Family Dispute Mediation (Sulh) in Islamic Family Law: An Overview of Its Validity and Practice

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Abstract:

The idea behind the resolution of disputes through amicable settlement process particularly Islamic oriented family is one of the most valuable instrument or tools in that regard. This process has succeeded in keeping the family tie intact and has contributed to peaceful and harmonious relationship. This article seeks to explore the validity or otherwise of this practice of resolving Islamic family disputes without resorting to conventional court practice and procedure. The article used a combination of two legal research methods. That is doctrinal and analytical research methods wherein primary and secondary sources of law were examined and analyzed. It is observed that lack of training and creating awareness for judges and stakeholders in amicable settlement of Islamic disputes particularly family ones contribute to accumulation of it. It is recommended that workshops, seminars and conferences be held on regular basis for them.

Keywords: Family Dispute, Mediation (*Sulh*), Islamic Family Law, dispute settlement.

1. Introduction

To avoid the breakdown of family ties, exploring the virtues of mediation to restore the collective values is required in Islamic family law. Family disputes are often mediated through the process of Alternative Dispute Resolution (ADR) called Mediation (*Sulh*). Mediation is an ADR process that involves offer and acceptance between the parties which protects the union from gradually getting collapsed. It appears nowadays family values are getting worse as a result of continued disputes in most families. This paper aims to suggest the preservation of family values from getting worse and collapsing due to unnecessary disputes. It suggests accessible means of mediation to all, particularly the less privileged. Mediation provides access to justice to all as stated thus: -

> *" Mediation is a civil justice system with special reference to family disputes issues with fundamental Shariah based mostly meet the following principles: just in the results it delivers; fair in the way it treats family members; offer appropriate procedures with less or no cost; deal with cases with reasonable speed; be understandable to those who use it; be responsive to the needs of those who use it; provide as much certainty as the nature of particular cases allows; and 80% be effective: adequately resourced and organized."*[1]

This explains how mediation is meant to create an enviable environment for settling family disputes in the increasingly competitive family life. Generally, family disputes such as marriage (*Zawaj*), Divorce (*Talaq*), inheritance (*Mirath*), custody (*Hadanah*), maintenance (*Nafaqh*), gift (*Hibah*) and bequest (*Wasiyya*) are complex and unpredictable, because they involve closely related families. This paper examined the concept of mediation under Islamic family law, origin of mediation, importance and effectiveness of mediation in resolving family disputes. The paper

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[1] Woolf. M.R., Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (HMSO) (1995), p. 1.

further discusses types of disputes amenable to mediation and elements of mediation with its advantages discussed.

2. The Concept of Mediation (*Sulh*) in the Resolution of Family Disputes

Under Islamic Law ADR is a range of processes for amicable settlement of disputes without compromising the fundamentals of Islamic family law.[2] Disputes of different natures exist among people, because man is by nature selfish, so also interest differs, and ADR mechanisms serve variety of disputes. The Holy *Quran* in confirming this position stated that: "selfishness is ever present in the human soul".[3] There are several ways provided by Islamic family law open to family members for settling disputes and some of these are: -[4]

a. *Sulh* which includes (Mediation, Negotiation, Conciliation, Compromise of action);
b. *Nasihah* (Counselling),
c. *Tahkim* (Arbitration),
d. Med-Arb (a process that begins with mediation and ends in arbitration),
e. *Muhtasib* (Ombudsman),
f. *Wali al-Mazalim* (Ombudsman),
g. Med-Ex (A combination of mediation and expert determination),
h. *Qada* (Adjudication) and

This paper is concerned with mediation (*sulh*) as a process in resolving family dispute, which can be discussed below:

The concept of mediation (*Sulh)* is very essential in Islamic family law; it is a confidential process of settling, healing and harmonizing, after estrangement between family members.[5] Mediation in Islamic family law is referred to as *Sulh*. The word *SuIh* in Arabic language is derived from the root *Salahah* or *Salohah* which means to be good.[6] The word *Sulh* in Arabic means to reconcile, to make peace and to mediate any dispute between opponents by relying on the prescribed conditions. *SuIh* is also one of the names of Mecca, the holiest city of Islam, described in the *Quran* as a safe city, free of disputes and a place of peaceful coexistence.[7] Technically, according to Bouheraona,[8] quoting Al-Jurjani in his *Taarifat* defines *Sulh* as: an accord to end a dispute.[9] The Ottoman Code, Majalla defines *Sulh* in Article 1531 as: a contract removing a dispute by consent and it becomes a concluded contract by offer and acceptance.[10] *Sulh* is also defined as: "an accord between two parties or more to settle a specific dispute by ending its causes".[11] From the definitions above mediation (*Sulh)* can simply include the process of mediating, negotiation, conciliation and

[2] Oseni. U. A and Ahmad. A. U. F, Op Cit, P, 7.
[3] Holy Quran 4:128.
[4] Zahidul Islam. M., 'Provision of Alternative Dispute Resolution Process in Islam', *IOSR Journal of Business and Management*, Volume 6, Issue 3, Nov-Dec (2012), P, 31.
[5] Abdulmalik. O, etal, Op Cit.
[6] Pennington. R., 'What is the Meaning of the Word Islam?', available at http://muslimvoices.org, accessed on 17/01/2017.
[7] Othman. A, Op:Cit
[8] Bouheraona. S., 'Foundation of Mediation in Islamic Law and Its Contemporary Perspective', available at https://www.google.com, accessed on 18/09/2016.
[9] Ibid
[10] Ibid.
[11] Abdalla.A, etal, Islamic Perspectives on Conflict Resolution Manual for Muslim Communities, available at http://salaminstitute.org.pdf, accessed on 06/01/2017.

compromise which easily fit into the definition of ADR.[12] In order words, mediation includes all ADR processes which encourage disputants to reach settlement either on their own or with the help of third party neutral that facilitates the disputants in doing so.[13]

Mediation in Islamic family law is the oldest process of settling family dispute. The process is aimed at bringing to an end hostility among believers so that they may continue their peaceful relationship in the family.[14] Mediation is a legal instrument intended not only for the purpose to finish dispute either directly or otherwise but sometimes with the help of a neutral third party among individuals and groups in lieu of litigation.[15] Its nature is like private settlement, wherein most of the disputing family members themselves settle without recourse.[16] It is a procedural requirement that may be facilitated by prominent family members or a *Qadi* (judge) within the context of his courtroom. Judges can defer disputants to settle before trying their case or at any stage of the trial.[17] Once invoked by a judge, mediation acts as a *fida al-yamin* (redemption of the oath) or avoidance of the judicial oath on the party burdened with oath taking due to whole or partial failure of evidence.[18]

Mediation should not be any compromise made in the domain of *huquq* (Right of Allah),[19] which include *hudud* (punishment), *kaffarah* (expiation), *zakat* (arms) *etc* and should not violate any provision of Islamic family law.[20] Mediation is usually used in the violent and important cases such as family dispute as a constructive process.[21] Being a practical code, Islamic Family Law provides its own legislative measures for managing family dispute by requiring reconciliation.[22] Marriage being a legal union of man and woman regulated by the Holy *Quran*, *Sunnah* and *Ijima*, is subject to various types of dispute which may arise from default in the relationship resulting to rift and rancor which may tantamount to misunderstanding between family members.[23] In Islamic family law, litigation of family dispute is discouraged and may not be allowed except if the dispute had escalated and is beyond control through compromise negotiation.[24] By compromise, the spouses are empowered to create their own legally enforceable commitments determining their rights and responsibilities in settling their differences.[25] Ahmed and Abdul-Hak pointed out that

[12] Usman. A. M, Matrimonial Arbitration Under Islamic Law: An Overview of Procedure and Practice in Area Courts, *Alternative Dispute Resolution and Some Contemporary Issues,* Legal Easy in Honour of Hon. Justice Ibrahim Tanko Muhammad, (M.O. Publishers Ltd, (2010), P, 129.

[13] AbdulMalik. O.L and Binti Muda. F. S, The Concept of Reconciliation (*Sulh*) in Islamic Family Law And Matrimonial Dispute Settlement Practice in Nigeria, Volume 3(1), *Peak Journal of Social Science and Humanities*, February 2015, P, 1.

[14] Walid. I., Dialogue and the Practice of Law and Spiritual Values: Courts, Lawyering and ADR: Glipses into the Islamic Tradition, *Fordham Urban Law Journal*, (2001), P, 1035.

[15] Zahidul Islam. M, Op Cit.

[16] Sigh. V, Op Cit P, 142.

[17] Othman. A, 'And Amicable Settlement Is Best: *Sulh* and Dispute Resolution in Islamic Law', Volume 21, Number 1, *Arab Quarterly Law Report*, (2007), P, 65.

[18] Ibid.

[19] Qafish. M. M., 'Restorative Justice in the Islamic Penal Law;; A Contribution to the Global System', Volume 7, Issue 1, *International Journal of Criminal Justice Science*, January-June (2012), P, 496.

[20] Islam. M. Z., 'Provision of Alternative Dispute Resolution Process in Islam', Volume 6, *IOSR Journal of Business and Management*, (2012) P 31.

[21] Prasasd. I, 'A Short History of Muslim Rule in India', available at https://archive.org, accessed on 16/01/2017.

[22] Shah. S. S, Op Cit.

[23] Usman. A. M, Op Cit.

[24] Wahed. H., '*Sulh*: Its Application in Malaysia', available at http://iosrjournals.org, accessed on 07/10/2016.

[25] Othman. A., 'And Amicable Settlement Is Best; Sulh and Dispute Resolution in Islamic Law', *Arab Law Quarterly* 21, 2007, P, 69.

Al-San' ani stated that the Prophet (saw) himself resorted to reconcile the parties first before judging the dispute.[26]

Islam family law has explicitly elaborated the foundation of a happy family life with full love and solace.[27] Islamic family law aims at mending disputes and managing spousal dispute more than it encourages family break up and divorce.[28] To this end, it stresses that husband and wife, once bounded by marriage, must strive for the establishment of peace, serenity and harmony by making all the necessary adjustments to each other's personal behavior.[29] Families are primarily required firstly to mediate between the couple in order to save their marriage and avoid divorce.[30] This mediation process is in order to save the marriage and the biological children interest.[31]

Mediation in addition to civil disputes is also allowed in criminal disputes like murder or traffic accidents.[32] In summary, mediation is part of every dispute settlement mechanism in Islamic family law.[33] The goal in mediating dispute is more of a traditional system and method. That is why some scholars view mediation as a title for pardon (*afw*), or relinquishment of a right or claim.[34] Abuakar reported that Ibn Arafat said it is shifting from a right or claim to indemnity for the purpose of settling misunderstanding or preventing its occurrence.[35] Mediation is based on forgiveness and symbolization that help the disappearance of hard feelings and revenge, pragmatic, psychological and ethical feelings.[36] Allah has permitted Muslims to relinquish their rights in a charitable manner and in return, has promised them prosperity.[37]

The basis of mediation is sourced to many *Quranic* verses thus:

> *"No good is there in much of the private conservation, except for those who enjoin charity or that which is right or reconciliation between people. And whoever does that seeking means to the approval of Allah, then we are going to give him a great reward."*[38]

Barindo said that the prophet was reported to have said thus: "There will be dispute after me, so if you have a way to end them in peace, then do so."[39] Islamic Family Law charges and encourages

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[26] Ahmed. S and Abdul-Hak. N., '*Sulh* (Mediation) in the State of Selangor: An A nalysis of Legal Provision and Application', Volume 18, Number 2, *International Islamic University of Malaysia Law Journal*, (2010), P, 218.

[27] Abdulmalik. O, Muda. F. S, Ismail and Taofeeq. A. A., 'The Roles of Masjid in Matrimonial Dispute Settlement (MDS) in Nigeria: An Assessment of The Shar'iah Concept of *Sulh'*, available at http://worldconferences.net.pdf, accessed on 18/09/2016. See also Jahirul Islam. Md, Suzui. M, Mazumder. N and Ibrahim. N., 'Challenges of Implementing Restorative Justice for Intimate Partner Violence: An Islamic Perspective, Volume 37, *Journal of Religion and Spititual in Social Work: Social Thouht,* April (2018), P, 37.

[28] Shah. S. S., Op Cit, P, 329.

[29] Ibid.

[30] Abdulmalik. O, etal, P, 642.

[31] Ibid.

[32] Barkindo. I, Op Cit, P, 170.

[33] Al-Ramahi. A, Op: cit.

[34] Uthman. M. B, An Overview of the Theory of *Sulh* in Civil and Criminal Cases, Alternative Dispute Resolution and Some Contemporary Issues', in Aliyu. I. A., (ed), *Alternative Dispute Resolution and Some Contemporary Issues*, Legal Essays in Honour of Hon. Justice Ibrahim Tanko Muhammad, (M.O. Press & Publishers, Nigeria, (2010), P, 152.

[35] Abubakar. M. S, Op Cit, P, 171.

[36] Staff. M.C., 'Forgiveness: Letting Go of Grudges and Bitterness', available at http://www.mayoclinic.org, accessed on 17/01/2017.

[37] Quran 2:178 and 5:45.

[38] Ibid 4:114

[39] Barkindo. I Op Cit, P, 171.

mediation in any situation to restore peace, harmony and understanding in the family. Magnanimity must be exhibited on part of the parties for the sustenance of any process of mediation in disputes. Allah says that:

> *"Reconciliation is always the best option…but you should be magnanimous and act benevolently towards others and always remain conscious of God, for He is indeed aware of all that you do,"*[40] *and*

> *"In most of their secret talks there is no good; but if one exhorts to a deed of charity or justice or conciliation between men, (secrecy is permissible); to him he who does this, seeking the pleasure of Allah, We shall soon give a reward of the highest (value)".*[41]

The verses clearly advocate for the mediation of disputes on equitable and fair manner, a divine reward is promised for those who do so. Also undue secrecy which is otherwise not approved is being condoned by Allah for the sake of conciliation.[42]

The significance of mediation in Islamic family law shows that it can cause postponement of *Salat* which is timely obligatory.[43] Al-Tirmidhi reported that the Prophet (saw) said that mediation is more rewarding than voluntary fasting, praying and offering charity.[44] It is dissemble from the verse quoted above and the nature of the dicta employed, that it is obligatory on the Muslim family to opt for mediation in appropriate situations.[45] Even though presence of witnesses does not form part of mediation, their presence, however, at the time of initiation and conclusion is very essential.[46] Its execution in forms of deed or written agreement or contract is very important, for the purpose of ensuring and retaining the certainty of the agreement.[47] Initiation and conclusion of mediation by ignorant mediators, not learned in Islamic jurisprudence, is legally and spiritually dangerous.[48] Such mediation may be rendered void *ab initio* and of no legal effect, in that it will not be enforced by the judge.[49]

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[40] Quran 4:128

[41] Ibid.

[42] Ibid 4:114, In most of their secrets confabulation there is no good; but if one exhorts to a deed of charity or conciliation between men secrecy is permissible. To him who does this seeking the good pleasure of Allah shall soon be given a reward of the highest value.

[43] Haroon I. A., The Use of Alternative Dispute Resolution (*Sulh*) in *Sharia* Cases , Being a Paper presented at the National Workshop for Area/*Sharia*/Customary Court Judges/Directors and Inspectors of Area/*Sharia*/Customary Court , from 3rd –5th April (2017), P, 5.

[44] Haytham Kreidly., 'Sunnah Al-Tirmidhi', Volume 3, Hadith, 2433, (Dar-Al-Kotob Al-Ilmiyah, Lebanon, 2008), P, 293.

[45] Nyazee. I. A., 'Islamic Jurisprudence (Usul-al-Fiqh), (Adam Publishers and Distributors, New Delhi, (2006), P, 46-47, Also Shah. N. A., 'Islamic Law and the Law of Armed Conflict: The Conflict in Pakistani,(Routldge Publication, London, (2011) P, 15. The authors stated that it is well-established in the science of Islamic Jurisprudence that if a reelation comes in the form of a (*Hukum*) command, then, the act of commission prescribed by the Law Giver is certain and binding on the subjects. Technically *Hukum* means a rule. It is a communication from Allah. .related to acts of the subjects through a demand or option or through declaration. It shows that a rule of law is a communication from Allah. The rule is related to the acts of subjects. The *Hukum* is epresed through demand to do or not to do something.

[46] Keffi. S.U.D. Op: Cit, P, 199.

[47] Ibid.

[48]Talesh. S. A., 'How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws', Volume 46, Number 3, *Law and Society Review*, September (2012), P, 469.

[49] Ibid.

3. The Origin and Legal Basis of Mediation Under Islamic Family Law

The bases of mediation in classical Islamic family law are linked to the pre-Islamic communities and the *Quran*.[50] In the pre Islamic period, tribal solidarity was the key virtue to maintain the integrity of family framework, by amicable resolution of disputes.[51] This is done through elders and traditional rulers.[52] Mediation played greater role in the incidence of *Hudaybiyya* which ushered in the moral and political victory of Islam.[53] Mediation in Islamic family law is for terminating dispute to establish unity where there is disunity. Allah (SWT) said: "And if two factions among the believers should fight then make settlement between the two..."[54]. This suggests that mediation leads to justice and combat dispute for peace.[55] This is done by inhibiting innate perception of superior contest by means of acrimony which is inevitable in conventional courts.[56] Islamic family law is a legal system, religion, complete way of life and total submission to the Will of Allah.[57] Allah is the source of authority and the sole sovereign law giver.[58] *Sharia* is the divine law and its focus is faith.[59] *Quran* and *Sunna* are the sources of *Sharia*, followed by *Ijma* (analogical deduction) and *Qiyas*, (consensus of opinion) as the secondary sources.[60] The capacity to exercise *Ijtihad* (juristic reasoning),[61] may be opened to jurist in issues that were not expressly provided for in the primary and the secondary. This is to provide solution due to a prevailing circumstance which is not pleasant at the time when the issue re-opens or calls for solution. Muslim jurists unanimously recommend the use of mediation in family dispute by means of *Qiyas* and *Ijima*.[62] To create a conducive environment for mediation *Sharia* had established authoritative sets of rules, regulations and general principles.[63] The value for mediating family dispute has religious sanctity.[64] Its practice is validated, enhanced and enforced unless it makes *haram* as *halal* and *halal*

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[50] Jamal. A.A., ADR and Islamic Law: The Cases of the UK and Singapore, available at http://law.nus.edu, accessed on 15/12/2016.

[51] Izutsu. T., '*Ethico-Religious Concepts in the Qur'an'*, (McGill-Queen's University Press, 2002), P, 100.

[52] Noriani. N and Badlishah. N., 'Islamic Family Law and Justice to Muslim Women', available at http://asiasociety.org, accessed on 0 7/09/2016

[53] Keffi. S.U.D., 'The Legal, Social and Economic Roles of As-Sulh from the Perspectives of Jurisprudence (Fiqh) of the Maliki Law', in Aliyu. I. A, (ed), *Alternative Dispute Resolution And Some Contemporary Issues*, Legal Essays In Honour of Hon. Justice Ibrahim Tanko Muhammad, (M. O. Press and Publishers, Nigeris, 2010), P, 188.

[54] Quran 49 Verses 9

[55] Rehman. J., 'The Sharia, Islamic Family Laws And International Human Rights Law: Examining The Theory And Practice of Polygamy And Talaq', Volume 21, International *Journal of Law and the Family*, (2007), P, 108.

[56] Usman. H. B, The Consequences of Family Breakdown in Post-Independence Nigeria: A Case Study of Borno State, Being a dissertation submitted in fulfillment of the requirements for the award of the Degree of Doctor of philosophy in the University of Warwick, School of Law. December (1989).

[57] K. H., "Employment Dispute Resolution Mechanism from the Islamic Perspective*", Volume* 10(2) *Arab Law Quarterly*, (2006), P, 181.

[58] Arthur. J, and Gemmell, A. J., Commercial Arbitration in the Islamic Middle East, 5 *Santa Clara Journal of International Law* 169 (2006), P, 169.

[59] Keshavjee, M.M., Islam, Sharia and Alternative Dispute Resolution: Mechanism for Legal Redress in the Muslim Community, (I. B. Tauris and Co. Ltd 2013), P, 57.

[60] Doi. A. I, "*Sharia the Islamic Law*" (Al-Yassar Publishers, Kano, Nigeria, 1990), P, 21-23.

[61] Kamali. M. H, Principles of Islamic Jurisprudence, available at http://vahdat-news.ir/files/en.pdf, accessed on 13/01/2017. The jurist use the rules of interpretation in which are open to re-interpretation in the light of new social, economic, educational and political circumstances to address the needs of the Muslim family. It is the reasoning by analogy to resolve a new legal issue in a family dispute where the *Quran* or *Sunnah* did not provide for the solution or proved complex and complicated.

[62] Amali. M, Islamic Law: Personal Law, available at http://www.encyclopedia.com.html, accessed on 11/09/2016.

[63] Singh. V., Alternative Dispute Resolution in Islam: An Analysis, Volume 1, Summer Issue (2017), P, 137.

[64] Andrew. D. Y., "A Water Spring in the Desert: Advancing Human Rights within Sharia Tribunals, Suffolk," Volume 35, *Transnational Law Review*, (2011), 101.

as *haram*.[65] Caliph Umar was reported to have said that mediation was fine but it could not agree to make licit the illicit, or illicit the licit.[66] For example, on the issue of divorce, neither the *Quran* nor the *Sunnah* did stipulate the place to initiate a divorce. In Indonisia to promote and strengthen mediation,[67] divorce must be initiated by either husband or wife and pronounce it in the Court room if mediation failed.[68] Caliph Umar bin Khattab was reported to have written the famous letter to Abu Musa Al-Ash'ri after appointing him as *qadi* and spelled out the wide span of coverage of mediation to guide him while deciding cases.[69]

The bases of mediation can be derived from the verse of Quran, which says: - "The believers are but a single brotherhood, so make peace and reconciliation between two brothers; and fear Allah, that ye may receive mercy".[70] And "If two parties among the believers fall into a quarrel, make peace between them...with justice, and be fair; for Allah loves those who are fair and just".[71]

The Prophet on several occasions acted as a mediator between believers.[72] In this light, mediation is practiced by the Prophet more especially in family disputes, thus: - "So fear Allah and adjust all matters of difference among you",[73] and "The believers are nothing else than brothers. So, make reconciliation between your brothers, and fear Allah, that you may receive mercy."[74] The Quran further states: And "If you fear breach between them appoint two arbiters, one from his family, and the other from hers. If they wish for peace, Allah will cause their conciliation. For Allah has full knowledge and is acquainted with all things."[75]

Islamic family law term for marital discord is *shiqaq*, which literally means dissension and discord.[76] To settle such discord, mediation should be resorted in relationships ruptured by friction, as the states *Quran*, thus: "And if a woman fears cruelty or desertion on her husband's part, there is no sin on them both if they make terms of peace between themselves; and making peace (*Sulh*) is better".[77]

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[65] Rashid, S. K., Peculiarities Religious Underlining of ADR in Islamic Law, paper presented in Asia Pacific Mediation Forum, Australia, 16-18 June, 2008. See also Amali. M, Islamic Law: Personal Law, available at http://www.encyclopedia.com, accessed on 11/09/2016. Which means any action which tends to turn a permitted work as prohibited or prohibited work as permitted.

[66] Jenning. R., 'Christians and Muslims in Ottoman Cyprus and the Mediterranean World', available at https://books.google.com.ng, accessed on 07/10/2016.

[67] The Marriage Law of 1974.

[68] Watson. C. W, Op Cit, P. 77-78. This law simply recommended to exhaust the processes of ADR before any family court will assume jurisdiction or allow the pronouncement of divorce despite it is allowed. The secondary source of *Sharia* is put into use in Indonisia to prevent the rampant cases of family dispute within the family members; this is done by the invocation of the *Quran* and the *Sunnah* which provided a significant opportunity for utilizing *Sulh*.

[69] Rizzo. J. R., "A Return from Tradition to Reform: The Shania's Appeals Court Rulings on Child Custody (1992-2001)" *Fordham International Law Journal*, (2003), P, 597. See also Margolith. D., 'Omar's Instruction to the *Qadi*' *Journal of Royal Asiatic Society*, (1910), P, 311-312.

[70] Quran, 49:10

[71] Ibid 49: 9.

[72] Aida. O., "An Amicable Settlement is Best: *Sulh* and Dispute Resolution in Islamic Law" Volume 21(1) *Arab Law Quarterly*, (2007), p. 64 at 66.

[73] Quran 8:1

[74] Ibid 49:10

[75] Ibid 4:35

[76] Shah. S. S., 'Mediation in Marital Discord in Islamic Law: Legislative Foundation and Contemporary Application', Volume 23 Number 3, *Arab Law Quarterly*, (2009), P, 335.

[77] Quran 4:128.

The *Quranic* verses makes it obligatory on family members to mediate. [78] It is clear that mediation has its legality from the Divine sources, as ethically and religiously means of resolving disputes.[79] The *Quran* states: "… then if you quarrel about anything, refer it to Allah and the Apostle…"[80] Under Islamic family law, fabricating lies is only allowed in the mediation,[81] and the mediator is rewarded on the outcome.[82] The prophet also upheld the cause of mediation even when certain derogatory remarks were made against life.[83] Mediation as a mechanism for dispute settlement is sanctioned by the highest source of legislation in Islamic family law designed to be implemented and realized through mediation.[84] It is prohibited for the judge to force disputants, to submit to it against their will, or persisting against the will of one or all of them.[85]

4. Importance of Mediation in Family Dispute:

There is no doubt that judges occupy significant position as legislative arm of the government.[86] Islamic family law confers high degree of recognition to the role of judiciary under a constituted government. During the classical era of Islam, there was no clear delineation between the functions of the *qadi* and mediators.[87] During the formative stages of Islamic jurisprudence, the role of judges transcended adjudication of disputes. Some Muslim jurists are of the view that the role of a judge encompasses three major analogous components, *qada*,[88] *mazalim*,[89] and *hisbah*,[90] and lay

[78] Rehman. J., 'Islamic State Practices, International Law and the Threat from Terrorism a Critique of the Clash of Civilizations in the New World Order', available at https://www.scribd.com, accessed on 14/12/2016.

[79]Rehman. J., 'The Sharia, Islamic Family Laws and International Human Right Law', available at http://lawfam.Oxfordjournals.org, accessed on 07/10/2016.

[80] Quran 4:59.

[81] Khan. M., '*Sahih Al Bukhari*', (English Translation), Volume. 3, Hadith 378, (Al-Arabia Publication, Beirut, 2015), p. 533 It is narrated by Um Kulthum bint Uqba that she heard Allah's Apostle saying, "He who makes peace between the people by inventing good information or saying good things, is not a liar. She further stated that, "I never heard him (she meant the Prophet) giving permission of lying in anything except in three (things): war, conciliating between people and the conversation of man with his wife and the conversation of a woman with her husband" .This *hadith* clearly reveals the extent to which Islam favours settlement of family dispute that fabricating lie is only permitted in the amicable settlement of family dispute in order to unite the family.

[82] It is reported in Sahih al Bukhari that Abu Hurariah narrated that Allah's Apostle said: 'There is a reward to be given for every joint of the human body and for every day on which the sun rises there is a reward or reward for the one who establishes reconciliation and justice among the people.

[83]Al-Ramahi. A., '*Sulh*: A Crucial Part of Islamic Arbitration', available at http://ssm.com, accessed on 19/09/2016.

[84]Jamal. A. A., 'ADR and Islamic law: the cases of the UK and Singapore, available at http://law.nus.edu.pdf, accessed on 15/09/2016.

[85] Khan. M., Op Cit Chapter 51, Hadith 875 on Peace Making, It is narrated by Al Bara bin Azib that When Allah's Apostle concluded a peace treaty with the people of Hudaibiya, Ali bin Abu Talib wrote the document and he mentioned in it, "the Prophet (saw), said ", the pagans said, "Don't write: 'Muhammad, Allah's Apostle', for if you were an apostle we would not fight with you." Allah's Apostle asked Ali to rub it out, but Ali said, "I will not be the person to rub it out." Allah's Apostle rubbed it out and made peace with them on the condition that the Prophet and his companions would enter Mecca and stay there for three days, and that they would enter with their weapons in cases.

[86] Section 6 (1-2) of the Constitution of the Federal Republic of Nigeria 1999

[87]Hossain. S. M., Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview, Volume 1, *Journal of Philosophy, Culture and Religion*, (2013), P, 2.

[88] The Arabic word *qada* means literally carrying out or fulfilling, to decide; to settle; to judge.

[89] The word *mazalim* means In terms of Islamic judicial system a special type of court, where sessions for hearing cases of injustices are held or supervised by the supreme political authority, or by one of his close deputies or other high-ranking authority

[90] *Hisbah* is the divinely sanctioned duty of the ruler (government) to intervene and coercively enjoin good and forbid wrong in order to keep everything in order according to *Islamic* law, example the Kano State *Hisbah* Corps is a religious police force in Nigeria's Kano state responsible for the enforcement of *Sharia*.

credence to the argument that the functions of judges were all-encompassing.[91] This is established to ensure high ethical standards and to maintain justice.[92] These practically involve active engagement in effective mediation to ensure social cohesion and promote reconciliatory attitude. The main thrust of mediation in family dispute is viewed in promoting settlement of disputes that are amenable to mediation in order to avoid the usual inexorable rancorous enmity associated with litigation.

There are various authorities in Sharia supporting the mediation of family disputes which serve as a reference for the modern practice of family dispute settlement.[93] Islamic law considers a number of effective mediation as part of a judge's role in settling family dispute.[94]The duties of the judge in Islamic family law are generally considered to be timely, costless, effective and efficient in mediation. Court-annexed mediation is considered part and parcel of the Shariah Court; it cannot be separated from the adjudicatory role of the judges.[95] In essence, mediation processes in Islamic family law include counseling, conciliation or compromise of action,[96] arbitration, Med-Arb etc.[97]

Haroon,[98] stated that Caliph Umar ibn Al-Khattāb, restated on the code of conduct of a Judge and position of Islam regarding adjudication of disputes in Islamic courts in a letter sent to Abū Mūsā Al-Ash arf where he observed that part of the role of a judge is to encourage the disputants to compromise between each other by means of mediation.[99] The mainstay and leading reason of Islamic family law is based upon the magnetism of interests and preclusion of harm to family members. Mediation is therefore an inevitable substance. This role is expected to be exercised before commencing trial or before judgement if such need still arises.[100] Most Judges are not encouraging compromise but prepare adjudication, despite the provisions of Islamic family law and the rules of procedure of some Court's that requires judges on all times to ensure parties

[91] Oseni. U.A, Op Cit.

[92] Salim. S, Abdallah.S.F.B and Ahmad. K., *Wilayat Al-Hisba*; A Means to Achieve Justice and Maintain High Ethical Standards in Societies, Volume 6, Number 4, *Mediterranean Journal of Social Sciences*, July (2015), P, 201.

[93] Salim. S and Hak. N.A., 'Family Mediation and Sulh: An Alternative Dispute Resolution in Malaysia', Volume 7, *International Journal of Social Policy and Society*, (2010), P, 40.

[94] Oseni. U. A., Sharia Court-Annxed ADR: The Need for Effective Dispute Management in Waqf, Hibah and Wassiyya Cases in Malaysia, Volume 26, Issue 2, *International Journal of Conflict Management*, (2015), P, 126-127.

[95] See Order 66 Rules 1-19 of the Borno State High Court (Civil Procedure) Rules 2017, Order 8 Rules 1-4 of the Borno State Sharia Court of Appeal Rules 2018 and Order 12 Rules 1-2 of the Area Court Civil Procedure Rules 1968.

[96] Ibid.

[97] Ibid.

[98] Haroon. I. A. The Use of Alternative Dispute Resolution (*Sulh*) in Sharia Cases Being a paper presented on Tuesday 4th April 2017 at the National Workshop for Area/Sharia/Customary Court Judges/Directors and Inspectors of Area/Sharia/Customary Courts, Organized by National Judicial Institute, Mohammed Bello Centre, Wuse, Abuja, from 3rd-5th April, (2017), P, 19.

[99] Ibid.

[100] Order 11 Rule of the Area Court Civil Procedure Rules 1971 provided that in Muslims disputes where Muslim law is to be administered or applied the court shall continue the hearing in accordance with Muslim practice and procedure.

equality, save time and expenses to deal with cases justly and swiftly.[101] Encouraging ADR is mandatory before trial by Courts.[102]

Mediation process establishes trust and respect within the family interest and the children. To achieve positive dialogue and creative solution mediation should be encourage by judges in disputes suggesting to involve high risk of conflicting interest. Mediation by Courts may do away with animosity by preserving relationship through quicker and less expensive process.

One of the etiquettes of adjudication in Islamic family law is that even if the judge proceeds with the trail of the case, he should still consider the possibilities of mediation before final decision.[103] The judge should strive to get the dispute mediated amicably based on certain terms of agreement.[104] This is considered as part of the adjudicatory role of the judge which should be given effect as a matter of procedure. The reason for this procedural prescription is that, the human mind is unpredictable and may shift grounds at any time. That is why it is expedient to mediate even in a situation of power imbalance. Family members may abruptly decide to mediate on their own volition and bury the hatchet. Mediation is very significant and relevant in family dispute because of its delicate nature.

The facilitative roles of mediation is sometimes delegated to specialist depending on the prevailing practice in a particular locality.[105] In this situation the Court will play its role by making referral of family disputes to the family mediators or to the Court Connected mediation centre.[106] Islamic family law recognizes the unparalleled role of the Court in social transformation, dispute management, and dispute avoidance.[107] Those who serve as mediators are exercising the regular features of the Court.[108] Mediation under Islamic family law have assumed significant relevance in the modern world. Mediation is settlement of disputes in good faith. Mediation has been in

[101] By the interpretation section of the Borno State Sharia Administration of Justice Law 2000, Muslim law means Islamic law and practice as prescribed by the Holy Quran, Hadith and Islamic Jurisprudence and interpretation adopted by Maliki School of thought, all recommended for attempting *Sulh* until it fails litigation should be resorted to.

[102] Order Rule High Court Civil Procedure Rule 2017. See also Order 11 Rule 1 of the Area Court Civil Procedure Rules 1971 where it is stated that "After the provision of Order 10 have been complied with then if the case is one in which Moslem law is to be administered or applied the court shall continue the hearing in accordance with Moslem practice and procedure.

[103] Sayen. G., 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia', Volume 24(4), *The Journal In Review: A Look Back at Twenty-Five Years of the University of Pennslvania Journal of International Economic Law*, (1984), P, 907

[104] Syed Khalid Rashid, "Alternative Dispute Resolution in the Context of Islamic Law," Volume 8, Number 1, *The Vindobona Journal of International Commercial Law and Arbitration* (2004), Pp, 95-100.

[105] Quran 4; For example the referral of disputes to *Sulh* centers or appointment of arbitrators by court for both spouses. The Arbitrators or Mediators will be family members of the disputants mostly in family disputes or dispute resolution specialist of a court connected *Sulh*, panel of Neutrals, lawyers or retired judges who have knowledge, minimum standard of training experience, education and ethical conduct who will ensure quality and successful outcome.

[106] *Sulh* Door of the Borno State Amicable Settlement Corridor (BASC) The Practice Direction (2009), P, 9. However, it is to be noted that *sulh* effected by the BASC if referred by the Sharia Courts normally happen at the later stage of the trial or sometime during an appeal. This is to say that the disputants have already incurred expenses as the case has proceeded for litigation in court. Therefore, it is much more beneficial for the parties in dispute to resort to *sulh* at the early stage of the case. That is one of the reasons why in Maiduguri Metropolis, parties in dispute are directed to *sulh* by the Court.

[107] Oseni. U. A., Op Cit.

[108] Ibid.

practice before Islam and continues for over 1400 years ago with the advent of Islam;[109] unfortunately, in the contemporary period, the culture and practice of mediation is about disappearing within family members and Courts.

For access to justice to be affordable which is the central concept of Islamic family law, it may be easily achieved by encouraging the practice of mediation by judges. The act of mediation may ensure justice to all, irrespective of people's status and any generation, may curb family disintegration to a greater degree through mediation. However, if families and judges neglect encouraging mediation the contemporary and future families may suffer all sorts of disputes for lack of compromising disputes. Mediation as mechanism will effectively, contribute in reducing chaos and enmity within family members.

5. Types of Family Disputes Amenable to Settlement

Islamic family law had provided for the types of disputes that are amenable to mediation and the circumstances under which it is applicable. Islamic family law has procedures laid down in disputes that are amenable to mediation. It is required mediation that should first be resorted to and if it fails the dispute shall be heard.[110] The Prophet (saw), who made it plain that he was skeptical of judicial proceedings, which were devised by man and therefore fallible.[111] Thus, the trial process is not regarded as an ultimate truth finding mechanism that will lead to substantive justice.[112] Umar ibn al-Khattab,[113] stated thus: dispel the disputants until they settle amicably with one another; for truly adjudication leads to rancor.[114] According to the Al-Shafii school a judge has the responsibility to encourage families to attempt mediation and extricates them from judicial duties for a reasonable time to facilitate mediation.[115] If mediation fails the judge should proceed to adjudicate.[116] Al-Shafii warned the judge against judging if the decision is not plain, for it amounts to oppression.[117] The judge has the burden of ascertaining exactly where judgment should lie, no matter how long it takes.[118] Muhammad,[119] stated that Al-Qass claims that although there is an *ijma* that a judge can delay litigation if he desires mediation, but this must be with the consent of the parties.[120] Ibn Hajar al-Asqalani opined that the judge should still be pushing for mediation

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[109] Lewis. B., *'Islam and the West'*, (Oxford University Press, New York, 1993), P, 43.

[110] Wahab. A.A, Court Annexed and Judge Led Mediation in Civil Cases: The Malaysian Experience, Being a thesis submitted in total fulfilment of the requirements for the degree of Doctor of Philosophy College of Law and Justice Victoria University of Melbourne October (2013), P, 40.

[111] Othman, A. 'And Amicable Settlement Is Best: Sulh and Dispute Resolution in Islamic Law', Volume 21, *Arab Law Quarterly, (*2007), p. 65.

[112] Wahab. A.A, and Gramberg, B. V., 'Court - Annexed and Judge led Mediation in Civil Cases: The Malaysian Experience', Volume 21, Number 4, *Australian Dispute Resolution Journal*, (2010), P, 253.

[113] Raddu-l-Khusum hatta yastalahu, fa-inna-l-qada yurith al-daghain, 8 (15304): 303-304; Ibn Abi Shayba, al-Musannaf 7 (2938): 213-14.

[114] Ibid.

[115] Muhammad. I. A. S., 'Kitab al-Aqliya in Al-Umm' Volume 6, (Dar al-Kutub al-Iimiyya, Beirut, 1995), P, 312, See also Buba. T. M, Deribe. M.A and Kwagyang. G. U., Custody and Maintenance Proceedings in Arbitrating (*Tahkim*) Family Disputes under the Sharia: Challenges and Prospects, available at http://www .unimaid. edu.ng.pdf, accessed on 20/12/2017.

[116] Ul-Hassan. M. R., The Concept of Affable Settlement of Disputes in Sharia Law', Volume 7, *Malayan Law Journal*, July-December (2017).

[117] Shafi. M., '*Al-Umm'* (Dar al-Kitab al-Limiyya, Beirut, 1993), P, 312.

[118] Ibid

[119] Muhammad. A. M., The Concept of *Sulh* in Islamic Law: A Case Study of the Practice and Procedure of the Katsina State Sharia Courts, Being a Thesis Submitted to the Post Graduate School, Ahmadu Bello University, Zaria in Partial Fulfillment of the Requirement for the Award of Degree of Master of Laws, November, (2014), P, 37.

[120] Ibid

even if he knows how he should be judging the dispute.[121] Lofti stated that Al-Shirazi viewed that where there is clear evidences before the court and the judge knows the end result, it is still recommended (*mustahab*) that the judge should recommend mediation of dispute.[122] When mediation failed there is no need to persuade but the judge should go ahead to deliver the judgment (*al-hukmu lāzim*) in such cases.[123] Toffar express that Ibn Hajar al-Asqalānī further shares the popular view that the majority of jurists prefer that a judge steer parties in the direction of mediation even if the case is clear for the judge to determine the case.[124] Al-Ramahi, reveals that Ibn Farhin has given some insinuations to the judges as to when to employ the concept of mediation in disputes.[125] These include: parties have a kinship with one another, they are people of virtue and good standing in society, learned, influential and respected man in the locality with followership to avoid reach of peace; there is risk of increased hostility between them, and the nature of the case is such that it is difficult for the judge to decide. Even though Islamic family law recommends and encourages resort to mediation, it is however prohibited for the judge to force the parties to submit to mediation.

6. The Role of Mediator (*Wasaatah)* under Islamic Law:

Wasaata means Mediating and intercession,[126] or walking between the disputants.[127] The person who performs the mediation role is called *wasit*.[128] *Wasaata* is a mechanism that prioritizes relational issues, such as restoring harmony and solidarity and restoring the dignity and prestige of individuals and groups.[129] The role of mediation can be executed by an individual or delegation of elders in family disputes.[130] The delegation of elders shall include persons of high status and prestige, known for their honesty, decency, generosity and piousness.[131] The process must nonetheless reflect standards of rightness and just compensation.[132] The success of the mediation is based on the necessity and desirability of preserving and restoring ongoing relations in the

[121] Ali al-Shirazi. I. 'Al Muhadhdhab', Volume 3, (Dar al-Kutubal-Ilmiyya, Beruit, 1995), P, 404. See also Ibn Hajar al-Asqalani., 'Faith al-Bari fi Sharh Sahih al-Bukhari', Volume 5, (Dar al-Salam, Riyardh, 2000), P, 378

[122] Lotfi. E.S.T., *Ijtihad* in Twelve Suffism The Interpretation and Application of Islamic Law in the Context of Changing Muslim Society, being a Thesis Submitted for the Degree of Doctor of Philosophy Department of Theology and Religious Studies The University of Leeds September (1999), P, 164.

[123] Ibid.

[124] Toffar. A. K., Administration of Islamic Law of Succession, Adoption, Guardianship, Legacies and Endowment in South Africa, being a Thesis submitted in fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of Islamic Studies. Faculty of Arts at the University of Durban Westville, P, 40.

[125] Al-Ramahi. A., '*Sulh:* A Crucial Part of Islamic Arbitration' Islamic Law and Law of the Muslim World' (Research Paper Series) at New York Law School, P, 12.

[126] Ayla. K., 'The Influence of Sharia Norms of Dispute Settlement and International Law: The International Court of Justice, Room for Accommodation?', *The International Journal of Arbitration, Mediation and Dispute Management*, (August 2009), P, 608.

[127] Mokhtar. K. A., 'Mediation in Islamic Banking', available at https://www.academia.edu, accessed on 17/01/2017.

[128] Sweify. M., 'The Art of Using Power as a Tool of Influence in Mediation', Volume 27, Number 4, *Australian Dispute Resolution Journal*, November (2016), P, 237.

[129] SirajuDeen. A., 'Mediation in Islamic Jurisprudence', available at https://www.academia.edu, accessed on 17/01/2017.

[130] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunity', available at https: //www .ciarb.org, accessed on 17/01/2017.

[131] Cunningham. R. B and Sarayrah. Y.K., '*Wasta: The Hidden Force in Middle Eastern Society*', 1st Edition, (Praeger Publication, Westport C.T, 1993), P, 109.

[132]Sirajodeen. A., 'Mediation in Islamic Jurisprudence', available at https://www.academia.edu, accessed on 07/01/2016.

community and peace keeping.[133] The independent mediator must then seek to achieve mediation by proposing solutions to the family members with assisted negotiation.[134] Negotiation may be thought of as communication for agreement.[135]

The disputing parties should negotiate and talk as family dispute being deeply embedded in miscommunication, require rigorous knowledge of communication to reestablish the relationship.[136] The parties also should ensure that appropriate interventions and responses which will facilitate progress during the mediating process.[137] The mediator should encourage parties to negotiate for an equitable outcome and has to be completely neutral by avoiding making any act that portrays a sign of biasness but allow the parties to negotiate[138] and place the power of decision making in the hands of the disputing family members.[139] It is an excellent tool for the settlement of disputes and for solutions that are invested in the parties who take part in the mediation.[140] Allah said in the Qur'an thus:

> *"Say O believers, be you securers of justice, witnesses of Allah, even though it be against yourselves, and your parents and kinsmen, whether the man be rich or poor".*[141]

Keshavjee said that it was reported by Hazrat that Ali B. Abi Talib (the fourth Caliph of Islam),[142] stated that:- He extolled the virtue of dialogue and the value of compromise. He likened the assistance given to solve human disputes to prayer and encouraged mediation settlements within the principles of the ethics of the faith.[143]

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[133] Cornet. W and Lendor. A., 'Matrimonial Real Property Issues On-Reserve', available at http://apr.thomp.sonbooks.com, accessed on 17/01/2017.

[134]Drew. R., 'Defining Mediation: Voluntary Assisted Negotiation', available at http://www.mediate.com, accessed on 07/01/2017. Hence, mediation is assisted communication for agreement. In the legal parlance, it signifies a process in which the parties to a dispute, with the assistance of a third party, identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. It is a benevolent and non binding procedure to end a dispute characterized by one or more persons intervening in a dispute either of their own initiative or at the request of one of the parties.

[135]Abdul Malik. O, etal, 'The Role of *Masjid* in Matrimonial Dispute Settlement (MDS) in Nigeria: An Assessment of the Sharia Concept of *Sulh*', available at http://worldconferences.net.pdf, accessed on 09/01/2017.

[136]Campbell. M., 'Its Not Communication, It's Ex Management', available at http://www.huffingtonpost. com, accessed on 07/01/2017.

[137] Zmorenski. D., 'How to Resolve Work Place Conflict', available at http://www.reliableplant.com, accessed on 17/01/2017.

[138] Keshavjee.M, The Philosophy of Mediation: Questions and Responses from Diverse Parts of the World and Especially from Islamic Tradition, available at https://www.scribd.com, accessed on 10/01/2017.

[139]Irani.G.E., Islamic Mediation Techniques for Middle East Conflicts, available at http://www.mediate.com, accessed on 09/01/2017.

[140]Yeak Hui. D. T and Mohammed.A.A, Mediation/Conciliation in the Malaysian Courts: With Emphasis on Settlement of Labour Disputes, available at http://www.asiapacificmediationforum.org, accessed on 10/01/2017.

[141] Quran 4:135

[142] Keshavjee.M, Arbitration and Mediation in The Shi'a Imami Ismaili Muslim Community, available at http://iis.ac.uk, accessed on 10/01/2017.

[143] Ibid.

Mediating parties may select a mediator of their own choice;[144] this is common in family dispute and marriage contracts.[145] The parties may also select a single mediator,[146] or a judge for his ability to successfully settle disputes.[147] And the parties may seek an opinion from a respected legal expert (*mufti*).[148] Kazemi stated that according to a Prophetic tradition, the reward for mediating between quarrelling groups is equal to that of prayer.[149] This ethic is highly commended in Hazrat 'Ali's exhortations.[150]

Any family dispute should be settled as early as possible, for their continuance within the family may culminate in ugly events or at least perpetuates some sort of hostility and malice between them.[151] Allah in the Holy *Quran* allowed it thus: "Have fear of Allah and settle your differences".[152] The Prophet put into practice this directive and mediated among his Companions, and accepted mediation between Muslims and non-Muslims, so also His Companions have done the same in their time of leadership.[153] Under an agreement known as the Charter of Medina, the Prophet (saw) was empowered to govern the city and acts as a judge, arbitrator and mediator for its citizens.[154] His continued revelations and actions during this time formed the first Islamic legal rules and precedents,[155]

The inspiration for the mediation of dispute among Muslims was to sustain and strengthen the spirit of community through harmony and the spirit of brotherhood.[156] Allah further stated in the Holy Qur'an, that Allah (swt) proclaimed thus;

> *"If two parties among the believers fall into a quarrel, make ye peace between them: ....The believers are but a single brotherhood: so make peace and reconciliation between your two (contending) brothers..."*[157]

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[144]Deutsch. M, etal, The Handbook of Conflict Resolution, Theory and Practice, available at http://profkaminskisreadings.yolasite.com.pdf, accessed on 10/01/2017.

[145] Khoury. N, Commercial Mediation in Africa and Islamic Law, available at http://www.businessconflict management.com, accessed on 11/01/2017.

[146] Yousef. N. A, Mediation of International Disputes; The Islamic Perspective, available at http://www.slide share.net, accessed on 10/01/2017.

[147] Bondy. V and Doyle. M, Mediation in Judicial Review: A Practical Handbook for Lawyers, available at http://www.nuffieldfoundation.org.pdf, accessed on 11/01/2017.

[148] Islam. M. Z, Provision of Alternative Dispute Resolution Process in Islam, *Journal of Business and Management*, Volume 6, Issue 3, November-December (2012), P, 34.

[149]Spencer. D., 'Identifying All Members of a Class Action Prior to Mediation and Mediation/Arbitration Media Watch', Volume 27, Number 4, *Australian Dispute Resolution Journal*, November (2016), P, 210.

[150]Kazemi. R.S, 'Understanding Al-Salat'n Nabi Through Imam Ali's Teachings on The Holy Quran', A Paper Presented At the Annual Imam Ali's Seminar, on 5th July 2015 at Rudolf Steiner House 35 Park Road, London, P, 46. Do not separate yourself from your brother unless you have exhausted every approach in trying to put things right with him… Do not be harsh with your brother out of suspicion, and do not separate from him without first having tried to reason with him… Seek reconciliation with your brother, even if he throws dust at you

[151] Ayatullah. M., 'Arbitration in Islam', available at https://smma59.wordpress.com, accessed on 17/01/2017.

[152] Quran 8:1

[153]Kamil. I. M., 'The Rights of Non-Muslims in Islam: An Islamic Basis', available at http://www.islamreligion.com, accessed on 11/01/2017.

[154] Coulson. N. J., '*A History of Islamic Law*, (Edinburgh University Press, 2006), P, 11.

[155] Ibid.

[156] Keshavjee.M.M., 'Arbitration and Mediation in the Shi'a Imami Ismaili Muslim Community', A Paper Presented at the 4th International Conference of the World Mediation Forum, May 10, 2003, Sheraton Hotel and Convention Centre, Buenos Aires, Argentina, P, 10.

[157] Quran 49, verses 9 and 10.

The concept of mediation and harmony is also practiced by the Prophet (saw) whose life is filled with examples of mediated solutions to human problems,[158] and the Meccan's had great admiration for his wisdom.[159] It is reported that the Prophet successfully mediated a dispute between a creditor and a debtor by suggesting that the creditor accept half the money owed to him if the debtor would immediately pay in full rather than in installments.[160] The implementation of mediation by the Prophet (saw) could be seen in the case of the making of the Treaty of *Hudaibiyah*.[161]

The *Madinah* Constitution which was enacted by the Prophet (saw), provided for provisions on mediation to settle any disputes emanating from the groups of people in *Madinah*.[162] The prophet also says: "Intercede so you will be rewarded."[163] It was also reported in Sahih al Bukhari about the dispute between two landowners who used the same stream for irrigation. The plaintiff had the legal right to the exclusive use of the stream. The Prophet nevertheless mediated by suggesting reconciliation whereby the defendant could have the use of any excess water not needed for irrigation of plaintiff's land. Only when the defendant refused this compromise solution did the prophet give judgment in accordance with plaintiff's legal right.[164]

Mediation in Islamic law is stronger and safer than binding arbitration and litigation. This is because judges and arbitrators who make an incorrect decision as well as any person who benefits from that decision will receive severe punishment in the afterlife.[165] The Prophet was reported to have said: "there are three types of judges: One in heaven and two in the fire,"[166] and also: "I am only a man and when you come before me it may happen that one of you might be more eloquent in his pleadings and that, as a result, I adjudicate in his favor according to his speech. If it so happens and I give an advantage to one of you by granting him a thing which belongs to his opponent, he had better not take it because I would be giving him a portion of hell."[167] Philips related that it was further reported that Abd-Allah ibn-Faruk, refused a judicial appointment in the city of Qairawan. He was persuaded to reconsider only when the city guards put him in chains and

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[158] Abdelhak. M, The Muslim Society During the Life of the Prophet Mohammed and After His Death, in Tiliouine. H and Este. R.J, (ed), *The State of Social Progress of Islamic Societies, Social, Economic, Political and Ideological Challenges*, (The Springer International Publishing, Switzerland, 2016), P, 5. The Prophet played a significant role when a dispute arose over the placing of the Black Stone (Hajar al-aswad) into the building, a serious disputed was averted by the Prophet's prudent action in giving all four leaders an equal honour of placing the stone.

[159]Sayen. G, Arbitration, conciliation, and the Islamic legal tradition in Saudi Arabia, *International Journal of Law*, Volume 24, Issue 4, (2014), P, 911. The Prophet (saw) had mediated several disputes even before his call to prophet-hood. At the earliest time of the Holy prophet's life time the Meccan's had great admiration for his wisdom, intelligence and uprightness and in critical moment they would seek his advice and refer their dispute to his judgment and would gladly accept his decision, because of this charismatic attitude, referred to him as *al amin*.

[160]Ibrahim. R.L, BIMA Conciliation-Arbitration-Mediation in Islam-FAHIM-08Jan, available at http://www.bimagroup.org, accessed on 11/01/2017.

[161]Khan.M.M, Sahih al-Bukhari, English Translation, Vol 3, para 858, (Lahore: Kazi Publications, 1986), p. 536. It was narrated by Al-Bara Bin Azid that when Prophet (saw) made the peace treaty with the people of Hudaibiyah, by erasing his name on a document when objected by the pagans. The pagans asked not to write 'Muhammad, Allah's Apostle, and then the Prophet (saw) himself erased and later made peace with them.

[162]Ahmad. K, A., Short Note on The Medina Charter, available at http://www.constitution.org, accessed on 11/01/2017.

[163] Quran 21:28.

[164] Khan. M.M, Sahih Al-Bukhar, Arabic-English, Volume VIII, No. 871, Dar Al Arabia, Lebanon, (1979), P, 2344.

[165]Hunt. C., 'Mediate, Arbitrate or Litigate?' available at https://gbr.pepperdine.edu, accessed on 08/01/2017.

[166]Coulson, N. J., 'History of Islamic Law', available at https://www.rwi.uzh.ch.pdf, accessed on 08/01/2017.

[167] Ibn. Anad. M., 'Al-Muwatta/Book of Judgment', (Dar al-Gharab al-Islam, 2013), P, 234, also see Olik.M and Cap. M, 'Comparison of Settlement Efforts by Arbitrators',Volume 82, Number 3, *The International Journal of Arbitration, Mediation and Dispute Management*, August (2016), p, 250.

threatened to throw him from the mosque roof. Nevertheless, he was reduced to tears when approached by his first litigants and successfully persuaded them to settle rather than ask him to make a judgment in their case.[168]

In Islamic law, a mediator and their method are chosen based on respect and knowledge of the law. Finally, a mediator must always take relevant Islamic law into consideration, both that which is legally binding and that which is merely recommended.

7. Essential Elements of Mediation under Islamic Law:

For *Sulh* in any family dispute to be enforceable and recognized under Islamic law, it must consist of:[169]

a. *Al-Muslih Lahu* (one who makes a declaration of claim):
b. *Al-Muslih Alaihi* (one against whom the claim is declared):
c. *Al-Muslih Anhu* (subject -matter of dispute):
d. *Al-Muslih Bihi/Badl al–Sulh* (the object offered for the mediation /Consideration):
e. *Al-ijab* (Offer):
f. *Al-Qabul* (Acceptance):

7.1. *Al-Muslih Lahu and Al-Muslih Alaihi*: (one who makes a declaration of claim)

The two disputing family members (*al-Masalih*) should possess the legal capacity to surrender their rights, and not otherwise.

7.2. *Al-Muslih Anhu* (Subject-Matter of Dispute):

The subject-matter in the family dispute should be property (*maal*) of value or usufruct (*manfa'a*). It is desirable to be well known, although to some jurists, it needs not be known where it may not be required to be received or delivered. Al-jahshiari said according to Abu Hanifa, if its delivery will not be required, having its knowledge will not constitute a condition.[170] The subject matter shall not be unlawful and a right of an individual (*haqq al-Ibad*).

7.3. *Al-Muslih Bihi* (Consideration):

This is the object or thing tangible or otherwise upon which the disputing family members to the settlement agree to be given as consideration in place of the right forgone by way of ADR. It must be something valuable, beneficial and capable of delivery, when so required.[171]

7.4. *Al-Ijab and Al-Qabul* (Offer and Acceptance):

Like any other contract under Islamic law, offer and acceptance are essential ingredients of ADR. The offer as well as the acceptance may be conveyed in any expression that illustrates the mutual consensus of the family disputants.[172]

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[168]Phillips. F. P., 'Muslim Law: Negotiation and Mediation in a Different Context', available at http://www.Business.conflictmanagement.com, accessed on 08/01/2017.

[169] Haroon. I. A., 'The Use of Alternative Dispute Resolution', Being a Paper Presented at the National Workshop For Area/Sharia/Customary Court Judges/Directors and Inspectors of Area/Sharia/Customary Courts, Theme Enhancing Administration of Justice in the Area/Sharia/Customary Courts, Presented at the Mohammed Bello Centre, Wuse Abuja on Tuesday 4th April (2017), P, 12.

[170]Al-Jahshiari., 'KItab al-Wuzaraa (The Book of Ministers)', available at http://www.asiapacificmediationforum.org, accessed on 06/01/2017.

[171] Ibid.

[172] Haroon. I. A., Op Cit.

8. Advantages of *Sulh* under Islamic Law

Islamic law is based upon the desire for preventing harm and attracting beneficial interests to family and it establishes principles that permit everything of interest to family members that do not cause harm.[173] Thus, the principal purpose of ADR is to end dispute and hostility among family members to conduct their relationships in peace and amity.[174] There are numerous advantages, benefits and usefulness of ADR which can be implied from the processes involved, these include the bringing about love between family members who are in dispute without sacrificing the limits of Islamic law.[175] In addition to some of the advantages enumerated above, mediation brings about love, mutuality and oneness.[176] Mediation is rewarding and safer than adjudication both for the judges and litigants, according to Muhammad this is buttressed by the Prophetic tradition that says: anyone who is made a judge has surely been slaughtered without a knife.[177] Judges are divided into three, one will go to paradise, while the remaining two will end up in fire of hell.[178] This is because while performing the sacred duty of adjudication judges must be extra careful to fulfill all righteousness and not otherwise. The Holy Prophet was reported to have said that: The best conducts of any mankind are prayers, settling of disputes and good manners.[179] Mediation saves time: unlike litigation wherein certain practices and procedures must be followed. It is quick and timely, enhances and restores cordiality, mutuality, and forbearance among family members. It can be concluded that mediation is cost saving, a timely dispute settlement, helps in the reduction of backlog of Court cases, leads to a satisfactory result or outcome, ensures access to justice and frees up judicial resources.[180]

9. Conclusion:

The determination of family disputes is among the most difficult decisions that can be made. Judges in determining cases are strongly encourage under Islamic family law to encourage mediation instead of litigation. This is because adversarial process of family dispute resolution is quite tedious with unforgettable memories. Mediation efforts by family members and contributions by some persons are required for the positive achievement of an amicable settlement of family disputes. Mediation proves to be more independent and more accessible by any family member. Mediation process is less bureaucratic as it has no rules of procedure. The process is very attractive to family members because of its nature which offers cheaper, faster and within family compound out of court settlement. Encouraging and continued successful mediation achieved in family disputes at the family, community or court annexed centers should become a catalyst towards encouraging more similar ADR in the future. Therefore, mediation should be formally recognized and strengthened as the best and mandatory modes of settling family dispute. This can be achieved through the medium of workshops, seminars and other educating programmes that should be

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[173] Ibn Taymiyyah, A mad ibnʿAbdal-alīm, Collections of Fatwā of Ibn Taymiyyah al-anbalī, Volume 11, (Dar Kutb al-Ilmiyyah), (1985), P 343

[174] Keffi, S. U. D. Op Cit

[175] Usman. A. M., 'Matrimonial Arbitration Under Islamic Law: An Overview of Procedure and Practice in Area Court', in Aliyu. A. A, (ed), *Alternative Dispute Resolution and Contemporary Issues*, (M.O. Press and Publishers, Nigeria, 2010), P, 148.

[176] Quran 4:35

[177] Muhammad. S., 'Trying to Avoid being Appointed as a Judge (Saalil-al-munaijid)', available at http://islamqa.info/en/95366, accessed on 31/05/2018.

[178] Abu Dawud and Ibn Majah.,Sunnah Abu Dawud The Third Correct Tradition of the Prophetic Sunnah, Volume 5, Dar Al-Kotob Al-Ilmiya, (2008), P,100.

[179] Naeem. M and Khan. M.H., Alternative Dispute Resolution from the Perspective of Islam, Volume 5, Issue 1, *Acta Islamica*, Jan-June (2007), P, 4.

[180] Ibid.

organized for judges, lawyers and other stakeholders within Muslim communities. This would facilitate the application of mediation to acquaint and give them reorientation about the essentials and essence of mediation. Judges, lawyers, and stakeholders must bring to the notice of family disputants the need to have the option to mediate family disputes amicably outside Court without any party recording a loss.