal relations are restored. State of sympathy is promoted. Issue is really settled.	Cause of enmity doesn't flee. Torn relations between the winner and the loser deepen further. State of antipathy develops. Issue is solved in the papers only.
17	The elders, arbitrators, mediators and conciliators, and the disputants speak the same language. There is no problem in communication.	The language of the court, particularly of apex courts is English. Legal terminologies are also not easy to understand. A communication gap always prevails between the court and disputants.
18.	Admittedly decisions are based on proven facts. When disputants are deposing before their village elders, they refrain from telling lies due to social pressure even though they have not been administered oath. The out-come is a fair as well as just decision.	Disputants and their witnesses, despite taking of oath, give false statements. They depose tutored and pre-dictated evidence. Hence, their veracity is rarely shaken. Resultantly, false facts get authenticity. The product is a fair (according to law) but unjust decision.



## Conclusion

- 1) ADR stands for Alternative Dispute Resolution. “Alternative” is more appropriate than “alternate”. ADR in some parts of the world is also known as External Dispute Resolution (EDR), Dispute Resolution Tools (DRT). The phrase Consensual Dispute Resolution (CDR) is also in field. Some experts prefer “appropriate” over “alternative” whereas some others prefer “difference” over “dispute”.
- 2) The appropriate similitude for phrase ADR in the Holy Qur’ān and Sunnah is “*Iṣlāḥ*”. The term “*Ṣulḥ*” should not be confused with *Iṣlāḥ* despite their interchangeable use.
- 3) The suitable transliteration for ADR, in the current Arabic usage, is *Taswiyyat al-munāza‘āt al-badīlah* or *Ḥasm al-nizā‘ al-badīl*.
- 4) The history of informal dispute resolution is as old as the history of mankind, nonetheless, the history of conflict resolution under the nomenclature of ADR is hardly half a century old.
- 5) ADR has its roots in Divine religions.
- 6) Primarily and historically ADR is alternative to violence but in current civilized states, it is an alternative to formal adjudication. However, it is not a substitute for that. It plays only a complementary role to the regular judicature.
- 7) Under the Islamic Law, formal litigation is lost resort. Its procedural law must carry a provision for recourse to ADR, as pre-trial proceeding.
- 8) ADR uproots the dispute whereas adjudication disposes it of.
- 9) ADR saves time and wealth and regular adjudication consumes them both.
- 10) ADR brings peace, harmony and promotes cooperation. Litigation creates hatred, enmity and brings the disputants to a state of antipathy.
- 11) In ADR, justness prevails over fairness and justice is dispensed on the basis of equity. In formal litigation, fairness prevails over justness and justice is done within the meanings of legal provisions. In ADR, justice and only justice is the objective whereas formal litigation aims at the application of laws to disputed facts, whatsoever the outcome may be.

## Notes and References

1. This nature of man has been described by the Holy Qur'ān in the following verses:  
"Truly man was created very impatient, fretful when evil touches him; And niggardly when good reaches him." (*Al-Ma'ārij*, LXX:19, 20, 21).  
"And violent is he in his love of wealth." (*Al-'Aadiyāt*, C:8).
2. "By violence" does not only mean the use of force or might against one opponent. It includes all such modes of dispute resolution that carries the element of inhuman procedures such as trial by fire (the healing of wound/burns after walking on fire or the picking of an object out from within a fire safely), trial by hot iron (the turning of one pound heated iron rod to three pounds in the hands of the accused, after taking it to a 09 feet distance), trial by water (throwing of the accused after chaining him in a fatal position into a container of water, then convicting him/her upon floating and acquitting him/her upon drowning), trial by hot water (the keeping of the accused his hand elbow-deep in a boiling water and his acquittal on the non-appearance of blistering), trial by Tagena, sassywood and ordeal bean (the ingesting of these poisonous seeds and tree-gums to the accused), trial by diving (a breath-holding test beneath the water, trial by snake (the safe lifting of a ring placed under a snake) and the like. All these procedures are collectively called 'Trial by Ordeal'. See for further details, editors of the *Encyclopedia Britannica*, ordeal trial method, available at <http://www.britannica.com/EBchecked/topic/431352/ordeal> (last accessed on May 11, 2015). Also see Aralyn Primm, A History by 'Trial by Ordeal', in *mentalfloss* 2013, available at <http://mentalfloss.com/article/50161/history-trial-ordeal> (last accessed on May 11, 2015). Also see Peter T. Leeson, Ordeals, in *Journal of Law & Economics*, pp. 691-714, available at <http://www.peterleeson.com/Ordeals.pdf> (last accessed on May 12, 2015).
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5. See for 'alternate' Section 89-A of the Code of Civil Procedure, 1908. Also see Bench Book published by Ministry of Local Government and Rural Development, at page 5. See for 'alternative' Order X, Rule 1-A of the CPC, both Pakistani and Indian.
6. Dr. Hassan Ghazalah, *Qāmus Dar Al-ilm lil mutalazamāt Al-lafziah*, Lebanon, Dar al-Ilm lilmalaeen, 2007, p. 66.
7. See Article 251(A) of the Constitution that says, "The National language of Pakistan is Urdu, and arrangements shall be made for its being used for official and other purposes within fifteen years from the commencing day".
8. A.S. Hornby, *Oxford Advanced Learner's Dictionary*, p. 439. See also P. Ramanatha

- Aiyar's, *Advanced Law Lexicon*, New Delhi, Wadhwa and Company, 2007, pp. 2, 1431.
9. Hassan Ghazalah, *Almutalazamāt Al-Lafẓiyyah*, p. 442.
  10. Aamir Raza, *Code of Civil Procedure, Order xv. Rule 01*, Lahore, Ganj Shakkar Press, 2000, p. 562.
  11. Aamer Raza, *Code of Civil Procedure*, pp. 555-556.
  12. Iqbal Muhammad Awan, *Qānūn-i-Shahādat 1984*, Lahore, Mansoor Book House, 2008, p. 280. See also Alan Tolyar, *Principles of Evidence*, London, Cavendish Publishing Limited, 2000, p. 2.
  13. Alan Tolyar, *Principles of Evidence*, p. 1.
  14. Mahmud Iqbal Aawan, *Qānūn-i-Shahādat Order 1984*, p. 28.
  15. Shaikh, Abdul Halim, *Code of Criminal Procedure v of 1898*, Lahore, Shah Electric Press, 1977, pp. 1:513, 514, 655.
  16. D. Fosket, *The Law and Practice of Compromise*, Scotland, Thomson Reuters (Legal) Limited, 2010, p. 5. Also available at <http://legalresearch.westlaw.co.uk/wp-content/uploads/2013/01/Prelim-Pages-from-Foskett-on-Compromise-7e-text.pdf> (last accessed on Feb.11 2015).
  17. Avtar Singh, *Law of Arbitration and Conciliation*, pp. 21-23.
  18. *Kamini Kumar Basu v Birendra Nath Bose*, AIR 1950 PC 100: 57 IA 117: ILR 57 Cal 1302.
  19. *Nand Kishore v International Mercantile Corpn Ltd*, AIR 1953 Cal 415. *V. Narasimha Raju vs Gurumurthy Raju*, AIR 1963 SC 107. *Sudhindhra Kumar v Ganesh Chandra Ghosh*, ILR (1939) 1 Cal 241.
  20. Muhammad Rawas Qala Jee and Hamid Sadiq Qanib, *Mu'jām Lughāt al-Fuqahā*, Karachi, Idarat ul Quran wal ulum al Islamiyyah, n.d., p. 196.
  21. Elizabeth A. Martin, *Oxford Dictionary of Law*, UK, Oxford University Press, 2006, p. 463. See also A.S. Hornby, *Oxford Advanced Learner's Dictionary*, p. 1301.
  22. Thomson Gale and Lehman, *West Encyclopedia of American law*, pp. 8, 343, available at <http://www.amazon.com/Wests-Encyclopedia-American-Law-Volume/dp/0787663670> (last accessed on Feb. 11, 2015).
  23. Luis Maaloof, *Al-Munjid*, translated by Balyavi Abu Al-fazl Abd-ul-Hafeez, Lahore, RR Printers, 2011, p. 185. Also see Shams ul Haq Haqqi, *Oxford English Urdu Dictionary*, not mentioned, Oxford University Press, 2013, p. 1431.
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  26. Bright Sambeth Glasner, *A Report on ADR of Nov.6, 2006*.pp 1-7, available at [https://www.google.com.pk/search?q=Bright+Sambeth+Glasner%2C+A+Report+on+ADR+of+Nov.&oq=Bright+Sambeth+Glasner%2C+A+Report+on+ADR+of+Nov.&aqs=chrome..69i57.1207j0j8&sourceid=chrome&es\\_sm=93&ie=UTF-8](https://www.google.com.pk/search?q=Bright+Sambeth+Glasner%2C+A+Report+on+ADR+of+Nov.&oq=Bright+Sambeth+Glasner%2C+A+Report+on+ADR+of+Nov.&aqs=chrome..69i57.1207j0j8&sourceid=chrome&es_sm=93&ie=UTF-8) (last accessed on Feb. 11, 2015).
  27. Justice Nazim Hussain, *Access to Justice and Alternative Dispute Resolution, 2004, page, 1*, available at <http://www.pakistanlawsonline.com/lawonline/law/Login.asp> (last accessed on Feb.11, 2015).

28. Muhammad b. Abi Bakr, Ibn Qayyem al-Jauziyyah, *Ilam-ul mu'aqi'in*, 1, p. 108.
29. Muhammad b. Isā Al-Tirmidhī, *Jāmi' al-Tirmidhī, Kitāb al-aḥkām*, reported by Kathir b. Abdullah b. Amr b. Awf, *Ḥadīth* no. 1364, Lahore, Maktabat-ul-Ilm, n.d., 1, p. 697. Abu Dawud Sulaiman b. Ash'ath, *Sunan Abi Dā'ūd, Kitāb al-'Aqayah*, reported by Abu Hurairah, *Ḥadīth* no. 197, Lahore, Maktabat-ul-Ilm, n.d., 3, p. 95.
30. Ahmad Al-Dardir, *al-Sharḥ al-Kabīr*, Egypt, Maktaba 'Isa al-Halabi, n.d., 4, p. 152. See also Muhammad Naeem Abd-us-Salam Yasin, *Nazria ul Da'wa*, Egypt, Ministry of Religious Affairs, 1972, 2, pp. 50-53.
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32. The Times Law Report, Tuesday, 8th January 2002, available at <http://asauk.org.uk/wp-content/uploads/2003/09/ADR-Update-4.pdf>, last accessed on Feb. 12, 2015.
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34. Barrett & Barrett, *A History of Alternative Dispute Resolution*, pp. 266-267.
35. *Ibid.*
36. Johan, Nicolay and John Hay, Abraham Lincoln, Notes for a law lecture, July 1, 1850, available at <http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm>, last accessed on Feb. 12, 2015.
37. Madabhushi Sridhar, *Alternative Dispute Resolution: Negotiation and Mediation*, p. 3.
38. According to the statistics provided by Mr. Sharif Ahmad, learned Additional Registrar PHC, on 06:02:2013, the cause list was of 146 cases, on 14:02:2013, it was of 312 cases, on 09:03:2013, it contained 364 cases. See cause list issued for 09:03:2013, by office of the Additional Registrar Peshawar High Court.
39. *The Daily Mashriq Peshawar*, April 7, 2015.
40. RSRTC v *Mohanlal Khandelwal*, 1985, Raj LR 866.
41. This sub-section was inserted in CPC by virtue of Ordinance X of 1980.
42. Abigail E. Ng and Eric Tin, *Leading Change In The Singapore's Magistracy: The Seven Working Precepts*, available at <http://www.aija.org.au/Mag01/Singapore.pdf> (last accessed on April 28, 2015). See also Justice Tassaduq Hussain Jillani, *Delayed Justice and the Role of ADR*, available at <http://www.supremecourt.gov.pk/ijc/articles/7/1.pdf>, last accessed on Feb. 12, 2015.
43. Qasim b. Abdullah Al-qunuvi, *Anīs-ul-Fuqaha fi Ta'arīfat al-Alfāz al-Mutadāwilah Bain al-Fuqahā*, Jeddah, Dar-ul-Wafa, 1986, p. 245. Also see Nasiruddin al-Mutarrizi, *Al-Mughrib fi Tartīb al-Mu'ārab*, Syria, Maktabah Usamah b. Zaid 1979, 1, p. 478. Al-Jawhari, *Al-Sihāḥ*, Bairut, Dar ul Ilm, 1979, 1, p. 383. Muhammad b. Yaqub Fairozabadi, *al-Qāmūs al-Muḥīṭ*, Egypt, Matbaa Mutafa al-Halabi, 1952, 1, p. 243. Ahmad b. Muhammad al-Fuyumi, *Al-Misbāḥ al-Munīr*, Egypt, Al-Matbaa Al-Ameeriah, n.d., 1, p. 528.
44. The Noble Qur'ān, II:11.
45. The Noble Qur'ān, VII:142.

46. The Noble Qur'ān, VII:85.
47. The Noble Qur'ān, XXVI:151-152.
48. The Noble Qur'ān, XVII:48.
49. *Saeedah Khānam v Muhammad Sami*, PLD 1952 Lahore 113.
50. Abd ul Karim Zaidan, *Al-Wajiz fi Uṣūl ul Fiqh*, Lahore, Dar al-Kutub al-Salafiyah, 1986, pp. 292-294.
51. The Noble Qur'ān, VIII:1.
52. The Noble Qur'ān, XLIX:9.
53. The Noble Qur'ān, XVI:90.
54. The Noble Qur'ān, V:42.
55. Imran Ahsan Khan Nyazee, *Islamic Jurisprudence*, p. 67. See also Muhammad Naeem Abd-us-Salam Yasin, *Naẓariyat al-Da'wah*, 2, p. 51.
56. Munir Al-Ba'alabacci, *Al-Mawrid English to Arabic*, Beirut, Dar-ul-ilm, 1989).
57. Qasim b. Abdullah al-Qunuvi, *Anīs-ul-Fuqahā fi Ta'arīfat al-Alfāz al-Mutadāwilah Bain al-Fuqaha*, Jeddah, Dar-ul-Wafa, 1986, p. 245. Also see Nasiruddin al-Mutarrizi, *Al-Mughrib fi Tartīb al-Mu'ārab*, Syria, Maktabah Usamah b. Zaid 1979, 1 p. 478. Al-Jawhari, *Al-Ṣiḥah*, Bairut, Dar ul Ilm, 1979, 1, p. 383. Muhammad b. Ya'qub Fairozabadi, *Al-Qāmūs al-Muḥīt*, Egypt, Matbaa Mutafa al-Halabi, 1952, 1, p. 243. Ahmad b. Muhammad al-Fuyumi, *Al-Miṣbah al-Munīr*, Egypt, Al-Matbaa al-Ameeriah, n.d., 1, p. 528.
58. Sriram Panchu, *Mediation; Practice and Law*, p. 295.
59. Zaheer Cheema, *West's Legal Thesaurus/Dictionary*, Lahore, Manzoor Law Book House, pp. 514-515.
60. Muhammad Rawas Qalaji and Hamid Sadiq Qunaibi, *Mu'ajam Lughāt al-Fuqahā*, Karachi, Idarat-ul-Quran, Publications, n.d., p. 71.
61. Muhammad Hamidullah, *The Emergence of Islam*, Islamabad, IRI Press, 2004, p. 187.
62. Kamal Sulieman Salibi, *A History of Arabia*, New York and Michigan, Caravan Books, 1980, p. 68.
63. T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution*, p. 13.
64. The members of this community centre were mostly from the family of Qusai. Only few members belonged to other clans. A person less than 40 years, while not possessing special aptitudes of leadership, could not be selected as a member. See Dr. Muhammad Buyumi Mehran, *Dirāsāt fi Tārīkh al-'Arab al-Qadīm*, Riyadh, Jamiah al-Imam Muhammad b. Saud al-Islamiah, 1982, p. 406.
65. Muhammad Hamidullah, *The Emergence of Islam*, p. 193.
66. Abdullah b. Muhammad al-Shaikh, *Seerat-ur-Rasūl* (ﷺ), Urdu translation, Jehlum, Pakistan, Javid Riaz Printers Lahore, 1990, p. 44.
67. Abul A'ala Maudūdī, *Seerat Sarwar-i 'Ālam*, Lahore, H. Faruq Associate Limited Press, 1980, 2, pp. 720-721.
68. Muhammad Hamidullah, *The Emergence of Islam*, p. 198.
69. Abdur Rahman b. Muhammad b. Khuldun, *Tārīkh Ibn Khaldūn*, Karachi, Nafis Academy Printers, Urdu Translation, 1981, p. 36. See also T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution*, p. 13.

70. Muhammad Abd al-Baqi Fuad, *Al-Mu'ajam al-Mufahras Li Alfāz al-Qur'ān al-Karīm*, Istanbul, Dar al-Da'awah, 1987, pp. 410-412.
71. Muhammad Hamidullah, *The Emergence of Islam*, pp. 233-236.
72. Munir Al-Ba'alabacci, *Al-Mawrid English to Arabic*, Beirut, Dar-ul-ilm, 1989.
73. A. Yusuf Ali, *The Holy Qur'ān, Text Translation and Commentary*, Chapter XXVI, The Poets, verses 105-109.
74. Anthony Glaister, Woolf Reforms: Lawyers continue to wrangle over merits a decade on, available at <http://www.thelawyer.com/analysis/opinion/practice-areas/city-analysis/woolf-reforms-lawyers-continue-to-wrangle-over-merits-a-decade-on/1000991> (last accessed on Feb.12, 2015). Also see Michael Zander, Cases and material on the English Legal System 10th edition, UK, Cambridge University Press, 2007, pp. 54, 138. Also see National Consumer Council. Seeking Civil Justice: A survey of people's needs and experiences, 1995, NCC. See also Gary Slapper and David Kelly, *The English Legal System*, UK, Taylor and Francis, 2009, p. 334, also available at <http://www.amazon.com/Seeking-Civil-Justice-Peoples-Experiences/dp/1899581057> (last accessed on Feb.12, 2015).
75. See Articles 146(3), 153, 154, 156, 159(4) 160, 184(1) and 17(2).
76. Inserted by Code of Civil Procedure (amendment) Ordinance, XXXIV of 2002, dated 27.7.2002.
77. It was established by The Establishment of the Office of *Wafāqī Mohtasib* (Ombudsman) Order 1983 (I of 1983), now having Constitutional authenticity under article 277A of the Constitution of Pakistan 1973.
78. See Chapter VII (ss.96-99) of the Punjab Local Government Act, 2013. Also see See Section 72 and Schedule III, item 32, of the Sindh Local Government Act, 2013. See also Chapter XVI, Section 109 of the KP Local Government Act, 2013. [In this later Act, the relevant provision is, nonetheless, cloudy and needs further improvement to clearly incorporate ADR techniques].
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81. Aasima Jahangir, *Manual of Family Laws in Pakistan*, Lahore, Law Book Publishers and Sellers, 2012, pp. 450-451, 466.
82. Madabushi Sridhar, *Alternative Dispute Resolution*, pp. 314-315.
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