

## ALTERNATIVE DISPUTE RESOLUTION IN ISLAM: AN ANALYSIS

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*“O you who believe! Stand out firmly for Allah as witnesses to fair dealings and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just, that is next to piety. Fear Allah, indeed Allah is well acquainted with all that you do.”*

*Quran: Chapter 5 Verse 8*

### Abstract

The purpose of this paper is to look at methods of dispute resolution in Islam which is nearly two thousand years old. It is commonly believed that the Alternative Dispute Resolution has emerged and originated from the west from past few decades. On the contrary, it is claimed by many Islamic Jurist that the ADR processes like Negotiation, Mediation, Med-Arb, and Arbitration are practiced in Islam from 1400 years and are mentioned in holy Quran. The present paper is an attempt to analyze practice and concept of Alternative Dispute Resolution from an Islamic theological perspective. In light of the clear foundation for these guiding principles to govern Islamic dispute resolution, this chapter will outline the foundations for Alternative Dispute Resolution in Islam and assess the theory and practice of *sullh* and taken in contemporary times.

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### I Introduction

AS THE world is getting smaller due to continuous exchange of information and knowledge and boundaries between cultures, religion and civilisations are gradually getting collapsed, the study of cross-cultural and multi-religious practice is of profound need. The study of any religion starts with detailed analysis of its customs and traditions. Customs and traditions in the religion have

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played a very vital role in the development of the society and framing of laws. Customs and practices of the people, which are unique in every society, help us in forming ideas about their culture and nature of life. These customs and practices themselves are considered as one of the major sources of law. In resolving disputes, the customary methods have proved to be very effective and they are so sacrosanct that few of those have been incorporated in the formal legal system. In Islam, the prime approach to conflict resolution is based on religious values, traditional rituals of reconciliation and principle of coexistence. These mechanisms form the basis of Alternative Dispute Resolution (ADR). The present research is aimed to trace the existence of ADR in Islamic culture and traditions. In every society, as Galanter observes, people are largely averse to going to courts or formal state forums for settlement of their disputes and most of their disputes are resolved in a variety of extra-judicial ways, including by negotiation, mediation, and arbitration. Muslim society is also no exception where ancient tradition of adjudication by a judge (qadi) co-existed and intersected with a range of complementary dispute resolution processes. The rich and elaborate history of complementary dispute resolution in the Islamic world has led some writers to postulate that the Islamic dispute resolution processes influenced the birth of ADR in the west,<sup>1</sup> or that the Islamic model is one from which the west should learn.<sup>2</sup>

## II Historical background of ADR in Islam

### Advent of Islam and the period of Prophet Muhammad

Islam for those who practice it is a complete way of life: a religion, an ethic, and a legal system all in one. The meaning of the expression Islam is submission to God, who is the source of authority and the sole sovereign law giver.<sup>4</sup> The birth of Islam as a religion can be traced back to early 7<sup>th</sup> century. The Prophet was the son of Abraham and considered as a descendant of Ishmael. It is believed that Prophet Muhammad had received the revelation and declared himself

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<sup>1</sup>Kamal Halili Hassan, "Employment Dispute Resolution Mechanism from the Islamic Perspective" 20(2) *Arab Law Quarterly*, 181(2006).

<sup>2</sup>*Ibid.*

<sup>3</sup>Allamah Sayyid M.H. Tabatabaia, *The Quran in Islam: Its Impact and Influence on the Life of Muslims*, 86 (1987). Quoted in Arthur J. Gemmill, *Commercial Arbitration in the Islamic Middle East*, 5 *Santa Clara Journal of International Law* 169 (2006).

<sup>4</sup>*Ibid.*

the Messenger of Allah.<sup>5</sup> To regulate the conduct of Muslims, prophet revealed the Will of Allah in Shariah. Shariah is a code of obligation and has a guided ethics and duties for every Muslim. It is a legal system not based on the code of law but rely on principles.<sup>6</sup> The term "Sharia" literally means "road", "path" or "way" to a watering hole. The *Sharia* is considered to be divine law and it is generally perceived that its origin is divine and its focus is faith.<sup>7</sup> Quran and the *Sunna* are considered to be two principal sources of *Sharia*, followed by *ijma*, *qiyas*, and *ijtihad*. Quran is the principal source of reference for the Islamic followers and it is also used for interpreting other sources of *Sharia*. It contains 6,235 verses of legal, moral, devotional and religious content.<sup>8</sup> *Sunna*, the second important source is the collection of tales of the life and actions of Prophet Muhammad. The compilation of Prophet Muhammad's teachings, saying etc. by Islamic scholars<sup>9</sup> are preserved in the form of *Hadith* in *Sunna*. It was said by The Prophet once that "the Muslim community would never agree upon an error". This statement refers to consensus and the third source of *Sharia* i.e., *ijma*. It provides for the consensus amongst entire Muslim community and authoritative source for determining the morality of acts.<sup>10</sup> In situations where consensus cannot be reached *Qiyas*, the fourth source fills in gaps as a tool for interpreting morality of actions.<sup>11</sup> Apart from all four sources, the individual juristic reasoning is also used in interpreting *Sharia* known as *ijtihad*.<sup>12</sup> The two schools of Islam *Shia* and *Sunni* interpret the contents of *Sharia* in diverse ways.

The rule for dispute resolution in Islam is a combination of both authoritative sets of rules and regulations and general principles. The purpose of these rules is to provide the environment for

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<sup>5</sup> The revelation is also known as *Wahy* and the *wahy* recorded in the Quran constitutes the first source of Shariah.

<sup>6</sup> The primary source of Sharia is Quran. However, there are secondary sources also: like Sunna, (binding authority of the dicta and decisions of the Prophet Mohammed), the Ijma (consensus of the community of Islamic scholars), the Qiyas (analogical deductions and reasoning of the Islamic scholars with respect to the foregoing). Since Sharia is based on principles which is why it is subjected to different interpretation by different group of Muslims.

<sup>7</sup> Mohamed M. Keshavjee, *Islam, Sharia and Alternative Dispute Resolution: Mechanism for Legal Redress in the Muslim Community*, 57 (I.B. Tauris & Co. Ltd 2013).

<sup>8</sup> Jeremy Grunert, "How do you Solve a Problem Like Sharia Award v. Zirix and the Question of Sharia Law in America" 40 *Pepperdine Law Review* 695 (2013).

<sup>9</sup> Some of the scholars are: Ibn Hajar al-Asqalani, Muslim ibn al-hajjaj, Amin Ahsan Islahi, Shabbir Ahmad Usmani etc.

<sup>10</sup> D. Andrew Yost, "A Waterspring in the Desert: Advancing Human Rights within Sharia Tribunals, Suffolk" 35 *Transnational Law Review* 101 (2011).

<sup>11</sup> Erin Sisson, "The Future of Sharia Law in American Arbitration" 48 *Vanderbilt Journal of Transnational Law* 891 (2015).

<sup>12</sup> *Ibid.*

dispute resolution.<sup>13</sup>In Islamic tradition, the regular courts and mechanism for ADR are essentially intertwined and it is also believed that legal system in countries who have relied on a traditional model of dispute resolution are more efficient than those who opted departure from Islamic spirit.<sup>14</sup> It is believed that in Islam ADR has religious sanctity because its practice is originated from the Quran and was embraced from the time of the Prophet.<sup>15</sup>The idea of ADR is allowed in Islam except where it makes a thing *haram* as *halal* and *halal* as *haram*, which means any action which tends to turn a permitted work as prohibited or prohibited work as permitted.<sup>16</sup> A famous letter which the second caliph of Islam-Umar bin Khattab- wrote to Abu Musa Al-Ash'ari after appointing him as *qadi* spelled out the wide span of coverage of amicable settlement of disputes to guide him while deciding cases.<sup>17</sup> Even before this letter, the validity of ADR in Islam can be derived from the verse of Quran, which says:<sup>18</sup>

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

In the same line the another *ayat* of the Quran says:<sup>19</sup>

If two parties among the believers fall into a quarrel, make ye peace between them...with justice, and be fair; for Allah loves those who are fair and just.

The preference of Prophet for amicable settlement is supported by other literature also. It is also quoted that he expressed his desire to even condone the exaggeration or misstatement if it is made for the purpose of *sulh*. The *hadith* is as follows:<sup>20</sup>

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<sup>13</sup> Johnston, Rizzo, R. "A Return from Tradition to Reform: The Sharia's Appeals Court Rulings on Child Custody (1992-2001)" *Fordham International Law Journal* 597 (2003).

<sup>14</sup> *Id.* at 603.

<sup>15</sup> Elana Levi-Tawil, *East Meets West: Introducing Sharia Into the Rules Governing International Arbitrations at the BCDR-AAA*, 12 *Cardozo Journal of Conflict Resolution* 609 (2010-2011).

<sup>16</sup> Syed Khalid Rashid, *Peculiarities Religious Underlining of ADR in Islamic Law*, paper presented in Asia Pacific Mediation Forum, Australia, 16-18 June, 2008.

<sup>17</sup> The exact words of Umar are: "All types of compromise and conciliation among Muslim are permissible except those which make *haram* anything which is *halal*, and a *halal* as *haram*". The letter is still preserved for its authenticity, which is established with carbon dating process.

<sup>18</sup> Quran, Surah Al-Hujurat (49), *ayat 10*.

<sup>19</sup> Quran, Surah Al-Hujurat, (49), *Ayat 9*.

Narrated Um KulthumbintUqba that she heard Allah's Apostle saying, "he who makes peace or *sulh* between the people by inventing good information or saying good things, is not a liar.

Throughout the Prophet Muhammad's life, there are numerous stories which reflect his interest in settling disputes in an amicable manner.<sup>21</sup>

In another verse Allah states in the holy Quran:<sup>22</sup>

*If you judge in equity between them, for Allah loves those who judge in equity*

The review of various commentaries on Islamic culture reflects that they have a greater focus on the Islamic judicial institution of the *qada* (court), and the role of the *qadi* (judge). Modern perspectives on the traditions of amicable settlement through the process of mediation or conciliation known in Islam as *sulh* and the process of arbitration commonly known as *tahkim* are however evident and their contribution to Islamic justice is increasingly acknowledged.<sup>23</sup> It is argued by many<sup>24</sup> that in Islam it is an assumption that adjudication is considered to be a superior mechanism for dispute resolution. However, neither the Quran nor Hadith stresses the virtue or necessity for *quad*.<sup>25</sup> On the other hand, unambiguously both Quran and Hadith uphold the values of conciliation, mediation etc over the asserting legal rights.<sup>26</sup>

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<sup>20</sup>*Sahih Al Bukhari*, Eng. 3 Translation by M. Muhsin Khan, 533 (Dar Al Arabia, Beirut, n.d.)

<sup>21</sup> In the reconstruction of the Holy Kaaba in Mecca, a serious quarrel arose over the setting of the Hajr-e-Aswad-the black stone in one corner of the Kaaba. Each one of the four leaders of the Quraish tribe that was in dispute over the issue was eager to have his honour and ensure he was not outdone by others. There was an impasse. They could not agree. One of the leaders suggested that the first person to arrive the next morning could be one to place the Hajr-e-Aswad. As it transpired, the Prophet Muhammad was the first person to arrive. Not wishing to have the privilege himself, he asked the leaders of the four tribes to spread a sheet of cloth and place the Hajr-e-Aswad on it, asked the leaders to hold it at four ends and together raise it. Thus a serious conflict was avoided by the Prophet's prudent action. Ifzal Akhtar, *Alternative Dispute Resolution and Islamic Thought*, available at: <http://theislamicbanker.blogspot.in/2011/11/alternative-dispute-resolution-adr-and.html> (last visited on June 10, 2017).

<sup>22</sup>Ch. 5 Verse 42.

<sup>23</sup> E. Ann Black, Hossein Esmaeili, Nadirsyah Hosen, *Modern Perspectives on Islamic Law*, 154 (UK and Northampton, MA: Edward Elgar, 2013).

<sup>24</sup>Othman, *And Amicable Settlement is Best: Sulh and Dispute Resolution in Islamic Law* 21 *Arab Law Quarterly*, 64 (2007).

<sup>25</sup>*Id.* at 68.

<sup>26</sup> Ann Black and Jamila Hussain, *Responding to the Challenge of Multiculturalism: Islamic Law Courses in Law School Curricula in Australia*, 9 *The Flinders Journal of Law Reform* 205 (2006).

### III Process of ADR in Islam

#### Sulh

In Islamic jurisprudence, the concept of *Sulh* which includes compromise, settlement or agreement between parties is the oldest practice of dispute resolution. Its purpose is to end hostility and conflict among believers so that they may continue their peaceful relationship in society.<sup>27</sup> Its nature is like private settlement, wherein most of the cases parties among themselves settle a dispute without recourse or interference by the third party. The strength of *sulh* is its flexibility and its process includes negotiation, mediation or conciliation. The expression *sulh* confer both linguistic<sup>28</sup> and legal<sup>29</sup> meaning in Islam. The textual basis comes from Quran and in the words of The Prophet ﷺ Making a settlement between Muslims is permitted, except one which legalizes what is prohibited or prohibits what is legal.<sup>30</sup> It is evident from the reporting of Hadith that Prophet Mohammad supported and encouraged people to settle their dispute through *sulh*. In one of the Hadith,<sup>31</sup> it is reported: “*there is a sadaqah to be given for every joint of the human body and for every day on which the sun rises there is a reward for the sadaqah for the one who establishes sulh and justice among the people.*” In addition to verses from Quran, 40 articles from article 1531 to article 1571 of the Ottoman Code *i.e., Mejelle* includes provisions for *sulh*, it describe in detail the procedure for *sulh*.<sup>32</sup> In Islam various types of *sulh* are recognized depending on the relationship of the parties, it includes Sulh-Permissible or just Sulh, Disapproved, Unfair Sulh, and Hanafi Division of *sulh*. The ground rule for all types of *sulh* under Islamic law is that any compromise should not be made in the domain of *huquq Allah*<sup>33</sup> which includes *hudud* punishment, *kaffarah*, *zakat* etc and it does not violate any provision of *shariah*.<sup>34</sup>

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<sup>27</sup>Iqbal, Walid, *Dialogue and the Practice of Law and Spiritual Values: Courts, Lawyering and ADR: Glipses into the Islamic Tradition*. *Fordham Urban Law Journal* 1035 (2001).

<sup>28</sup> Linguistic meaning of *sulh* in Islam is ending a dispute.

<sup>29</sup> Legal meaning of *sulh* is ending a dispute through a contract.

<sup>30</sup>Quran 4:128.

<sup>31</sup>Sahih Al-Bukhari Hadith No. 3.857.

<sup>32</sup>*Supra* note 27.

<sup>33</sup>Rights of Allah.

<sup>34</sup> Md. Zahidul Islam, *Provision of Alternative Dispute Resolution Process in Islam*, 6 *IOSR Journal of Business and Management* 31(2012).

### **Tahkim (Arbitration):**

The recognition of arbitration or amiable composition in Islam is in practice since more than a thousand years, before the adoption of French law or UNCITRAL model law.<sup>35</sup> Islamic law allows resolving the disputes between its followers through arbitration if they are unable to reach an amicable solution of their private disputes.<sup>36</sup> It is reported in the various literature that Prophet Mohamed also practiced and recognized arbitration.<sup>37</sup> The arbitration derived its textual basis from the Quran, *“and if ye fear a breach between them (the man and wife), appoint an arbitrator from his folk and an arbitrator from her folk.”*<sup>38</sup> This verse of Quran substantiates that arbitration is a recognized practice in Islam. In Islamic arbitration, any prior agreement or express written authorization is not required for initiation of amicable composition or arbitration.<sup>39</sup> In many Muslim nations for commercial matters between states-to-state, corporations, banks, state agencies, investment *etc.*, international arbitration on the basis of applicable Muslim law is used for the settlement of cross-border disputes.<sup>40</sup> The method of arbitration in Islam is not limited to economic, social, religious and political affairs but it could be applied to private law as well, but it is limited to rights or obligations to specific individuals and not extended to physical punishment or any kind of retribution.<sup>41</sup> However, studies have shown that in the field of family law, there is more mediation than arbitration.<sup>42</sup> Further, it is also essential to have the assent of the parties before issuance of a decision by the arbitrator and any of the party have right to withdraw from the arbitration before the pronouncement of award.<sup>43</sup> The procedure for *tahkim* is considered to be less technical, informal, cost-effective and expeditious as compared to normal

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<sup>35</sup>Ahmed Moussali, from Islamic birthplace -Arabian Peninsula states that arbitration dates back centuries to the pre-Islamic societies.

<sup>36</sup>*Supra* note 34.

<sup>37</sup> Prophet Mohammad also acted as an arbitrator in several occasions for resolving disputes between individual and tribes. The famous political case for arbitration was between Caliph ‘Ali bin Abi Talab and ‘Muawya bin Abi Sofian.

<sup>38</sup> Quran verse 4:35.

<sup>39</sup>*Supra* note 16.

<sup>40</sup>International mechanism includes UNCITRAL, ICSID, Permanent Court of Arbitration *etc.*

<sup>41</sup> Musa Furber, *Alternative Dispute Resolution: Arbitration & Mediation in non-Muslim Regions*, Tabah Analytic Brief, No. 11 (2011).

<sup>42</sup>Sukhsimranjit Singh, Religious Arbitration and its Struggles with American Law & Judicial Review, 16 *Pepperdine Dispute Resolution Law Journal* 360 (2016).

<sup>43</sup> Earlier the Prophet was considered to be divine arbitrator. After him, arbitration did not lose its significance and it was transferred to the entire community, *Ummah*, which was to confer it to the new leader, the *caliph*; since no one after Prophet inherited his power its interpretation is always questioned by fundamentalist.

law of arbitration. However, for *tahkimit* is pre-requisite that dispute must have already arisen,<sup>44</sup>future disputes cannot be arbitrated.<sup>45</sup>

### **Med-Arb**

Med-Arb is another way of ADR practiced in Islam. It derived its recognition from Verse 35 of Surah al-Nisa<sup>46</sup> and it is combination of both *sulh* and *tahkim*. It is expected from the arbitrator to first mediate between the parties and in case of failure of mediation he should proceed for arbitration. Med-Arb in Islam is considered to be unique feature and it involves the consensuality of mediation process along with the finality of arbitration.<sup>47</sup> The entire procedure of dispute resolution involves two steps, it starts with mediation as primary approach and gives finality to the outcome of the procedure given through arbitration.<sup>48</sup> This process is different from *sulh* and *tahkim* due to its unique nature and mixed procedure.

### **Ombudsman (Muhtasib)**

In Islam practice of ombudsman is present from the time when Al-Quran came from Allah and it originates from Quran verse 3.110: *“let there arise out of you a band of people inviting to all that is good enjoining what is right and forbidding what is wrong; they are the ones to attain felicity.”* It is roughly said that this practice is 1400 years old. The charge of first two ombudsmen in *Makkah* and *Madinah* was given to Umar bin Khattab and Sa‘ad Umayyah respectively by The Prophet himself.<sup>49</sup> The ombudsman or Muhtasib is used in the matters of hisab, religious activities, matters related to salat, municipal affairs etc. In due course of time, the institution of ombudsman has become an integral part of the administration of justice in Islamic dispute

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<sup>44</sup>Art. 1847-1850 of Ottoman Civil Code (Mazellah), which is based on Islamic law says that future disputes cannot be arbitrated in Islam.

<sup>45</sup>Syed Khalid Rashid, *Peculiarities & Religious Underlining of ADR in Islamic Law*, paper presented in a conference “Mediation in the Asia Pacific: Constraints and Challenges” organized by Harun M. Hashim Law Centre, IIUM, 16-18 June (2008).

<sup>46</sup>*“if ye fear a breach between them (the man and wife), appoint an arbitrator from his folk and an arbitrator from her folk; if they wish for peace Allah will cause their reconciliation: for Allah hath full knowledge and is acquainted with all things.”*

<sup>47</sup>Doron Pely, *Muslim/Arab Mediation and Conflict Resolution: Understanding Sulha* 29 (1<sup>st</sup> edn. Routledge, New York, 2016).

<sup>48</sup>Sherry Landry, “Med-Arb: Mediation with a Bite and an Effective ADR Model” 63(2) *Defense Counsel Journal*, 264 (1996).

<sup>49</sup>*Supra* note 45.

resolution system. The jurisdiction of *muhtasib* also includes keeping a watch on the functioning of various professionals like teachers, traders, doctors, gold smith *etc.*, and for discharging their duties they could take help of the state institutions like police.<sup>50</sup> In Pakistan the institution of *muhtasib* is having its functional network in all four provinces and in addition to above mentioned areas they also look after religious, civic amenities and community affairs.<sup>51</sup>

### **Fatwa or Mufti**

In some countries, *afatwa* is also considered to be a kind of ADR, where any matter pertaining to a legal issue is solved by legal opinion or *fatwa*. In Islam *fatwa* is considered to be a religious ruling, a scholarly opinion on matters related to religion. As per the Islamic tradition only a great legal scholar, panel of scholars (*ulama*), in Sunni schools, a mufti, in Shia school Ayatollah are empowered to issue *afatwa*.<sup>52</sup> It is generally expected that *fatwa* issued should be based on the application of logic and reasoning (*ijithihad*). The findings of the *fatwa* are not binding but advisory in nature. Islamic history is full of instances where complicated situations were referred to *Muftis* and answers were given by them in the form of the *fatwa*.<sup>53</sup>

In addition to the above modes of ADR, there are two less common types of alternatives present in Islamic Law, known as *Wasita* (intercession) and *Wakalah* (representation). In both forms the concept of third party intercession or agency is present and the matter is settled by intermediary or agent on behalf of their principal. The role of intermediary or agent for negotiation *etc.* is bound by the terms of the delegation. This type of ADR has its recognition in the holy Quran, at *Sura al-kahf* 19.<sup>54</sup>

From the analysis of above literature and practices, it can be said that in every society procedure for imparting justice is indicative of social awareness and consciousness of the people. Even under Islamic principles of equitable justice the various ADR methods are always available at the

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<sup>50</sup> Syed Khalid Rashid, *Peculiarities & Religious Underlining of ADR in Islamic Law*, key note address in conference on Mediation in Asia Pacific: Constraints and Challenges, June 2008, Australia.

<sup>51</sup> *Ibid.*

<sup>52</sup> Sezai Ozcelik, *Non-violent Action and Third Party Role in Islamic World* (2000), available at: <http://www.geocities.com/tartarkirim/island4.html> (last visited on June 18, 2017).

<sup>53</sup> The earliest collection of *Fatwa* known as *Kitab Al Nawazil* in 983 A.D by Abu Layth.

<sup>54</sup> George Sayen, *Arbitration, Conciliation, and Islamic Legal Tradition in Saudi Arabia* 9 (1) *The University of Pennsylvania Journal of International Business Law* 211 (1987).

discretion of the parties. Though over the period the system has lost its sanctity due to political and communal overtones. In essence dispute resolution out of court is not new and every society has long used non judicial, indigenous methods to resolve disputes.<sup>55</sup> It can be inferred from the above discussion, that under Islamic principles of equitable justice various ADR methods were always available at the discretion of the parties. But in western countries, with predominant non-Muslim population it is unlikely that any country will embrace an alternative dispute resolution mechanism based on shariah in any meaningful sense.<sup>56</sup> In both Muslim countries and the countries where Muslims are in minority, there is increasing trend to resolve the disputes among themselves as per the laws of Allah Almighty.<sup>57</sup> In context with India with the common law tradition that guides adjudication unlike the status of Islamic law in predominantly Muslim countries, it can be said that detail qualitative research is required to understand the complexity of legal interfaces with ADR in Muslim community.

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<sup>55</sup> In Indian society too, village level institutions played a pivotal role where elders forming a Panchayat used to resolve the disputes through mediation. It has been prevalent in India since ancient times.

<sup>56</sup> Almas Khan, *The Interaction between Shariah and International Law in Arbitration*, 6 *Chicago Journal of International Law* 791 (2005-2006).

<sup>57</sup> Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 *The Yale Law Journal* 294 (2014-15).