THE CONCEPT OF *SULH* IN ISLAMIC LAW: A CASE STUDY OF THE PRACTICE AND PROCEDURE OF THE KATSINA STATE SHARIA COURTS

By

Abdullahi Mustapha MUHAMMAD

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DECLARATION

I declare that the work in this thesis entitled *"The Concept of Sulh in Islamic Law: A Case Study of the Practice and Procedure of the Katsina State Sharia Courts"* has been carried out by me in the Department of Islamic Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma at this or any other institution.

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Abdullahi Mustapha MUHAMMAD Date

CERTIFICATION

This Thesis entitled *"The Concept of Sulh in Islamic Law: A Case Study of the Practice and Procedure of the Katsina State Sharia Courts"* by Abdullahi Mustapha MUHAMMAD meets the regulations governing the award of the degree of Master of Laws - LL.M of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

_____ _____

Prof. I. A. Aliyu Date

Chairman, Supervisory Committee

_____ _____

Dr. M. A. Muhammad Date

Member, Supervisory Committee

_____ _____

Prof. Sani Idris Date

Head, Department of Islamic Law

_____ _____

Prof. A. Z. Hassan Date

Dean, School of Postgraduate Studies

DEDICATION

To Allah (S.W.T.) for the bounties of mercy He bestows on me; to my parents; and to my wife Hajiya Balkisu Shehu; and all the people who in one way or the other contributed in seeing through my education at this level.

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ABSTRACT

This study entitled "The Concept of Sulh in Islamic Law: A Case Study of the Practice and Procedure of the Katsina State Sharia Courts" has examined the concept of Sulh as a type of dispute resolution in which a third party intervenes to help disputing parties reach a mutually satisfactory agreement and the practice thereby in Katsina State Sharia Courts (KSSC). The research work is predicated upon the problem of the volume of cases coming before the KSSC and the latent absence of formal adoption of the rules and principles of Islamic law relating to amicable settlement of disputes within the judicial setting in Katsina State. The main objective of this work therefore, is to offer a highlight on the concept of Sulh as the Islamic perspective of Alternative Dispute Resolution (ADR). To achieve this, doctrinal and empirical methods of legal research was adopted. It is argued that Islamic law contemplate amicable resolution of disputes some 1400 years ago right from the 7th Century A.D. in advance of any Western move on the subject and in view of this, it was observed that, in its Islamic law conception, Sulh is one of the characteristic features of administration of justice in Islamic law. The findings of the study was that some of the rules of practice and procedure related to the concept of Sulh in KSSC are to a large extent, reminiscent of English style of mediation rules than that of Islamic law per se. Additionally, it was found that much of the current challenges and legal problems associated with the practice of Sulh before the KSSC due to the neglect by the government over the years of affording to Muslims a religiously based amicable dispute resolution as per the provisions of Islamic law. The study concludes with recommendations that Sulhu should be formally recognized as an amicable dispute resolution mechanism alongside adjudication in the KSSC it being more advantageous to Muslims than the Western conception of ADR. It is further recommended that it is expedient that the practice of Sulh shall be extended to the sphere of Islamic criminal justice and in line with this, the Sharia Criminal Code and the Criminal Procedure Code of Katsina State shall be amended urgently to reflect the teachings of Islamic law on the practice of Sulhu in criminal cases. It was also recommended that there shall be accessibility by all persons to the Sulhu-Door facility of the KTMDCH instead of being centralized in Katsina metropolis alone.It is also recommended that theSharia Court Rules and the Sulhu-Door Rules of Katsina State should be amended to additionally reflect the rules and principles of the Shariaor where possible, their replacement with a purely Sharia-based rules of procedure for the Sharia Court and the Sulhu Door respectively.

TABLE OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CJ	Chief Judge
KSSC	Katsina State Sharia Courts
KTMDCH	Katsina Multi-Door Court House
LFN	Laws of the Federation of Nigeria
SAW	Sallallahu Alaihi Wasallam (peace be upon him)
SCNJ	Supreme Court of Nigeria Judgment

TABLE OF STATUTES

TABLE OF CASES

GLOSSARY

Al-Bay'u: - contract of sale

Al-Qada'u: - adjudication in litigation before a court of law

At-Tahkeem: - arbitration

Biko: -reconciliation effort initiated by the families of a husband whose wife has deserted the husband in protest.

Diyyah: -compensations offered for loss or damaged arising out of criminal acts.

Fiqh: is a term used to describe Islamic jurisprudence.

Fuqaha: Muslim jurists

Gharar: uncertainty in in respect of transactions that have elements of deceit.

Hadana: custody of children

Hadith: is a report or tradition of the saying or practice narrated from Prophet Muhammad (saw).

Hakam: arbitrator

Hakamain: third-party ad-hoc arbitration panel involving representatives from family members of the wife and those of the husband.

Hakim: Ruler

Halal: permitted or allowed action under the sharia.

Haquq-ul-Ibad: the right of an individual

Haram:forbidden or prohibited action under the sharia.

Hibah: contract of gift

Hudud/*Hadd*: fixed penalties for crimes mentioned in the Qur'an.

Huquq: valid rights ordained by the Shariah

Huquq-ul-Allah: the rights of Allah

Iddah: waiting period, prescribed on women upon divorce or death of their husbands to ascertain pregnancy.

Ijara: contract of lease

Ijbar: compulsion

Ijma: consensus of the Muslim jurists

Ijtihad: independent juristic legal reasoning.

Kadi/Qadi: a judge that preside over disputes in an Islamic court.

Khul'u: self-redemption of personal freedom following a wife's release from the bond of marriage upon her own initiatives.

Maal: is a term used to generally describe property, i.e., something that exists and can be held in use and be beneficial at the time of need.

Manfa'ah: usufruct/benefit accruing from a tangible property.

Maslaha: public interest or common welfare of the Muslim *ummah*.

Milk: ownershipright which is established and vested in the claimant of that right

Muamalaat: civic transactional dealings involving transfer and acquisition of rights and interests.

Noshouz: an ill conduct that is grossly disobedient.

Radd al-Mazalim: reparations or return of articles illegally deprived to victims of crimes.

Riba: is a usury whichis basically any amount of interest on capital loan

Shari'ah: is a term used to describe the general body of Islamic laws

Sheqaq: disagreement between married couples.

Sulh: is an agreement for the amicable settlement of dispute which is a contract consisting of the surrender of a right or discontinuance of a dispute for a consideration.

Sunna: the established precept of the Prophet (saw).

Ta'azir: deterrent or exemplary penalty.

Ummah: the worldwide Muslim community.

Wajib: obligatory or compulsory action under the sharia.

Wali: marriage guardian

Waqf: endowment funds

TABLE OF CONTENTS

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

Socially, it is understood that the nature of human being as a social animal indicates that man doesn't live in isolation but interact and interrelate with others in his daily life regarding all aspects of human endeavors. And it is natural that once a group of people live together, there may be difference of opinion, thought, taste, temperament, inclination and behavior among individuals which differences may lead to dispute, conflict or misunderstanding among people. When these negative attitudes arose, the Sharia does not leave this kind of disgruntle state of conflict unchecked but provided a means of its resolution. The mechanisms for the resolution of disputes envisaged under the Sharia may take the form of litigation before a court of law (i.e., *al-qada'u*) or its amicable settlement (i.e., *As-Sulh*). Each of these two mechanisms has its own peculiarities.

As there are many fields of human endeavors, so do disputes or conflicts arose and permeate these fields - be it social, economic, political, etc., and the *Shariah* had recognized and institutionalized *Sulh* (amicable settlement) as a dispute resolution mechanism in addition to litigation so as to restore peace and tranquility among the Muslim *Ummah*.

Katsina State being one of the 36 States of the Federal Republic of Nigeria has inherited the deeply rooted application of *Shariah* in its judicial system from the then Sokoto Caliphate.[1] Katsina State has also in the year 2000 desired the formal reintroduction or

[1] Suleiman, I. *A Revolution in History: The Jihad of Usman Dan Fodio*, Mansell, London (1986), p. 26; Suleiman, I. *The Islamic State and the Challenge of History: Ideals, Policies and*

application of Sharia in its administration of justice.[2] To this end, Sharia Courts were established and conferred with jurisdiction by virtue of the *Sharia Courts Law*[3] to administer and implement the provisions of Islamic law among Muslim contending litigants within Katsina State. The Rules of Court governing Katsina State *Shariah* Courts have also provided for the resort to *As-Sulh* (amicable settlement) of disputes using and relying upon the provisions of the *Shariah* as a guide.[4]

Interestingly, there exists a general provision in the present *Shariah Courts Law* of resort to the rules and principles of Islamic law from the Maliki school of law in the process of adjudication. But while the interpretation given to Islamic law by the Maliki school of law applies almost throughout Sharia Courts in Northern Nigeria including Katsina State, these laws do not form part of the codified body of the Laws of Katsina State but only found in various books of *fiqh.* And in view of the fact that today, Lawyers both Muslims and non-Muslims have the right of audience before Sharia Courts in Nigeria including Katsina State and these Lawyers may not be knowledgeable in the language of the original sources of the literature on the subject of *Sulh* which are mostly in Arabic and

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Operation of the Sokoto Caliphate, Mansell, London (1987), p. 14-20; Mahmud, A. B. *A Brief History of Shari'ah in the Defunct Northern Nigeria,* Jos University Press Ltd., (1988) pp. 1-5; Ubah, C. N. *Islamic Legal System and the Westernization Process in the Northern Emirates*, Journal of Legal Pluralism and Unofficial Law (1982), Vol. 2, pp. 69-93 at pp. 69-71; Yadudu, A. H. Colonialism and the Transformation of Islamic Law in the Northern States, Journal of Legal Pluralism and Unofficial Law (1992), Vol. 22, pp. 110-117; Anderson, J. N. D. *The Future of Islamic Law in British Commonwealth Territories in Africa*, Journal of Law and Contemporary Problems (1962) pp. 626-628

[2] Islamic Penal System (Adoption) Law 2000, Cap 174, Laws of Katsina State of Nigeria.

[3] *Sharia Courts Law* 2000, Cap. 173, Laws of Katsina State of Nigeria.

[4] Katsina State *Sharia Courts (Civil Procedure) Rules* 2008

that the official language of Sharia Courts are also English supplemented with indigenous languages popular in the particular locality calls for venturing into this topic.

Sharia Courts officials themselves when a plea for *Sulh* is presented before them from either party, they rarely reject such a plea but when so granted, i.e., permission for out of court settlement, it may thereby be handled by incompetent personalities in the absence of an established practice and procedure in that regard. The implications is that, the matter may go out of court and if not successfully negotiated, it would therefore serve as a temporal stay of proceedings within which a mischievous interests may be achieved by the proposing party eventually delaying the course of justice and relegating the role of Sharia Courts in the settlement process.

However, *Sulh* as a dispute resolution mechanism has for long been part and parcel of the Sharia legal system since 1400 years back. It has been envisaged in the *Shariah* and it is more prominently appropriate to the resolution of disputes before the Katsina State *Shariah* Courts than the modern proclaimed alternative dispute resolution [ADR] processes.

1.2 Statement of the Research Problem

The Katsina State Sharia Courts being the subject of this case study have not been availed of any detailed code for Sharia Courts to follow in the process of adjudication regarding the practice of *Sulh*. Both the *Shariah Courts' Law* and *Sharia Courts Rules* lack clarity and details as regards *Sulh* but only make skeletal provisions for resort to the use of *Sulh* in the resolution of disputes coming before these courts without further elaborating on its procedure and typical cases wherein it should be applied. As a result, a lot of difficulties

are encountered in trying to give effect to its practice in the Sharia Courts. These problems are further backed by the non-availability of reliable literatures in English on the subject because most literatures on the subject are in Arabic and embodied in several books of Islamic jurisprudence.

Moreover, some Sharia Court judges, lawyers, litigants and other stakeholders in the administration of justice before Sharia Courts often portray lack of awareness on the nature, rationale and effectiveness of *Sulh* under the *Shariah,* they thus emphasize on adjudication to the neglect of *Sulh.* This calls for a study of the Islamic framework for resolving conflicts amicably whereby the use of Islamic sources, including the Qur'an, the hadiths and other broad principles of Islamic law to develop a framework for dispute resolution through *Sulh* in the Katsina State Sharia Courts is imperative. Therefore, the needs have arisen for the professionalization of *Sulh* in Katsina State Judiciary to allow disputants to resolve interpersonal conflicts according to their own religious values with the aid of the judiciary.

However, parts of the problems that this research work seeks to address are improper appreciation of the viability of *Sulh* and the requisite procedure to be employed in the resolution of disputes that are typically brought before the sharia courts. Instead of relying solely on adjudication, an alternative recourse to *Sulh* necessitates the need for an attention by the relevant authorities and stakeholders to ensure that the proper procedure that would yield its thorough practice in cases involving matters of marriage whereby issues of *ijbar* (compulsion) and consent to marriage, dower, consummation of marriage, maintenance, intolerable conduct, divorce, *iddah* (waiting period), custody of children (*hadana*), etc. So also the sustainability of *Sulh* before the sharia courts in matters of

inheritance, cases involving land – be it tenancy, pledge, boundary disputes; cases involving contracts, loans, religious/ethnic disputes are typical instances where the application of *Sulh* is possible but due to inadequate appreciation of the special rules of the sharia in these mentioned areas of conflicts, the resort to *Sulh* in cases before the sharia courts was minimal with little formalization by the relevant authorities.

Moreover, the shortcomings of adversarial method of adjudication calls for a significant attempt to incorporate formally *Sulh* as a rancor-reducing procedure in the administration of sharia justice before Katsina State Sharia Courts. This is because, the outcome of adversarial processes (i.e., adjudication) undertaken to resolve disputes sometimes result in parties being left in a state of serious hurt and anger which may become a vehicle for renewed or continuous hostility, bickering, awkwardness, resistance, avoidance, etc. Then, the state of conflict that was intended to be resolved continues after the litigation but this is not the case with *Sulh* as an amicable settlement undertaken by the parities. Therefore to avert the problems of adversarial method of adjudication, *Sulh* is the best alternative to be adopted by the sharia courts.

Furthermore, there is the problem of avoidance of court processes that is common among some litigants who are totally opposed to attending courts over disputes with their adversaries. In the event, the best alternative is for the adverse party to approach the contending party for *Sulh* and where this is achieved, the parties may come back to the Sharia Courts for its formal adoption and eventually its enforcement in the event of breach by either party. In this event, what power does the Shariah Courts have to refer cases before them for *Sulh*? Should the *Sulh* be successfully attained, what are the legal implications of these settlements? Is the award or outcome of *Sulh* admissible and

enforceable by Sharia Courts? Similarly, what role does Sharia Court judges play in the practice of *Sulh* on cases duly commenced before Shariah Courts? What is the legal effect of a *Sulh* attained out of court but presented before a Shariah Court for enforcement? These problems and many other incidental issues connected therewith is what this research work considered in the subsequent chapters of this work.

1.3 Aim and Objectives of the Research

The principal aim of this reaearch work is to provide an appraisal on the concept of *sulh* under Islamic law with particular reference on its practice and procedure in the Katsina State Sharia Courts. However, the specific objectives of the research work are the followings:

1. To examine the concept of *Sulh* as a dispute resolution mechanism in Islamic law in order to determine its effectiveness in the resolution of disputes in the Katsina State Shariah Courts.

2. To examine the role of Shariah Court Judges, Lawyers, etc., in the application of *Sulh* in Katsina State Shariah Courts in order to determine their contribution to the promotion of the practice of *Sulh* in the resolution of disputes in the Muslim communities of Katsina State.

3. To examine the rules of law and procedure requisite to the practice of *Sulh* within the Katsina State Judiciary on order to determine the extent of its recognition as a dispute resolution mechanism by the government and the people in Katsina State.

4. To examine the prospects and challenges to application of *Sulh* in the Katsina State Shariah Courts with a view to recommending further steps for its proper practice as envisaged under the *Shariah*.

1.4 Scope of the Research

The scope of this research is restricted to the application of *Sulh* processes in the resolution of disputes over cases within the jurisdiction of Katsina State Sharia Courts. The scope of this case study is therefore restricted to the Sharia and Upper Sharia Courts of Katsina State.[5]

1.5 Research Methodology

To realize the objectives of the research, doctrinal method was adopted. Recourse was made to the primary and secondary sources of Islamic law on the subject. So also, published legal materials such as Islamic text books, journals, conference and seminar papers, statutes and case law were also consulted.

Similarly, an empirical method of legal research was also adopted and the researcher went out on field visit to the Shariah Courts to interview judges, court personnel, lawyers and litigants. From the respondents interviewed, relevant oral information was gathered and used as the basis of our assessment of the practice of *Sulh* in the Sharia Courts of Katsina State.

[5] See Section 3(1), Sharia Courts Law, 2000, Cap 173, Laws of Katsina State of Nigeria.

1.6 Literature Review

The concept of *Sulh* is relatively not a new concept in the Islamic system of administration of justice. In the book ***Irshadal-Saalik***[6] it was provided by this author that *Sulh* is permitted upon admission or denial (of a claim) except that which makes lawful what is unlawful, or makes unlawful what is lawful. That whoever knows that he doesn't have a legal right; it is not lawful unto him what he takes by way of *Sulh.* That *Sulh* is of two kinds, *mu'awadah* and *ghair mu'awadah*. The *al-mu'awadah* type is like a sale (and all other things which are lawful in a sale contract as well as those which are not). The *ghair mu'awadah* type involves delaying aspect of the object of *Sulh* in its delivery and abandoning the remaining aspect. And in a *Sulh* contract, whoever foregoes parts of his legal right, he cannot reclaim it and this would be the position even if a person had a proof and did not put it forward nor stand by it. Such a proof could not avail him and he could not withdraw the *Sulh.* The only exception is when the person did not know about the proof or when it is absent at the point of litigation.

Similarly, in the book ***Aqrab al-Masalik***[7] it was also discussed that *Sulh* is permissible upon admission, denial or silence provided it did not calls for the unlawful. *Sulh* may take the form of a sale contract over a tangible object, a hiring contract over a *manfa'ah* (usufruct), or a contract of gift. That *Sulh* is permissible with exchange of debt with a valuable object or gold with paper currency (money) and the like if that object is lawful and promptly delivered. That *Sulh* may be concluded with a lesser or equal amount to that

[6]Ibn Askar, Abd al-Rahman Ibn Muhammad, *Irshad al-Salik ila Ashraf al-Masalik fi Fiqh al-Imam Malik,* Mustafa al-Babi Publishers, Cairo (nd), p. 96

[7] al-Dardir, Ahmad Muhammad Ibn Ahmad, *Aqrab al-Masalik li Mazhab al-Imam Malik,* al-Qudus Publishers, Cairo (nd), pp. 106-107

in issue between the parties but not a higher amount as any form of interest is not allowed to be charged in *Sulh.*

However, it was also provided that even if a person admits a claim and thereafter he discovered a proof in his favour that he doesn't know before or that it was far away from him or that he discovered documentary evidence, he would stand by this proof and withdraw the *Sulh* if he is able to present this proof. So also, is a person said he has documentary evidence and it was demanded of him to present it and he pleaded it being lost, if he enters into a *Sulh* or in an instance where in inheritance for a person to accept money in place of objects this should be done with object of lesser or same value equivalent to one's share of inheritance.

The book ***Mukhtasar Khalil***[8] on the subject of *Sulh* follows closely what the book *Aqrabul Masalik* have conversed but that the discussion further encompasses *Sulh* in marriage or *Khul'u* (self-redemption) where the author provides that something of value equivalent to what have been received could be given in *Sulh*. He also went further to discuss the viability of *Sulh* in criminal cases where he stated that where a person kills a group of people or maims them, it is permissible to do *Sulh* with each of them for the wrongdoer to be forgiven.

However, the three books stated above, that is to say, ***Irshad al-Saalik, Aqrab al-Masalik*** and ***Mukhtasar Khalil*** provided mainly the basic and general principles on the permissibility of *Sulh* without setting forth the procedural aspect of it as to how it is to be put into practice especially before a *Kadi*. These books did not also elaborate further on

[8] Khalil Ibn Ishaq al-Maliki, *Mukhtasar Khalil fi Fiqh Imam Dar al-Hijra,* Dar ibn al-Haitham, Cairo (nd), pp. 167-169

the principles regarding its formal validity or whether this kind of agreement is enforceable as of right.

Other books of *fiqh* within the *Maliki* School of law besides those mentioned above that are typically known and frequently referred to in Nigeria are books of commentary mostly to those books already mentioned above. But before going into these books of commentary, an important book to be looked at is *Tuhfatul Hukkam* being one classical book most frequently referred to and relied upon by both lawyers and judges alike in Sharia courts as a book of substantive law and procedure in the field of litigation. The exposition contained in this book has covered several aspects on the subject. This book alone has also attracted so many commentaries such as *Ihkamul Ahkam,*[9] *al-Bahjah fi Sharh al-Tuhfah,*[10] *Mayyara ala al-Asimiyyah,* etc., and each of these commentaries remain standard works as far as *Sulh* is concerned. In this book of *Ihkamul Ahkam*, it was discussed that *Sulh* is permitted unanimously by all Muslim jurists but not in all circumstances. That, it is like a sale contract which may be predicated upon confession or denial and as a sale contract, the principles of the Sharia regarding unlawful and prohibited stipulations that govern a valid sale contract also governs *Sulh*. Among these basic principles as mentioned by the author is the prohibition of *riba* (interest) in the process of exchange by way of increase or delay. Thus, in the process of exchange, the principle of silver with silver and gold with gold, food stuff with food stuff without an increase or delay is applicable to Sulh in like manner. It is also prohibited for a *Sulh* to

[9] Muhammad ibn Yusuf al-Dafii, *Ihkamul Ahkam ala Tuhfah al-Hukkkam,* Dar al-Fikr, Beirut, Lebanon (nd), pp. 64-68

[10] Abi al-Hassan Ali ibn Abdussalam al-Tusuli, *al-Bahjah fi Sharh al-Tuhfah,*Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon (nd), Vol. 1, pp. 350-357

combine elements of a sale and loan transaction. So also, transactions that have the elements of *gharar* (uncertainty) are prohibited, such as an unripe fruits, objects yet to be taken into possession by a party, etc.

The eminent jurist further stated that a father is permitted to conclude *Sulh* on behalf of his minor child of which, a father may bind his ward in accepting a lesser amount than that claimed with the exception of compromising the entitlement of a virgin girl's dowry. So also, a testamentary guardian can enter into a *Sulh* on behalf of his ward except where doing so is detrimental to minor's interest. It has also been outlined in this book that, parts of the essential principles of *Sulh* is that when it is freely entered into, it cannot be withdrawn or rescinded unilaterally but that the parties are to be compelled to stand by its terms. This author has also discussed that there can be *Sulh* over inheritable property between heirs if the value of each heirs share in that property has been determined but those heirs cannot by way of *Sulh* agree to distribute a debt they inherited even if the debt has been admitted by the debtors, i.e., it must first be reduced into tangible or actual possession at the disposal of the heirs before any *Sulh* over it may be initiated.

There are certain well written and authoritative books of commentaries on the above stated Maliki books on *fiqh*, prominent among them is ***Al-Mudawwanah***[11] where it has been discussed that *Sulh* (amicable settlement) is permissible in Islamic law and in many segment of the book, various issues have been treated. There was a discussion on the permissibility of *Sulh* over an object misplaced by a person, that an amicable settlement may be concluded for something of its value to be offered in lieu of it but such a *Sulh*

[11]Imam Malik ibn Anas, *Al-Mudawwanah al-Kubrah*, Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon, (nd), Vol. 3, pp. 375-398

should be promptly executed otherwise it could be unlawful for something to be agreed to be offered in such a *Sulh* at a later date, i.e. to be delayed as this would amount to settling debt with debt which is unlawful in Islamic law. Also discussed in this book was the permissibility of a *Sulh* concluded by a father on behalf of his minor child that to Imam Malik, it is permissible for a father to conclude *Sulh* on behalf of his minor child and such a settlement would be binding on the minor.[12]It was also discussed in this book that *Sulh* can be concluded between a husband and wife in *Khul'u* (self-redemption) when the mischief is from the husband's part for the woman to be offered something in lieu of what she forgoes and this is within the context of the provision of Qur'an 4:128 when she fears either a cruelty or desertion from the husband's part.

Some of the most authoritative commentaries whose discussions closely followed the above quoted books are ***Sharh al-Kabir li al-Sheikh al-Dardir***[13] who has discussed enormously on *Sulh* in criminal cases; ***Sharh Mukhtasar Khalil li al-Khirshy***;[14]***Hashiyat al-Dasuqi ala Sharh al-Kabir;***[15]***Hashiyat al-Sabuni ala Sharh al-Saqir;***[16]***Fawakih ad-Dawani;***[17]***Minhaj al-Jalil Sharh Mukhtasar Khalil,***[18] these books have thoroughly considered the definition of *Sulh* by various scholars. These books taken together have

[12]Ibid, pp. 378-380

[13] Al-Dardir, Ahmad ibn Muhammad al-Adawi, *Sharh al-Kabir li al-Sheikh al-Dardir*, (nd), pp. 309, 317-319

[14]Al-Khirshy, Muhammmad ibn Abdullah, *Sharh Mukhtasar Khalil lil Khirshy*, (nd), p. 187

[15]Al-Dasuqi, *Hashiyat al-Dasuqi ala Sharh al-Kabir*, Dar ihya al-Kutub al-Arabiyyah, (nd) Vol. 13, p. 304

[16]Al-Saawi, Ahmad ibn Muhammad, *Hashiyat al-Saawi ala Sharh al-Saqir*, (nd), pp. 390-393

[17]Ahmad ibn Ghanim ibn Salim ibn Mahna al-Naghraway, *al-Fawakih ad-Dawani ala Risalatu Abi Zaid al-Qiraqani*, (nd) Vol. 1, pp. 317-322, 326

[18]Muhammad Ulaish, *Minhaj al-Jalil Sharh Mukhtasar Khalil*, pp. 358-433

provided abundant literatures on the subject of *Sulh* and they are by themselves an authority over the subject of *Sulh* in Islamic law, especially under the Maliki School of Islamic law. The contributions of these authors are such that most of today's legal issues on the question of *Sulh* in any Islamic society that desires the application of Sharia in its administration of justice has ample source of guidance in doing so. However, these books of Islamic law can be considered to have contemplated situations relative to the time these Islamic jurists attempted a jurisprudential analysis on the primary sources of Sharia on the subject; of which today, many recent and emerging legal problems continues to pose questions in search of legal solution that to contextualize the already established principles of the Sharia would require a unique methodology appropriate to present day situations. It is therefore expedient that these books be studied, analysed so as to be reviewed for contemporary application in the administration of sharia justice particularly in the northern states of Nigeria where quest for the application of sharia resurfaces.

Doi, I. A.[19] in discussing marriage relationship stated that Islamic Law encourages the taking of family disputes to courts of law while referring to Holy Qur'an 4:35 which provided for arbitration in Shariah law. The verse provides that "*If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things"*.[20] The author here did not conceive the above quoted verse as being in aid of As-*Sulh* (ADR) but that it encourages resort to court for the resolution of family disputes. But the same author went

[19] Doi, I. A., Shari'ah The Islamic Law, Ta-Ha Publishers, London (1984), p. 160

[20] Qur'an 4:35

further in his Chapter[21] on divorce to state that Islam encourages reconciliation between spouses rather than severance of their relations. Quoting Qur'an 4:35, he went on to state that as soon as differences between spouses take a serious turn to endanger their contract, the Shariah ordained that arbiters be appointed to sort out these differences and bring about reconciliation between.

Abdullah,[22] A. H. H., in his book on ***Sales and Contracts in Early Islamic Commercial Law***, the writer had discussed Sulh as a juridical settlement of disputes and he had tried to investigate the development of the legal theory and practice of solving disputes amicably through *Sulh* especially as regards contractual transactions.[23] In his discussion on the subject, the author states that, "al-Sulh is not only procedural, although its purpose is the elimination of dispute; it is also possible as an agreement to modify an existing obligation by which the creditor, for a consideration, waives his original claim. This contract is not restricted to the law of business transactions, claims arising from family law and penal law, apart from *hadd* or fixed punishments, may also be settled by *al-Sulh*"[24] however, his discussion went largely historical thereby tracing the minutest details on the legal framework on the subject right from the early development of islamic law. Thus, the work remains inspirational as regard the existence of sulh under Islamic law and its role in the resolution of commercial disputes.

[21] Doi, I. A., op. cit., pp. 160-169

[22] Abdullah, Alwi Haji Hassan, Kitab Bhavan New Delhi, India, (nd) pp. 173-186

[23] Ibid, p. 173

[24] Ibid, p. 178

Abul A'ala Maududi,[25] in his book "***The Laws of Marriage and Divorce in Islam**,"* has discussed matrimonial arbitration emphasizing that is a suitable device for settling family disputes which do not involve complicated legal issues. He argued that to make arbitration still more serviceable, it is necessary to add few more clauses to the law. The clauses should clarify the procedure of arbitration, the powers of the arbiters, the mode of the enforcement of their agreed decision and the applicable course of action if the arbiters disagree among themselves. While these suggestions of the author are germane and laudable, it would have been rather more helpful that the author should have thrown certain light on how best to islamically revive current application of the age long recognition of arbitration in Islamic law. Thus, the author fails to offer tangible mechanism of dealing with the issue thereby rendering his recommendations to serve only as mere suggestions for further research on the subject.

K. N. Ahmed, in his book "***The Muslim Law of Divorce**"*[26] has discussed the application of arbitration before undertaking divorce proceedings under Islamic law. That before the actual dissolution of a marriage, a final effort for reconciliation is always to be made to smooth out any differences between the couples by the appointment of two arbitrators, one representing each spouse. That the aim of the arbitration is to endeavor to understand the nature and causes of the grievances of the parties and try to bring about a reconciliation between the two in order to remove ill-feelings and where possible, to re-establish harmony between the married couples.

[25] Maududi, A. (1983) *The Laws of Marriage and Divorce in Islam*, Fazl Ahmed (trans.), Islamic Book Publishers, Safaat, Kuwait, pp. 80-81.

[26] Ahmed, K. N. *The Muslim Law of Divorce*, Kitab Bhavan New Delhi, India, (1978) pp. 277-294

M. T. El-Imairi,[27] in his manuscript titled "***Murafa'at: Procedure and Evidence in Sharia Courts***" have discussed the procedures related to the administration of justice under Islamic law. The elegance of his presentation together with the scope of the issues covered in the manuscript is good enough to warrant its recommendation as a source book to be refined and adopted as the rules of procedure to guide the sharia courts in northern Nigeria. However, his discussion omits Sulh which is one of the options available to the courts in the administration of justice under Islamic law.

A. B. Wali,[28] in his article on "***The Viability of As-Sulh (ADR) to Sharia-Based States in Nigeria***", the writer had examined largely wesrern-based alternative dispute resolution (ADR) mechanisms and their level of acceptance in the resolution of commercial disputes but to the neglect of what he called "sharia-based alternative dispute resolution". His overall analysis rests on the lack of proper attention dedicated to Sulh in Nigeria over the years and the unfortunate ascendancy of Western models of ADR but to a large extent, the writer did not ariticulate thoroughly the viability of *Sulh* to Sharia-Based States in Nigeria as the title of his article suggests and his recommendations are somehow misconceived in co-mingling the elements of western and Islamic provisions on amicable settlement of dispute to be the guide for the sharia courts in Nigeria.[29] In fact, he did not

[27] El-Imairi, M. T. *Murafa'at: Procedure and Evidence in Sharia Courts*, Unpublished Manuscrpit, Centre for Islamic Legal Studies, Institute of Administration, Ahmadu Bello University Zaria.

[28] Wali, A. B. (2010) *The Viability of As-Sulh (ADR) to Sharia-Based States in Nigeria*. In: Aliyu, I. A. Alternative Dispute Resolution and Some Contemporary Issues, M. O. Press and Publishers, Kaduna, pp. 115-128

[29] Ibid, pp. 126-127

avail the readers of the status of sharia-based ADR processes in the Shariah Courts in Nigeria.

M. B. Uthman,[30] in his article on ***the Theory of Sulh in Civil and Criminal Cases*** has examined the theoritical basis of the concept of Sulh in Islamic law more particularly as it has been espounded by Muslim jurists. However, this author relies heavily on the famous book of *Tuhfah* to analyse the various legal principles articulated therein without undertaking an effort to survey the practical means to secure their application in the Sharia Courts in Nigeria. Although the writer had observed that *sulh* is a means to determine litigation within the normal court system, but if so, how could it be given effect to in the administration of justice in the sharia courts especially in view of the fact that such courts derives their enabling legislation from codified laws that do not take cognizance of *Sulh* properly.

S.U.D. Keffi,[31] in his article on the subject of *Sulh*, the writer has tried to identify the legal, social and economic roles of *Sulh* while discussing the various kinds of disputes amenable to *Sulh* but his discussion went largely theoritical without carrying on board the long standing relegation of *Sulh* in Nigeria in both academic and judicial setup. Therefore, while he calls for its proper practice from a pro-modern style, it is believed that the starting point must be its entrenchment in the curricular of academic institutions

[30] Usman, M. B. (2010) *An Overview of the Theory of Sulh in Civil and Criminal Cases*. In: Aliyu, I. A. Alternative Dispute Resolution and Some Contemporary Issues, M. O. Press and Publishers, Kaduna, pp. 151-168

[31] Keffi, S.U.D. (2010) *The Legal, Social and Economic Roles of As-Sulh from the Perspective of Jurisprudence (Fiqh) of the Maliki School.* In: in Aliyu, I. A. Alternative Dispute Resolution and Some Contemporary Issues, M. O. Press and Publishers, Kaduna, pp. 188-192

responsible for the teaching of Islamic law and its detailed inclusion in the various Sharia Courts rules of procedure in addition to establishing modern facilities for that purpose.

From the review of the above examined literatures, the writer intends to develop the literature further by taking a further course to determine the viability of the practice of Sulh in the Katsina State Sharia Courts in the light of the various kinds of disputes that are amenable to Sulh under Islamic law. While there have been a gap left by earlier researchers on the subject, it is intended to fill this gap in our case study.

1.7 Justification of the Research

The research work is justifiable because it will be of immense benefit to Sharia Court Judges, Lawyers, Islamic Scholars, Islamic law lecturers, students, researchers, etc., who are involved in the practice of Islamic law whereby the resolution of disputes through *Sulh* before the Shariah Courts in Katsina State arises. Thus, the study would be helpful in resolving disputes such as matrimonial causes, cases of contractual transactions, compensations (*diyyah*) and reparations to victims of crimes (*radd al-Mazalim*) and in solving other categories of disputes coming before the Sharia Courts. Furthermore, the study would help influence resort to the use of *Sulh* in the resolution of disputes before the Sharia Courts as the basic rudiments of *Sulh* processes has been exposed and analyzed in the study.

1.8 Organizational Layout

This research work is structured into five chapters. ***Chapter One*** primarily deals with the General Introduction identifying the Statement of the Research Problem(s), Aim and Objectives of the Research, Scope and Limitations, Literature Review, Justification of the Research and Organizational Layout.

Chapter Two deals with the concept of *Sulh* under Islamic Law; its nature and scope, its legality, circumstances under which it is recommended, its formation and essential elements. Pertinently, the chapter also examines the advantages and disadvantages of *Sulh* under the *Shariah*.

Chapter Three provides an overview on the classifications of *Sulh* in Islamic law, focusing on Matrimonial Disputes, Criminal Cases, *Muamalaat* (transactional cases), Armistice between Muslims and non-Muslims, etc.

Chapter Four basically deals with the procedural application of *Sulh* in Katsina State Shariah Courts by examining the legal basis of *Sulh* in Katsina State Shariah Courts; the jurisdiction and commencement of *Sulh* in Katsina State Shariah Courts; admissibility and enforcement of *Sulh* in Katsina State Shariah Courts; the role of Sharia Court Judges and Lawyers in *Sulh* in Katsina State Shariah Courts; etc.

Chapter Five is the final chapter and it contains the summary of all the preceding chapters and it encompasses observations and recommendations.

CHAPTER TWO
THE CONCEPT OF *SULH* IN ISLAMIC LAW

2.1 Introduction

In the past few decades, Alternative Dispute Resolution [ADR] has gained popularity in many Western countries as a cost-effective and confidential means of resolving disputes outside the court system.[32] And although there is a common misperception that ADR is a novel Western idea, in about 1400 years, Islamic societies have a tradition of informal mediation (*Sulh*) of disputes based on social norms and religious injunction.[33] In the Islamic legal system, disputes are resolved in accordance with the principles set forth in the established sources of the Sharia.

This chapter examines the concept of *Sulh* under Islamic law by demonstrating how this concept serves as an Alternative Dispute Resolution [ADR] process in Islamic law.

2.2 Historical Overview on the Concept of *Sulh*

The Islamic legal system embodies a distinct preference for alternative methods of dispute resolution, like mediation and reconciliation – reflected in the traditional Islamic concept of *Sulh*.[34] However, the origin of *Sulh* in the Islamic legal system has a long history as it derives its foundation right from the Qur'an, supplemented by numerous *Ahadith* and further expounded by the Muslim jurists through the exercise of *Ijtihad*. *Sulh*

[32] See Jacob Neusner and Tamara Sonn, (1999) *Comparing Religions Through Law: Judaism and Islam*, pp. 46-47.

[33] See Albert, F. (2004) *Alternative Dispute Resolution: A Developing World Perspective, p*. 27

[34]Walid Iqbal, *Courts, Lawyering, and ADR: Glimpses into the Islamic Tradition*, 28 FORDHAM URB. L. J. 1035, 1035 (2000). See also *See* Mukarram, A. M. *Encyclopaedia of Islam*, 125 (2005); Maqbul Ilahi Malik, *The Concept of Human Rights In Islamic Jurisprudence*, *HUMAN RIGHTS QUARTERLY* (1981) vol. 3, p. 56 at 57.

is thus as old as the Islamic religion or *Shariah* itself. Putting into consideration its earlier legal development and practice as far back as *Hudaibiyyah* incidents which took place towards the ends of the sixth year *Hijrah* when the prophet (S.A.W.) concluded the renowned Treaty of *Hudaibiyyah* with the Meccans, the concept of *Sulh* is thus an integral part of Islamic law.[35]

A very famous *Sunnah* of the Prophet Muhammad (S.A.W.) that historically illustrates the origin of *Sulh* was that concerning the setting of *Hajar al-Aswad* (Black Stone) during the reconstruction of *Ka'bah*. Then, the four leaders of the *Quraish* were in dispute over the issue of who were the best amongst them to put *Hajar al-Aswad* in its right place. There was an impasse and one of the leaders suggested that the first person to arrive at the *Ka'bah* the next morning could have the honour of placing the stone. That fateful person was none other than the Prophet Muhammad (S.A.W.). Instead of placing the stone himself, the Prophet (S.A.W.) asked each tribe to select one leader to represent them. He spread a sheet and put the stone on it. Then he instructed the four leaders to hold each end of the sheet and together they raised the stone to the right place. Thus, by the wisdom of the Prophet (S.A.W.) a serious conflict was prevented and everybody was pleased with the solution.[36]

[35] Keffi, S.U.D. (2010) *op. cit.*, pp. 188-192

[36] Abdullah, Alwi Haji Hassan, *op. cit.*, pp. 180-183

2.3 Nature and Meaning of *Sulh* under Islamic Law

Linguistically, the word *As-Sulh* means perfection especially if things become good, i.e., *Salaha* or *Saluha ash-Shay'u.* It means terminating a dispute. According to Ibn Arafah, it technically means abandonment or relinquishing of one's right or claim with a consideration for the purpose of terminating disputes or its avoidance altogether. The term *Sulh* has been used to refer both to the process of restorative justice and peacemaking, a method of resolving dispute amicably.[37]

The concept of *Sulh* in the *Shari'ah* means a contract that is concluded by two parties, under which each party waives part of his rights for the purpose of reaching a mutual and final resolution of a conflict.[38] Hence, in legal sense, *Sulh* is a settlement grounded upon compromise negotiated by the disputants themselves or with the help of a third party. Therefore, it is the actual outcome of the reconciliatory processes undertaken to resolve a dispute, i.e., the contract entered into by the disputants containing agreed private settlement out of court.[39]

Sulh is an independent system which is permissible in the *Shariah*. It has been ordained under the *Shariah* to settle and terminate disputes. It can thus be said to be a legal mechanism intended

[37] al-Kaafi, *Ihkamul Ahkam ala Tuhfah al-Hukkam, op. cit.,* p. 64; See also Sayyid Sabiq, *Fiqh al-Sunnah, op. cit.,* Vol. 3, p. 210; See also Sheikh U. D. Keffi, op cit., p. 192

[38] Sayyid Sabiq, *Fiqh al-Sunnah, op. cit.,* Vol. 3, p. 210; See also Al-Zailaie, Othman ibn Alī, *Tabyīn al-Haqāʾiq Sharʾh Kanzu ad-Daqāʾiq*, Dār al-Māʿrifah, Beirut, 2nd edn., Vol. 5, p. 29; Ibn Qudamah, *Al-Mughni*, Dār al-Kitāb, Beirut, Vol. 4 p. 476.

[39] Keffi, S.U.D. op cit., p. 192; See also Aida Othman, *And Sulh is Best: Amicable Settlement and Dispute Resolution in Islamic Law*, Unpublished Ph.D. Thesis, Harvard University, (2005) p. 25

not only for the purpose of private conciliation among individuals and groups in lieu of litigation, but it is also the procedural option that could be resorted to by a *Qadi* within the context of his courtroom (i.e., *al-Qada'u bi al-Sulh*)[40] or a *Hakam* (arbitrator) in his conference room. Thus, *Sulh* is part of every-day dispute resolution mechanism in Islamic law.[41]

Sulh represents one of the methods of conflict resolution in the Islamic legal system and it is attained through mediation and conciliation which may be facilitated by either a *Qadi* or prominent member of the family or community. However, it involves the principles of counseling, advising and arbitration.[42] During the process, the facilitator assists the parties as they attempt to reach a voluntary settlement. The facilitator can suggest various settlement proposals, but cannot force a final agreement on the parties.[43] Once the parties ultimately reach a settlement, it acts with the same force as a binding judgment.[44] And having effectively surrendered all rights to claims on the matter, subsequent attempts by

[40] See ibn Farhun, *Tabsirat al-Hukkam, op. cit.*,Vol. 2, pp. 54-56

[41]Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration*, London School of Economics and Political Science[LSE], Law, Society and Economy Working Papers 12/2008, p.3, available at: http://ssrn.com/abstract=1153659 accessed on the 5/08/2012.

[42] Samir Saleh, *The Settlement of Disputes in the Arab World Arbitration and Other Methods – Trends in Legislation and Case Law*, ARAB LAW QUARTERLY (1985) vol. 1, p. 198; See also Iqbal, *op cit*, at pp. 1039-42; See also George E. Irani & Nathan C. Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives*, 19 (Kroc Inst., Working Paper No. 19: OP:2, 2000), http://www.nd.edu/~krocinst/ocpapers/abs_19_2.shtml. accessed on the 5/08/2012.

[43] Ratno Lukito, *Religious ADR: Mediation in Islamic Family Law Tradition*, AL-JAMI'AH MAGAZINE (2006) Vol. 44, pp. 325, at p. 337.

[44] Iqbal, *op cit*, at 1037-38

either party to a *Sulh* to initiate a related suit during the pendency of the *Sulh* will be summarily rejected by a Sharia Court.[45]

Upon closer examination, however, the actual method of accomplishing *Sulh* is quite distinct. The most noticeable difference is that a facilitator generally plays a far more proactive role during a *Sulh* negotiation. Rather than act as a mere neutral observer, the facilitator delves deep into the actual substance of the conflict, openly evaluates the arguments of both sides, and actively takes part in negotiating a solution.[46] In many instances, the facilitator must accomplish this without any initial face-to-face interaction among the parties, which raises the risk of embarrassing a party or antagonizing the situation.[47]

Muslim jurists reinforce the view that the judge has no power to compel the parties to conclude an agreement by *Sulh* in the event that one or both parties are not inclined to it. Because this contract is optional, the judge has no power to compel conflicting parties to enter such a contract. Only if the parties agree to such a contract will the judge have the power to order the parties to enter the contract and end the conflict. The issues related to *Sulh* therefore fall under the general theory of contracts in the *Shari'ah*, which require that parties adhere to contracts they conclude and remember that steadfastness to ones

[45] Sayyid Sabiq, op cit., vol. 3, p. 213; Iqbal, *Op Cit*, at 1037-38

[46] Ratno Lukito, op. cit., at p. 335.

[47] *See* Mohammed Abu-Nimer, *Conflict Resolution in an Islamic Context: Some Conceptual Questions*, PEACE & CHANGE (1996) vol. 21, pp. 23, at p. 30; Mohammed Abu-Nimer, *Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities*, 55 AMERICAN JOURNAL OF ECONOMICS & SOCIETY (1996) Vol. 55, pp. 35, at p. 46

deeds comes under the philosophy of faith, which every Muslim must in any event is ordained to observe and discharge his obligation under any lawful contract.[48]

2.3.1 The Contractual Nature of *Sulh*

Sulh as a contract may take various forms and it is usually manifest in the form of *al-Bay'* (Sale), *Ijara* (lease), *Hibah* (gift), etc. In *Sulh*, the settlement may be effected in exchange for *maal* (wealth or property) which is confined to tangible assets to which the Shariah gives monetary value, or in exchange for *manaafi* (usufruct/benefits). If the *Sulh* is *maal* for *maal*, then the rules of Bay' (Sale) will apply and the agreement will be assigned to the category of a sale contract.[49] However, in view of the existence of some ingredients of a valid sale contract, the *Sulh* in this instance (*maal* for *maal*), is given the status of a bay' (sale). On the other hand, if the *Sulh* is related to *maal* in exchange for *manaafi'i* (benefits), then the rules of *Ijaarah* (leasing) will become applicable to the agreement.
If the basis of the dispute is a *Haqq* (right), it should be a right which is established and which is in the *milkiyyat* (ownership) of the claimant of the right, i.e., it must be a right vested in the claimant. A person cannot claim compensation for a right if he does not own the *mahal* (substratum) such as *Haqq-ul-Shuf'ah* (the pre-emptive right of buying the adjacent property). In this case, he has no *milkiyyat* (ownership) in the article of sale, i.e., the building. On the other hand, *Sulh* can be effected in a right, if related to a *mahal* in which he has *milkiyyat*, such as *Qisas* (taking the life of a murderer). In this case, the heirs of the murdered person possess the *milkiyyat* (ownership) of executing *Qisas* against the murderer.

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[48] See Qur'an, *Sūrah Al-Mā'idah*, 5:1

[49] Al-Shafii, *Al-Umm, op. cit.,* Vol. 4, p. 463; See also al-Kaafi, *Ihkamul Ahkam ala Tuhfah al-Hukkam, op. cit.,* p. 64

However, even in valid *huqooq* (rights) ordained by the Shariah, the institution of *Sulh* with its characteristic of wide latitude and scope, does not admit permissibility of monetary compensation for certain rights. In terms of the concept of *Sulh*, a mutual compromise agreement will be placed in the category of a sale, only for the purpose of the invocation of all the rules (*masaail*) applicable to *Bay'* and to mention but few, the following rules (*masaail*) should be kept in mind while attempting to negotiate *Sulh*. These include the requirement that the subject-matter must be definite and free from all kinds of uncertainty; no *riba* (interest or usury) of any kind should be introduced into it; the capacity of the disputants must not be in question; legality of the claim against *al-Masaalih Alaihi* must be ensured; the subject-matter apart from being certain, must be present at the time of *Sulh*; offer and acceptance must conform with the legal requirements of contract under Islamic law; etc.[50]

2.4 Legality of Making *Sulh* in Islamic Law

The concept of *Sulh* is relatively not a new concept in the Islamic system of administration of justice. It is a concept provided for by the primary sources of the Sharia. It has been explicitly established by the Holy Quran and exemplified by the *Sunnah* of the Prophet (S.A.W.) and the *ijma* of the Muslim jurists.[51] The Holy Qur'an as the principal source of the *Shariah* has made mentioned emphatically the provisions relating to *Sulh* in several verses of the Qur'an. However, the evidences for its legality have been derived from the following verses of the Holy Qur'an:

[50] al-Kaafi, *Ihkamul Ahkam ala Tuhfah al-Hukkam, op. cit.,* pp. 64-65

[51] Sayyid Sabiq, *Fiqh al-Sunnah, op. cit.,* Vol. 3, p. 210

Qur'an 4:35 provides:[52]

> If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers; if they both wish for peace, Allah will cause their **reconciliation**. Indeed Allah is Ever All-Knower, Well-Acquainted with all things.

Qur'an 4:114 provides:

> There is no good in most of their secret talks save (in) him who orders *Sadaqah* (charity in Allah's cause), or *Ma'ruf* (Islamic monotheism and all the good and righteous deeds which Allah has ordained), or **conciliation between mankind;** and he who does this, seeking the good pleasure of Allah, We shall give him a great reward.

Qur'an 4:128 provides:

> 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 is better**. And human inner-selves are swayed by greed. But if you do good and keep away from evil, verily, Allah is Ever Well-Acquainted with what you do.

Qur'an 8:1 provides:

> …so fear Allah and adjust all matters of difference among you…

Qur'an 49:9-10 provides:

> And if two parties or groups among the believers fall to fighting, then make peace between them both. But if one of them outrages against the other, then fight you (all) against the one which outrages till it complies with the command of Allah. Then if it complies, **then make reconciliation between them justly**, and be equitable. Verily, Allah loves those who are the equitable.

The provisions of these verses of the Holy Qur'an had been elegantly interpreted by the Islamic exegetists the scope of which could not conveniently be stated fully here but the

[52] The Qur'anic translation of the verses set out below are culled from English Translation of the Meanings and Commentary of the Holy Qur'an by Dr. Muhammad Taqi-ud-Din al-Hilali and Dr. Muhammad Muhsin Khan

highlight of it is briefly indicated below in conjunction with the understanding given to them by the *fuqaha* (Islamic jurists) in the books of *figh* (Islamic jurisprudence). Ibn Kathir,[53] a famous commentator of the Holy Qur'an in his interpretation of Qur'an 4:35 said that if there is a dispute between two spouses, a *Hakim* (Ruler/Judge) should appoint two arbitrators one from each side of the spouses to look at their affairs with a view of either compromise or separation between the two couples and whatever they decree, it stand binding among the parties. But the jurists have differed as to whom is addressed in Qur'an 4:35 to appoint the arbitrators. Some jurists said *al-Hakim* (Ruler/Judge); some said the couples themselves; and some said the *Wali* (Guardians to the couples), either of these categories of people whoever is appointed is in a position to induce a compromise and help bring about a settlement.

Similarly, the same interpretation was given by Al-Qurtabi[54] on verse 35 of Surat Al-Nisa and he added that these verse is the authority in the Holy Qur'an regarding Arbitration under the *Shariah* and that those to be appointed arbitrators should be men that come from the couples family, be trustworthy, with wisdom, just, knowledgeable and of understanding and that they can be appointed only when it is uncertain whom among the couples is at fault, otherwise if the erring party is already known, he/she simply takes his/her responsibility.

Ibn Qudama,[55] an eminent Muslim jurist has also stated that all Muslin jurists have agreed that two arbitrators should be appointed when a dispute and dissension occurs

[53] Ibn Kathir, *Tafsir al-Qur'an al-Azim*, *op. cit.,* Vol.4, pp. 29-32.

[54] Al-Qurtabi, *al-Jami'u li Ahkam al-Qur'an*, *op. cit.,* Vol. 6, pp. 289-297

[55]Ibn Qudama, *Al-Mughni*, *op. cit.,* Vol. 7, p. 5

between two spouses and it is not known which of the two spouses is in fault. So also, those arbitrators can be appointed where both spouses are in disaccord and the husband has refused to keep his wife in a proper manner or to set her free in a godly way or the wife refuses to fulfill her obligations that Allah (SWT) has imposed upon her towards her husband.

Ibn al-Arabi[56] have also stated that jurists have agreed that one of the arbitrators if possible should be from the husband's and wife's family but if it is not possible, other people may be appointed depending on what is in the best interest of those concerned. That the two arbitrators when in agreement are to execute what they see is the best opinion in bringing accord between the spouses. But if the arbitrators differ in their opinion, then their verdict is not to be executed.

It has also been reported by Al-Shafii in al-Umm[57] from Ubaida al-Salmani who said, "A man and woman came to Ali Ibn Abu Talib and each of them have a group of people with them. Ali ordered them to appoint a male arbitrator from his family and one from her family. Then he said to the arbitrators, 'Do you know what your responsibilities are? If you find that you can bring them back together, then do so. If you find that they should be separated, then do so.' The woman said, 'I am pleased with the Book of Allah concerning what is upon me and what is for me.' The man said, 'As for separation, I will not accept that.' Ali told him, 'You are lying, by Allah, until you accept the same things she has accepted."[58]

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[56] Ibn al-Arabi, *Ahkam al-Qur'an*, *op. cit.*, Vol. 1, pp. 537-544

[57] Al-Shafii, *Al-Umm*, *op. cit.*,Vol. 4, p. 463

[58] Abdul Razzaq, *Musannaf*, op cit., Vol. 6, p. 512

From the *Sunnah*, the legality of *Sulh* is derived from several *ahadith* of the Prophet (S.A.W.) whose life was filled with examples of mediated solutions to human problems. In a *hadith* narrated by Kathir bin ‘Abd Allah bin ‘Amru bin ‘Auf al-Muzani, it is reported that the Prophet Muhammad (S.A.W.) said:

> *Sulh* is permissible among the Muslims except the one which makes the unlawful as lawful and which makes the unlawful as lawful. Muslims are bound by their promises except promises that permit the unlawful as lawful and the lawful as unlawful.[59]

This *hadith* clearly says that *Sulh* is permissible in all matters as long as it does not go against ‘*hukm sharia’.* The agreement reached between the participants in the *Majlis Sulh* (reconciliation session) must reflect the principles of Islamic law. *Sulh* is only allowed when it concerns the rights between man and his fellow human being. In other words, *Sulh* is never allowed in a matter that concerns the rights of Allah, for example in *hudud* cases.

Similarly, in another hadith, it was reported that:

> Kaab Ibn Malik had sought for the repayment of his loan from Ibn Abi Hadrad in the Mosque and their voice went high until it attracted the attention of the Prophet (SAW) from his home. The Prophet (SAW) called Kaab and told him to remit one half of his loan and he agreed. The Prophet (SAW) then told Ibn Abi Hadrad to stand and settle the loan. Similar narration was also reported from Isma’il Ibn Abi Uwais from his brother Suleiman, from Yahya Ibn Sa’id, from Muhammad Ibn Abdur-Rahman, that his mother Amrata the daughter of Abdur-Rahman said, she heard the mother of the believers Aishah (RA) saying: the Messenger of Allah (SAW) has heard the high voice of disputants. One party was seeking and appealing for compassion from the other party who was swearing by Allah’s name never to be compassionate. The Messenger of Allah (SAW) met them and asked, who is that taking an oath never to do an act of virtue or kindness? He said: I am O Messenger of Allah and I have waived the whole of it.[60]

[59] Sayyid Sabiq, *Fiqh al-Sunnah, op. cit.,* Vol. 3, p. 210

[60] Sahih Bukhari, Vol. 4, Hadith No. 2705

In another hadith, it was narrated by Abdul-Azeez bin Abdul-Allah from Ibrahim bin Sa'ad, from Saluh from bin Shihab, that Humaidah bin Abdur-Rahman informed him that his mother Umm Kulthum bint Uqbah informed him that she heard the Prophet (SAW) saying: "*he who reconciles between people is not a liar by reason of what lies he makes or says (with the best of intentions)*". Umar bin Khattab (RA) was reported to have said, *"return the disputants for reconciliation, for adjudication of conflicts through litigation engenders hatred*".

Similarly, further evidence from the *Sunnah* includes the fact that Prophet Muḥammad (PBUH) consented to arbitrate between Jews of Bani Quraizah when they requested him to do so. He appointed Saʿad ibn Muʾaz to arbitrate and then recognized the award made by him and ordered it to be carried out. This became tangible evidence that arbitration is both permissible and legal.[61]

From the juristic point of view, the Muslim jurists have also been reported to have reached a consensus (*ijma*) on the legality of *Sulh* in Islamic law. In other words, the Islamic jurists have upheld unanimously the legality of *Sulh* under Islamic law as something strongly recommended and desirable.[62] However, it is reported by Ibn Qudama that:

> Some Muslim jurists differ in opinion regarding the matter of arbitration (*at-Tahkeem*) and its permissibility. Their views fall within one of three

[61] See Abū Dāwud, *Sunan Abī Dāwud*, Dār al-Fikr for Publishing and Distribution, Vol. 4, p. 289, Ḥadīth 4955; See also Al-Nisaee, Aḥmad bin Shuwaib, *Al-Sunnah al-Kubrā*, Vol. 3, p. 466, Ḥadīth 5940/1; Al-Albanī, *Erwa al-Ghaleel*, Al-Maktab al-Islāmī, Beirut (1979) Vol. 8, p. 237.

[62] Sayyid Sabiq, op cit., Vol. 3, p. 210; See also al-Kaafi, *Ihkamul Ahkam ala Tuhfah al-Hukkam, op. cit.*, p. 64

> opinions. The first opinion is that arbitration is totally permissible, whether or not there is a judge in the city. This opinion is held by the four main schools of jurisprudence: Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī, plus Ziydiyyah and some Shiʾa. They rely upon the provisions of the Holy Qurʾan, the *Sunnah*, *Ijma* and *Qiyas* to state that, in each of these sources, arbitration is mentioned. The second opinion holds that arbitration is permissible, provided that there is no judge in the city. Besides, as the provisions of Qur'an 4:35 clearly makes arbitration between husband and wife permissible, and if arbitration is permissible for resolving matrimonial conflicts, it should also be allowed for other conflicts by way of *qiyas* (analogy). Logically, if the use of arbitration is permissible to bridge family disputes as the prime nucleus of society, then it should also be permissible to resolve conflicts between members of society to avoid a rift in the social entity that is in the public's interest (*al-maṣlaḥah al-mursalah*). This is the opinion of some scholars from the Shāfiʾī School, based on their belief that arbitration is second to judicature and that a judge is the principal arbiter of conflicts. Hence, some Shāfiʾī jurists believe that arbitration is not permissible while a judge is present.[63]

Moreover, an arbitrator serves in place of a judge, helping him to resolve the conflict. Further, since it is not explicitly forbidden in the *Shari'ah*, arbitration remains permissible because the original judgment on issues, contracts, and transactions is permissible unless a specific text renders it otherwise.

A third opinion held by a number of Shāfiʿī jurists, and *Al-Khawārij*, they opined that arbitration is never permissible, based on the fact that conflict resolution is the basic function of the *Imām* and anyone to whom he delegates this authority. Hence, arbitration is an assault upon the authority of the *Imām*, his deputies and judges. However, this opinion can also be challenged on the basis that arbitration does not invade the *Imam's* authority because the arbitrator has no authority to imprison or to implement a judgment.

[63] Ibn Qudamah, *Al-Mughni*, *op. cit.*, Vol. 11, p. 483; Al-Mardawi, Alī bin Suliman, *Al-Insaf*, Dār Ihyaʾ al-Turath al-Arabī, Beirut, Lebanon, Vol. 2, p. 197; Al-Murtada, Aḥmad bin Yahya, *Al-Bahr al-Zakhar*, Al-Risalah, Beirut, Lebanon, Vol. 6, pp. 113-114. Al-Amili, Muḥammad al-Jawad, *Muftah al-Karama*, Damascus, Vol. 10, p. 3.

The arbitrator may only resolve conflicts based upon justice and reasonability, which Islam does not prohibit.[64]

Therefore, in view of the above stated Qur'anic verses, Prophetic traditions and juristic exposition on the subject, the legality for the practice of *Sulh* between contending litigants is considered an act virtuously recommended. Thus, it is not wrong for a judge to make a recommendation to the disputing parties to resort to *Sulh*. The judge may encourage them to settle their dispute by way of *Sulh*.

2.5 Advantages of *Sulh* under Islamic Law

The *Shari'ah* is based upon desire for attracting beneficial interests and prevention of harm to human beings, *i.e*. the principle that everything of interest to human beings that does not cause harm is permissible (i.e. *ḥalal*), without regard to whether the thing is beneficial in whole or in part.[65] For this, the essence of the institution of *Sulh* under the Sharia as we seen in the definitions considered above was to restore peace, end hostilities and misunderstanding before they are blown to a proportion that cannot be managed.

Islam advocates amicable settlement of every dispute to avoid antagonism between parties. In many instances, the Qur'an refers to the principle of resolving disputes through negotiated settlement as a dispute may tend undeniably to affect the rationality or the

[64]Ibn Najeem, Zain Aldeen Ibn Ibraheem, *Al-Bahr al-Raʾiq*, Dār al-Māʿrifah, Beirut, Lebanon, Vol. 7, p. 42; Al-Ramli, *Nihayat al-Muhtaj*, Vol. 8, p. 230; Al-Kharshi, Muḥammad bin Abdullah, *Sharh al-Kharshī*, Dār Sadr, Beirut, Vol. 7, p. 145; Ibn Rushd, Muḥammad bin Aḥmad, *Bidayat al-Mujtahid*, Dār Al-Fikr, Beirut, Lebanon, Vol. 2, p. 452.

[65]Ibn Taymiyyah, Aḥmad ibnʿAbdal-Ḥalīm, *Collections of Fatwā of Ibn Taymiyyah al-Ḥanbalī*, Dar Kutb al-Ilmiyyah, (1985), Vol. 11, pp. 344-345; See also Sheikh U. D. Keffi, op cit., pp. 194-196.

mental state of the disputants. This will cause the inability for them to see the dispute clearly. The failure to see the issue at hand will create misunderstanding and this will further aggravate the dispute. Thus, the principal "purpose of *Sulh* is to end conflict and hostility among believers so that they may conduct their relationships in peace and amity."[66]

It can be seen that the ethical principle in *Sulh* is to forgive and to compromise. Furthermore, negotiated settlements are encouraged in Islam for the purpose of fostering and preserving human relationship. Thus, it is acknowledged that resolving conflicts through *Sulh* establishes a productive relationship for the future. In divorce for an example, an amicable settlement would generate in the parties concerned, a sense of respect for each other even though they have separated.

Moreover, among the advantages of *Sulh* is that, it manage to shorten the time needed to resolve the dispute. It avoids strive and ill-feelings that often accompany winner-take-all litigation.[67]*Sulh* restores and enhance cordiality, mutual respect and forbearance among disputants which ensure coherence among the Muslim *Ummah* as not only parties to dispute could feel relieved and delighted but also all those who participate in the process that eventually led to the amicable settlement.[68]

It has been narrated in a Hadith that a man bought a piece of land and later discovered some mineral deposit of gold therein and he contended that he bought only the land and not anything on it but the seller argued that the transfer of the land includes anything

[66] Keffi, S. U. D. op cit., pp. 194-196; See also Iqbal, *op. cit.*, at pp. 1035

[67]Iqbal, *op. cit.*, at pp. 1035

[68] Keffi, S. U. D. op cit., pp. 194-196

found along with it. As they could not resolve the dispute, a third party arbitrated for them and third party resolved for one of the disputants to marry his descendants to the descendants of the other party and that the gold treasure be expended on the couples.[69]

2.6 Circumstances under which *Sulh* is Recommended

Under the Sharia, it is not in all instances or circumstance that *Sulh* is applied or resorted to in settling a dispute. Accordingly, the Islamic law has procedurally laid down instances that are typical or amenable to *Sulh*. As it is not legal for a *Qadi* (judge) to pass a decision on a case without fully understanding its nature, *Sulh* could be resorted to in an instance where the judge could not ascertain the nature of the case or where the judge is unable to determine clearly who is right or wrong among the contending litigants despite the evidence before him due in part to the complexity of the case.[70] In the same vein, *Sulh* cannot be applied where the case is straight forward and that a decision could be given to either party based on the evidence before the court.

Sulh was the method preferred by the Prophet, who made it plain that he was skeptical of judicial proceedings, which were devised by man and therefore fallible. Parties who won their cases by dent of eloquence at the expense of truth were threatened with direst sanctions.[71] Thus, the trial process is not regarded as an ultimate truth-finding mechanism

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[69]Ibn Hajar al-Asqalānī, *Fath al-Bārī fi Sharh Sahīh al-Bukhārī,* Dār al-Salām, Riyadh (2000) Vol. 8, p. 378; See also Keffi, S. U. D., op cit., pp. 193-194

[70] Ibn Farhun, *Tabsirat al-Hukkam fi Usul al-Aqdbiyah wa Manahij al-Ahkam, op. cit.,* pp. 54-56; Qadi Abubakar Muhammad, *Tuhfatul Hukkam*, p. 15; See also Keffi, S. U. D., op cit., pp. 193-194

[71] Othman, A. *And Amicable Settlement Is Best: Sulh and Dispute Resolution in Islamic Law*, Arab Law Quarterly (2007) Vol. 21, p. 64.

that will lead to substantive justice. It can be tainted and subverted by the imperfect nature of humankind; therefore, it should be avoided when possible.

A report in the *Musannaf* of al-San'ani attributed to Umar ibn al-Khattab (the second caliph of Islam) to be unequivocally critical of adjudication: "Dispel the disputants until they settle amicably with one another; for truly adjudication leads to rancor." However, an arbitrator or judge cannot turn the parties away if they cannot be reconciled. This was dealt by the Umar ibn al-Khatt'ab who was reported to have directed in his letters to his representatives in the different parts of the Muslim Empire: 'And strive for conciliation so long as the rendering of judgment does not become evident to you.'[72]

Al-Shafii states that he prefers it if a judge commands disputants to attempt *Sulh* and extricates himself from his judicial duties (i.e. offer an adjournment of the case) for one or two days to facilitate their conciliation. However, if they disagree, he cannot turn them away and should instead proceed to adjudicate between them. Al-Shafii warns the judge against judging if the decision is not plain to him, for it amounts to oppression. The judge has the burden of ascertaining exactly where judgment should lie, no matter how long it takes.[73] His follower al-Qassim claims that if there is an *ijma* that a judge can delay judging if he desires *Sulh*, but this must be with the consent of the parties.

[72] al-San'ani, *Musannaf,* vol 8, hadith 15304, pp. 303-4 cited in Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration*, p. 11, LSE Law, Society and Economy Working Papers 12/2008, London School of Economics and Political Science Law Department, available online at: http://ssrn.com/abstract=[1153659]

[73] al-Shafi, *al-Umm, op. cit.,* Vol. 6, p. 312

Al-Shirazi goes a little further and says that even if the judge knows which way judgment should be given, it is still recommended (*mustahab*) that he command them to attempt a *Sulh*. Once they fail, he is not to try again to persuade them, for judgment is obligatory (*al-hukmu lāzim*) in such cases, and postponing it without the consent of the entitled party is not allowed. Ibn Hajar al-Asqalānī agrees, saying that the majority of jurists prefer that a judge steer parties in the direction of *Sulh* even if it is clear how he should judge the case.[74]

Ibn Farhun emphasized that judges should apply *Sulh* when faced with certain types of disputants and cases, namely when (1) the parties have a kinship with one another, (2) they are people of virtue and good standing in society, (3) there is risk of increased hostility between them, and (4) the nature of the case is such that it is difficult for the judge to decide. The implication is that the judge need not feel compelled to consider *Sulh* otherwise.[75] Similarly, where each of the party to the litigation is able to present his evidence and the evidence presented by each of them happens to be on equal weight or strength when put on the scale of justice, the judge may advice the litigants to consider settling their dispute by way of *Sulh*.[76]

In general, the sources of Islamic law reveal that *Sulh* is central to the Islamic legal system, and that judgment by judicial sanction is not the superior method for dispute

[74] Ibrāhim ibn Alī al-Shirāzī, *al-Muhadhdhab*, Dār al-Kutub al-Ilmiyya, Beirut, Lebanon, (1995) Vol. 3, p. 404; Ibn Hajar al-Asqalānī, *Fath al-Bārī fi Sharh Sahīh al-Bukhārī, op. cit.*,Vol. 5 p. 378

[75] Ibid

[76] Ash-Shanqiti, *Mawahib al-Jalil min Adillatil Khalil*, Al-Makhtab al-Ilmiyyah, Beirut, Lebanon, (nd.) Vol. 4, pp. 54-55

resolution. In that, *Sulh* is encouraged to be attempted whenever it is reasonable to do so. This is because, the basic conditions or impetus for a judge to order contending litigants to resort to *Sulh* is when the judge does not appraise himself the nature of the case and that the parties concerned have consented to the use of *Sulh* in resolving their dispute. As to the condition that the judge should order the use of *Sulh* where he could not understand the nature of the case, what is meant by this condition as it was expatiated by some jurists is that, when the circumstance is such that it becomes confusing as to whom the legal right belongs to among the contending parties, the judge should recommend the use of *Sulh* to resolve the conflict. Ultimately, it would remain prohibited for a judge to force one or both litigants to submit to *Sulh* against their will other than as per the circumstances mentioned above.

2.7 Formation and Essentials of *Sulh*

There are certain essential elements that must the satisfied before a Sulh can be attained and these requirements have been discussed below.

2.7.1 Basic Conditions Governing *Sulh*

A *Sulh* contract has certain conditions that must be available to the party concluding the contract. For example, the person who concludes *Sulh* must be sane, because both the insane and minors have no eligibility.[77] Moreover, *Sulh* must not disfavor a minor if it is to be performed by his custodian otherwise the contract will be invalid. *Sulh* can only be permissible in matters involving right of man. The Court shall not order the case to be settled by *Sulh* if it is apparent that one party is right in the dispute. It should not

[77] See Doi, I. A., *op. cit.*, pp. 553.

contravene the principle of *Shari'ah*. *Sulh* is not applicable in the case which was already decided by the court.

The subject of *Sulh* contracts must be treasury (of financial value), or something similar such as real estate, owned by the defendant and known to the parties. Jurists list important types of dispute that could occur between people today, and upon which *Sulh* may be applied, although not purely permitted by the Shari'ah as subject of *Sulh*, at least in the opinions of some jurists. The three most significant situations are those discussed below.

In the first situation, debt is deferred, and the debtor and creditor are reconciled that part is to be paid in advance while the remainder is waived. For example, say a N1, 000 debt is to be paid after 1 year, and the creditor reconciles with the debtor to accept N800 now on condition that the remaining N200 will be waived. This form of *Sulh* is not permissible in the opinion of most jurists because in this case the *Sulh* contract becomes a compensation contract, for which the price is delay in payment. Since delay is not of a financial nature (*māl*), it cannot be equated with price in a *Sulh* contract. Such jurists find some similarities between credit usury (*ribā*) and this type of *Sulh*. They also see delay in payment as vital to addition in credit usury and vital to diminution in this form of *Sulh*. Ibn al-Qiyyam has discussed this opinion.[78] He and his teacher, Ibn Taymiyyah, are of

[78]Ibn al-Qayyim, Muḥammad Ibn Abī Bakr, *Iʿalam al-Muwaqīnʿan Rabb al-ʿAlamīn*, Al-Sādah Printing, Vol. 3, p. 371. It is worth mentioning that this opinion is said to be that of Imām Aḥmad Ibn Ḥanbal (may Allah's mercy be upon him).

the opinion that this form of *Sulh* is permissible.[79] They reason that this form of *Sulh* is ultimately counter to usury, because usury includes an addition in one of the payments as the price of delay. Hence, in this type of *Sulh*, part of the price is waivered instead of making an advanced payment. Both parties benefit such action; there is no question of usury which is an addition, which is absent in this case. Ibn al-Qiyyam's reasoning is upright and logical in that both parties obtain benefits, but without usury. Accordingly, this falls within what is permissible which rests upon the consent of both parties, by one party waiving some of his rights to benefit in return for being paid in advance by the other party.

In the second situation, debt is immediate, and the plaintiff reconciles with the defendant to pay part of the debt within a certain time. As illustration, suppose that the debt is N100,000. The plaintiff agrees with the defendant to pay only N90,000 in full satisfaction of the debt, but he fixes a time for the payment to be made on Friday. If the defendant fails to pay on Friday is he then liable to pay the N90,000 or N100,000? Muslim jurists are of two opinions on this question. Abū Ḥanifah and his student, Muḥammad ibn al-Ḥassan, said that, if the payment is not made on Friday, the debt will return to its original status, and *Sulh* will be nullified because the defendant did not adhere to the plaintiff's stipulation. Abū Yusuf, who is also a student of Abū Ḥanifah, argues that the *Sulh* contract includes suspension in that part of the debt is being waived upon the condition that payment is actually made. He contends, however, that waiving cannot be suspended on conditions. Hence, if the plaintiff does not intend the defeasance of the contract, if the

[79] Al-Baʾali, Muḥammad bin Abbas, *Al-Ikhtiyarat al-ʿIlmiyyah min Futawāʾ ibn Taymiyyah,* Dār al-Kutub al-ʿIlmiyyah, Cairo, (2000), p. 134.

defendant does not fulfill his condition, then the *Sulh* contract remains valid, and the defendant is liable to pay only the agreed amount.

Logically, Abū Ḥanifah's opinion is more viable and practical, because it must be concluded from his having suspended the waiving of his right on a condition and a specific time that the plaintiff suspended the contract defeasance on those terms. Otherwise, the condition would be without value. Moreover, following Abū Yusuf's opinion would render the possibility that such *Sulh* contracts would be impossible, for it would endanger the plaintiff should the defendant fail to adhere to the condition, in which case the underlying claim would remain in full force. This would particularly be the case if the defendant realized that he benefited from the *Sulh* contract immediately after entering into it, for part of the debt has been waived and his obligation to pay within the specific time frame or not at all would not affect that waiver.

The plaintiff who proposed the *Sulh* contract is supposed to be the most powerful party but he will become the weaker party, which is not permissible. The plaintiff should remain the strong party while the defendant's role is to adhere to the conditions stipulated if the contract is to be of value for both, and not just one, parties. This is the philosophy intended by *Sulh* contract in the *Shari'ah*.

The third situation occurs when the conflicting parties agree to reconcile and the price offered is a benefit rather than a tangible thing or money. In other words, the defendant, who owes the plaintiff N10,000 agrees to give the plaintiff use of his apartment for 1

month in lieu of paying the amount owed in funds. In this case, the jurists say that the *Sulh* contract is permissible, in that, it resembles a rental contract.[80]

As stated earlier, *Sulh* contract assumes the form of contract. Ḥanafi jurists are distinct from the three other schools, in that, they deal with many hypothetical cases, some of which occurred in past eras and others in modern times. No doubt the existence of solutions for hypothetical cases gives evidence of the richness of the Ḥanafi School which we are in dare need nowadays. This is especially so in the light of many emerging issues and new commercial transactions that requires intelligence and the ability to study new contracts and issue jurisprudential solutions that are suitable, effective and flexible without colliding with the common rules of the *Shari'ah*.

2.7.2 Essential Elements of *Sulh*

Sulh as a contract has certain essential elements that together make up a valid *Sulh* agreement under Islamic law. The following are the essentials of *Sulh* agreement:

a) *Al-Musalih Lahu* (one who makes a declaration of claim);

b) *Al-Musalih Alaihi* (one against whom the claim is declared);

c) *Al-Musalih Anhu* (subject-matter in respect of which the claim is lodged);

d) *Al-Musalih Bihi/Badl al-Sulh* (the object offered for the *Sulh*/Consideration);

e) *Al-ijab* (Offer);

f) *Al-Qabul* (Acceptance).[81]

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[80] Al-Kasani, *Badai'ī al-Sana'ī fī Tartīb al-Sharīʿih, op. cit.,* Vol. 6, p. 47; See also Ibn Qudamah, *Al-Mughni, op. cit.,* Vol. 4, p. 483.

[81] Sayyid Sabiq, *Fiqh al-Sunnah, op. cit.,* Vol. 3, p. 210

2.7.2.1 *Al-Musalih Lahu* and *Al-Musalih Alaihi*

The two conciliating parties (*al-Masaalih*) should be persons who possess the legal capacity to surrender their right, donate or make a gift and not otherwise. In accordance with this principle, an insane, a minor, a guardian over orphan's property, an administrator over endowment funds (*waqf*), etc., shall have no legal capacity to become *Masaalih* over properties or interests that they lack the legal capacity to validly dispose under Islamic law.[82] Their capacity in this regard is only contingent on the fact that all such persons whose legal capacity is in question (i.e., minors, orphans and administrators of *waqf*, etc.,) should stand to benefit from the *Sulh*.[83] This means that there shall be a special need and benefit that may accrue to such persons for a *Sulh* on their behalf to be valid.

2.7.3.2 *Al-Musalih Anhu* (Subject-Matter of Dispute)

The subject-matter of *Sulh* 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. According to Abu Hanifa, if its delivery will not be required, having its knowledge will not constitute a condition.[84]

As dispute on illegalities cannot be rectified by *Sulh*, the subject-matter of *Sulh* may emanate from dispute over anything lawful - be it dispute involving monetary claims, property, issues concerning marriage and divorce, and lot of civil cases to the exclusion of *Hudud* cases. To this end, the right upon which the dispute arises must be the right of an individual (*haqq al-Ibad*) out of which a person is capable of relinquishing. It must be

[82] Sayyid Sabiq, op cit, pp. 210-211

[83] Ibid

[84] Sayyid Sabiq, op cit, p. 212

a vested right of the individual even if it is not a tangible property like *Qisas.* But as regards the rights of Allah (*huququl Allah*), it is not lawful to conclude *Sulh* over it.[85]

Furthermore, to be valid, a *Sulh* contract must fall within the rights of the human being, not the rights of Allāh, i.e., *ḥudūd*, or *tazīr*,[86] because the rights of a human being can be waived and not the rights of Allāh. Also, where *Sulh* is concluded to the effect that a witness should conceal his evidence either on an issue pertaining to Allah's right or that of an individual, this kind of *Sulh* would be invalid and unlawful because of the illegality of concealing evidence.[87]

2.7.3.3 *Al-Musalih Bihi* (Consideration)

This is the object or thing tangible or otherwise upon which the parties to the *Sulh* agree to be given as consideration in place of the right forgone by way of *Sulh*. Here, the basic rules of Sale contract as to the subject matter of sale apply. In that, it must be something valuable, beneficial and capable of delivery, when so required. It must also be well-known, i.e., such knowledge that would negate ignorance and conflict where it may be required to be received or delivered.[88]

However, according to Hannafi School, if it is something that doesn't require actual physical delivery, it is not a condition that the article or item must be well-known. This leniency (*rukhsah*) applies where, for example, there is a claim and counter-claim between two parties in dispute with one relinquishing his claim against the other and vice

[85] Sayyid Sabiq, op cit, p. 212

[86] Al-Zailaie, *op. cit.,* p. 37.

[87] Sayyid Sabiq, *op. cit*., p. 382

[88] ibid, p. 211

versa. But to Shafii, it is not acceptable to conclude *Sulh* with an unknown article or item as the consideration.[89]

2.7.3.4 *Al-Ijab* and *Al-Qabul* (Offer and Acceptance)

Like any other contract under Islamic law, offer and acceptance are essential ingredients of *Sulh*. The offer as well as the acceptance may be conveyed in any expression that illustrates the mutual consensus of the parties.[90] For instance, the *Al-Musaalihu Anhu* may say: "I offer to you by way of *Sulh* a sum of … in place of your … being owed by me". The *Al-Musaalihu Lahu* may reply: "I accept". Once the parties are true with this process, it has become binding on them and it will not be valid for anyone of the parties to unilaterally repudiate it.[91]

2.8 RELEVANCE OF WESTERN MODELS OF ALTERNATIVE DISPUTE RESOLUTION [ADR] WITH THE ISLAMIC CONCEPT OF SULH

ADR processes in Islamic law include *nasihah* (counselling), *sulh* (mediation/conciliation or compromise of action), *tahkeem* (arbitration), Med-Arb (combination of mediation and arbitration), *muhtasib* (Ombudsman Judge), *fatwa* of *mufti* (Expert Determination), and walī al-*mazālim* (Chancellor).[92] In terms of similarities, these are forms of alternative

[89] ibid, p. 211

[90] ibid, p. 210

[91] Sayyid Sabiq, *op. cit*., p. 210

[92] See generally, Syed Khalid Rashid, "Alternative Dispute Resolution in the Context of Islamic Law", *The Vindobona Journal of International Commercial Law and Arbitration* (2004) 8 VJ (1) 95-118; Umar A. Oseni, *Sharī'ah Court-annexed ADR: The Need for Effective Dispute Management in Waqf, Hibah and Wasiyyah Cases in Malaysia*, 14th Annual Conference of the Sharī'ah Legal Officers of Malaysia, pp. 3-4 available online at: http://irep.iium.edu.my/27072/4/Shariah_Judges_Paper_-Langkawi_2012.pdf accessed on the 21/10/13

dispute resolution, and are conditional on the choice of the disputants, and possible, settlement of the dispute.

As for the differences, arbitration "tahkim", for instance, differs from conciliation (Sulh) in two aspects: firstly, arbitration ‘tahkim’ results in a binding, judicial decision, whereas conciliation "sulh" results in a non-binding proposal for settlement; secondly, in conciliation ‘sulh’ one or both parties renounce some rights; whereas in arbitration no one renounces any of his rights. Arbitration also differs from mediation; where the former ends in a binding judicial decision, the latter facilitates negotiation.

As for conciliation "Sulh" and mediation "Wasaatah", they are considered by some scholars to be similar in general terms, but they are, in my opinion, different in nature. Conciliation in Islamic Law is a means of amicable dispute settlement, whereas mediation is one of the means of amicable settlement, and arbitration is another one.[93]

Ombudsman in Islamic law is *Muhtasib,* whose office is mentioned in the Quran and the first two ombudsmen that of Makkah and Medinah were appointed by the Prophet himself. *Muhtasib* serve towards dispute resolution and dispute avoidance.[94] *While Muhtasib* or Ombudsman is as old as Islam itself, the institution of Ombudsman has now become an integral part of the administration of justice in many countries of the world. Ombudsman helps to take into cognizance such public complaints against the government bureaucracy which are generally considered outside the jurisdiction of courts. This institution emerged in Sweden in 1809 and in England in 1967 through the

[93] Said Bouheraoua, *Foundation Of Mediation In Islamic Law And Its Contemporary Application*, Department of Islamic Law, Ahmad Ibrahim Kulliyyah of Law International Islamic University Malaysia (IIUM), p. 3

[94] Ibid, p. 3

Parliamentary Commissioner Act. It is now considered as an important and integral part of ADR.

Expert determination is an ADR process in which the parties to a dispute seek the expertise of an expert in making a neutral evaluation of the dispute and pronounce an assessment of the relative merit of the cases of both parties. The assessment is not binding but advisory in nature. Yet, keeping in view the knowledge of the expert and his neutrality parties tend to accept the assessment as binding and settle their dispute accordingly.[95]*Fatawa* given by the *Muftis* closely resembles with expert determination. *Fatawa* in Islamic law are non-binding evaluative opinions given by a *Mufti* (juristconsult), regarding a specific issue affecting the whole of society (eg. birth control, etc) cloning, transplantation of human organs, etc) or a specific individual problem affecting only two a parties (eg. a business dispute, matrimonial problem, testamentary disposition, ect). Not everyone can act as *Mufti*, except those who have the same qualifications as a *qadi.*[96]

Islamic history is full of cases in which thousands of problematic issues and disputes were referred to *Muftis* and the answers given by them constituted a collection of *fatawas.* In fact, *fatawa* have become an integral part of Islamic legal history, both past and present. The earliest collection of *Fatawa* known as *Kitab Al Nawazil* was compiled by Abu Layth al Sumaqandi, who died in 983 AD. And the latest collection is *Fatawa Abu Zahra* published from Beirut in 1998. In many countries like Malaysia, there is government constituted *Fatawa* Committees to give verdicts on matter of general interest

[95] Ibid, p. 7
[96] Ibid, 8

for every Muslim. In still other countries like India, there are *Dar ul Ifta* constituted by the religious parties to give *fatawa* on voluntary basis. These have helped in resolving thousands of disputes among Muslims.[97]

It is a popular belief that ADR has emerged and originated in the West during the last few decades. But contrary to this belief, such ADR processes like Negotiation, Mediation, Arbitration, Expert Determination, Ombudsman and Med-Arab are as old as Islamic law itself, that is, 1400 years old. All of these have been not only mentioned in the Quran but were practiced since the times of the Prophet, who was a great supporter of the idea of amicable settlement of disputes.[98]

The Islamic law processes of ADR have assumed significance relevance in the modern world. The thrust of case management and dispute resolution in Islamic law is premised on amicable resolution of disputes based on good faith negotiation or mediation. The unique factor here is the spiritual element which drives the parties towards an amicable settlement. A number of these processes were introduced over 1400 years ago with the advent of Islam. Unfortunately, with the passage of time, some of the processes disappeared into the thin air and the ones that were still in use were not developed to meet the challenges of the time. However, with the paradigm shift in the modern world towards amicable resolution of disputes, scholars have perked up these long forgotten processes which are deep-rooted in the prime sources of Islamic law – the Qur'an and Sunnah. The court in a Muslim society is a multipurpose centre for case management. Its

[97] Ibid, p.8

[98] Rashid, S. K. (2008) *Peculiarities & Religious Underlining of ADR In Islamic Law*, pp. 1-2. A paper presented at the **Mediation in the Asia Pacific: Constraints and Challenges**, Organised by Harun M. Hashim Law Centre, IIUM & Asia Pacific Mediation Forum, Australia, held at IIUM, Kuala Lumpur, 16-18 June, 2008

role goes beyond court adjudication. As earlier observed, the case management role of the court includes appropriate court referral of a dispute to the relevant dispute resolution process.[99]

It may be noted generally that the Western system over-emphasizes more on the soft skills of the mediators whereas Islamic law, on the other hand, focuses on the moral integrity of the mediators. So also, the line of demarcation existent in the Western models of ADR between arbitration, mediation and reconciliation, etc., is non-existent in Islamic law. In the Western system, whilst ADR mechanisms are similar in nature, they have been ascribed distinct remedial effects in the conflict resolution circle.

[99] Umar A. Oseni, *Sharī'ah Court-annexed ADR: The Need for Effective Dispute Management in Waqf, Hibah and Wasiyyah Cases in Malaysia,* 14th Annual Conference of the Sharī'ah Legal Officers of Malaysia, p. 5 available online at: http://irep.iium.edu.my/27072/4/Shariah_Judges_Paper_-Langkawi_2012.pdf accessed on the 21/10/13

CHAPTER THREE

TYPES AND CLASSIFICATION OF *SULH* IN ISLAMIC LAW

3.1 Introduction

This chapter is aimed at identifying the various types and classifications of *Sulh* while looking at the scope of their application. The overall objective thereby has been focusing attention on the aspect of these categories of *Sulh* that are typically recognized and applied in Katsina State Sharia Courts being the focus of the case study of this research work.

It is worth nothing that the concept of *Sulh* in Islamic law has an embodiment of certain principles that provides for the substantive law on the subject matter of *Sulh* as well as certain other principles that provides for the procedural rules on how the substantive principles on the subject can be practically administered especially before the constituted authorities responsible for the administration of justice under Islamic law. Thus, *Sulh* is governed by both substantive rules as well as procedural rules. This position gave birth to the consideration of the scope of this concept regarding the types and classifications of *Sulh* to be perceived differently by the Islamic jurists; some referring to the procedural aspect in their discussions while others referring to the substantive rules on the subject. Be it as it may, this chapter identifies and highlights the various types and classifications of *Sulh* under Islamic law.

From the various definitions as well as the nature of *Sulh* considered in chapter two of this work, *Sulh* does not come in a vacuum, it is always preceded by a conflict or misunderstanding of various nature - be it that arising out of everyday contractual transactions which may inherently be commercial or domestic; inter-state political

relations which become worsen by military actions eventually culminating into armistice or truce; etc.[100] As such, the various types and classifications of *Sulh* under the Sharia provide largely for the scope of the wider concept of *Sulh* that cut across almost all facets of human endeavour wherein disputes or misunderstanding between and among Muslims and non-Muslims as well may possibly result giving rise to the need for the application of rules of Islamic law on dispute resolution. The implication is that, the various forms and classifications of *Sulh* envisaged under the Sharia may therefore not be governed by the same rules.[101]

It is generally said that *Sulh* is largely divided into two, transactional and confrontational. Transactional refers to relationship engendered by mutual consent, be it contractual, marital, etc., as well as that engendered through any of the well-known and established processes of acquiring and disposing property under the Sharia. Confrontational on the other hand refers to a situation of misunderstanding or conflict arising out of war or armed conflict.[102] The transactional category of *Sulh* is more common than the former which is occasional but devastating.

[100] Ibn Qudama, *Al-Mughni*, *op. cit.,* Vol. 7, p. 5

[101] Al-Kasani, *Badai'ī al-Sana'ī fī Tartīb al-Sharīʿah, op. cit.,*Vol. 6, p. 47

[102] Ibn Qudama, *Al-Mughni*, *op. cit.,* Vol. 7, p. 5; See also Abubakar, M. S. (2010) *The Role of the Sharia in Resolving Armed Conflicts Between Muslims or Between Muslims and Non-Muslims,* in Aliyu, I. A. Alternative Dispute Resolution and Some Contemporary Issues, M. O. Press and Publishers, Kaduna, p. 172

3.2 *Sulh* in *Muamalaat* (Transactional Cases)

Muamalat is one of the famous fields of human endeavor under the sharia that the relevance and application of the concept of *sulh* is contemplated. Its application relates to cases of contracts of sale, debts, mortgage, partnership, leases, hire, etc. In this arena of *muaamalat* (transactions), some Islamic jurists consider that primarily, *Sulh* can be classified into three categories biz:

a) *Sulh alal Iqrar* (i.e., *Sulh* upon the admission of liability by the defendant);

b) *Sulh alal Inkar* (i.e., *Sulh* upon the denial of liability by the defendant);

c) *Sulh an Sukutin* (i.e., *Sulh* upon neither the admission nor denial of liability by the defendant).[103]

This aspect of the law of *Sulh* in Islamic law contemplates resolution of disputes initiated formally before a constituted and competent judicial authority within the framework of Islamic legal setting wherein disputants submit their case before Islamic courts for adjudication. In this respect, *Sulh* can be seen and regarded under Islamic law as a court-connected dispute resolution mechanism, i.e., *al-Qada'u bi al-Sulh*.[104] It presents a scenario whereby a dispute is already commenced before a court of law but is somewhat sought to be resolved amicably either upon the request of one or both parties or upon a recommendation by the court for resorting to and exploring *Sulh* as an avenue meant for out-of-court settlement.[105]

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[103] Sayyid Sabiq, op cit, p. 212; See also Al-Kasani, *Badai'ī al-Sana'ī fī Tartīb al-Sharīʿah*, *op. cit.*, Vol. 6, p. 47; Ibn Qudama, *Al-Mughni*, *op. cit.*, Vol. 7, p. 5

[104] ibn Farhun, *Tabsirat al-Hukkam fi Usul al-Aqdbiyah wa Manahij al-Ahkam, op. cit.*, Vol. 2, pp. 54-56

[105] Qadi Abubakar Muhammad, *Tuhfatul Hukkam, op. cit.*, p. 15

Following the above classifications of *Sulh* procedurally into three categories (i.e., *al-sulhu alal iqrar, al-Sulhu alal inkar* and *al-sulhu an sukutin*), the Muslim jurists have deduced rules of law applicable to each of the above categories.

3.2.1 *Sulh alal Iqrar* (Upon Admission of Liability by the Defendant)

When *Sulh* is contemplated upon the admission of liability by the defendant (*sulhu alal iqrar*), the jurists see such a *Sulh* as a contractual transaction that is reached between the disputing parties aimed at settling their dispute which is placed as equivalent to a sale agreement and as such, all the rules of Islamic law that relates to the contract of sale (*al-Bay'*) becomes applicable to such a *Sulh* contract. That is to say, all such rules that relates to a sale agreement under Islamic law should be duly observed and complied with in the process of the *Sulh*. This applies only where the defendant has readily admitted liability or acknowledges his indebtedness to the Plaintiff (the claimant).[106] Here, the defendant admits the plaintiff's claim, while agreeing to pay a certain amount of money or offering something in return for settling the debt and ending the conflict. As illustration, assume that the plaintiff 'X' claims that the defendant 'Y' has borrowed N5.000.000 although the plaintiff 'X' has no supporting evidence. If the defendant 'Y' admits his indebtedness to the plaintiff and offers to give the plaintiff a car in satisfaction of the debt, the conflict is ended with the *Sulh* and this will be classified as similar to a sale contract. In this example, the *Sulh* takes place in the form of a sale contract because the car is given against the debt and in concluding such a *Sulh*, all the rules of a contract of sale must be observed. Similarly, because the plaintiff acquires the right to return a defective thing, he could reject an inferior car if its value is insufficient. Moreover, the price must be known

[106] See Ibn Farhun, op. cit., Vol. 2 at p. 55

and it serves as the determinant for the *Sulh* contract to be valid, similar to the case of a sales contract.

3.2.2 *Sulh alal Inkar* (Upon Denial of Liability by the Defendant)

As to *Sulh* upon the denial (of liability) by the defendant (i.e., *al-Sulhu alal inkar*), this form of *Sulh* is permissible in the opinion of Ḥanafī, Mālikī, and Ḥanbalī, but not Shāfiʿī, jurists. In this kind of *Sulh*, the defendant may deny what has been claimed against him be it a property, debt or *manfa'a* (usufruct). It also involves an instance where the defendant denies the debt or immovable thing that the plaintiff claims while admitting that the plaintiff has a right to less than what he is claiming. Accordingly, admission and denial occur simultaneously. Under such circumstances, the majority of Muslim jurists are of the view that there is nothing to prevent the conflicting parties from drawing up a *Sulh* contract to end the conflict.[107]

However, on the other hand, Shāfiʿī and Ibn Hazm opined that, in such cases of denial (i.e., *al-Sulhu alal inkar*), *Sulh* is not permissible stating that *Sulh* is only permissible upon the defendant's admission of liability and no more because in their view, *Sulh* justifies an established legal right which cannot be based upon denial by the defendant.[108] These jurists further held the view that, a defendant's act of paying money solely for the sake of ending a conflict is similar to the act of giving a bribe, which is not permissible by the *Shariah*. But it may be observed that, in circumstances of this nature, this form of *Sulh* contract have a compensatory nature. The plaintiff perceives reception of money as compensation of his right while the defendant perceives the contract as a tool to avoid

[107] Sayyid Sabiq, op cit, p. 213

[108] Ibid

taking an oath before the judge. Therefore, the principle of the *Shari'ah* that evidence is required of a claimant and an oath is required of someone who denies [the claim] may thereby become relaxed.

3.2.3 *Sulh an Sukutin* (Upon Silence of the Defendant)

The third category of *Sulh* in transactional cases is that which arises out of the defendant's silence, i.e., *al-sulhu an sukutin*. This involves an instance where the defendant neither admits nor denies but rather agrees to give something or to pay a certain amount of money to the plaintiff for the sake of ending their conflict. This form of *Sulh* is considered permissible by the majority of Muslim jurists. However, Shāfiʿī jurists and Ibn Hazm forbids it based upon the argument that the defendant's silence should be interpreted as a denial of the case, consequently making *Sulh* neither permissible nor achievable.[109] Be that as it may, it could be argued that the defendant's silence can be interpreted in many ways. For example, he could be hesitant and unsure about the plaintiff's claim, yet at the same time wish to exonerate himself before Allah by reconciling with the plaintiff to pay a certain amount of money or to give a specific thing to end their conflict. Thus, an individual could forfeit material gain for the merit of sustaining peace of mind between himself and *Allah* (swt).

[109] Ibid

3.3 *Sulh* in Criminal Cases

A crime literally is a term that refers to bad things (a sin, an offence). It is something that when committed by a person, it attracts punishment either in this world or hereafter.[110] Technically, a crime means an abominable act (*mahzur*) that occasion harm on human beings or other living things. Ibn Qudamah said it is any act of transgression committed against a person or property, but it was customarily understood to refer to acts committed against any part of the human body.[111]

As far as criminal cases are concerned, the applicability of the principles of *Sulh* depends on the nature of the rights at stake, i.e. whether it is a right of Allah (*Huquq-ul-Allah*) or that of individual (*Huquq-ul-abd*). The basic principle is that the rights of Allah (e.g. *Hadd* punishment for adultery, alcoholism, theft, etc.,) are absolute and not amenable to any form of alteration, waiver or variation by man (be him a *Qadi* or *Imam*) and as such, no *Sulh* will be concluded on it because they have no substitute. But victims of criminal acts whose individual rights have been transgressed can conclude *Sulh* with the perpetrator when such rights are capable of substitution (e.g., retaliation) even if it is not property.

According to Qadi Iyadh, if an armed robber kills a person and the perpetrator is apprehended before he repents, members of the deceased family (*wali ad-Dam*) cannot grant waiver of *Qisas* (retaliation) to the criminal nor can they contemplate *Sulh*. This

[110]Jamal al-Din Muhammad ibn Makram ibn Manthur al-Misri, *Lisaan al-Arab,* Dar al-Fikr, Beirut, Lebanon, Vol. 14, p. 154

[111] *Al-Mughni ma'a al-Sharh*, Vol. 9, p. 319; al-Jarjani, Muhammad ibn Ali, *Al-Ta'arifaat*, Maktabah Labnan, (nd) p. 83

means that, if the victim's family embarks on *Sulh* with the armed robber ahead of his apprehension, the *Sulh* is void in view of the fact that punishment for robbery is the right of Allah (SWT) alone to which no one can validly wade into it.[112]

Sulh is equally not amenable in cases of defamation (*Qazaf*) because the punishment for defamation under the *Shariah* is sanctioned as a deterrence for people to desist from impugning upon other peoples' integrity even though there is in it, embodiment of individual's rights and that of Allah (SWT) but the rights of Allah therein is more stronger than that of the individual.[113]

3.3.1 Legality of Making *Sulh* in Criminal Cases

It is no doubt that *Sulh* is among the very objectives of the *Shari'ah*. There are various legal authorities that specifically serve as a proof for the resort to *Sulh* in criminal cases under the *Shariah*. The legal proofs are from the Holy Qur'an, *Sunnah*, *Ijma'a* as well as reason (*dala'il aqliyyah*). These proofs includes those that relate to the subject of *Sulh* generally (i.e., those that are all-encompassing on the subject of *Sulh* which have been earlier discussed in chapter two of this work) and those that are specific to *Sulh* in criminal cases alone. Our concern here is on such proofs as relates to criminal cases. From the Holy Qur'an, Allah (swt) states:

> O you who believe, *Qisas* (law of equity and punishment) is prescribed for you in case of murder, the free for free and the slave for the slave and the female for the female. But if the killer is forgiven by the brother (or the relative, etc) of killed against blood money then adhering to it with

[112] Ibn Farhun, *op cit*, vol. 2, p. 165

[113] Sayyid Sabiq, op cit, p. 213

> fairness and payment of the blood money to the heir should be made in fairness, that is an alleviation and a mercy from the Lord …[114]

The Islamic jurists say that what is meant by the phrase ***"faman ufiya lahu"*** in this verse is to collect *Diyyah* instead of *Qisas* in intentional killing and the person collecting (accepting) the *Diyyah* to do so without having oppressing the killer in settling its amount and for the killer to also settle it without any harm on either side.

From the *Sunnnah*, it was reported from A'isha (RA) that the messenger of Allah (saw) has sent Abu Jahm ibn Huzaifah to collect Zakat and a particular person refused to offer his own. Then, Abu Jahm beats the person and his people came to the Prophet (saw) demanding *Qisas* (retaliation). The Prophet (saw) said you would be given such things and they refused. Thereafter, the Prophet (saw) further increased the amount and they also refused. The Prophet (saw) then further increased such an amount and they finally agreed to it.[115] Therefore, this hadith establishes the legality of concluding *Sulh* in criminal cases under Islamic law, more so in such heinous crimes that attracts *Qisas* (retaliation). Thus, unlike what obtains under the English criminal justice system where neither the victim of crime nor the accused person have a say in having the case settled amicably, the practice of *Sulh* in criminal cases under the *Shari'ah* is a well-founded phenomenon.

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[114] Qur'an 2:178

[115] Reported in Sunan Abu Dawud, *Kitaab ad-Diyyaat*, Hadith No. 4534; Ibn Majah in *Kitaab ad-Diyyaat*, Hadith No. 2638.

Furthermore, the legality of Sulh in criminal cases is also derived from *Ijma'*. Muslim jurists are unanimous in accepting a *Sulh* over intentional crimes.[116] Thus, it becomes reasonable according to some Muslim jurists to conclude *Sulh* over certain criminal cases from two perspectives:

a) In respect of *Qisas* which is an established right of the victim (of a crime), he can accept a compromise over this right or relinquish it altogether by way of *afwu* (pardon).[117]
b) An instance may occur wherein it is difficult to attain proportionality in executing *Qisas* (retaliation). Accordingly, such right of retaliation may be turn down to a compromise of accepting a value (i.e., property) with the exception of the crime of defamation (*Qazaf*).[118]

Consequently, following the above discussed legality of *Sulh* in criminal cases under the *Shari'ah*, its contextual application in various criminal offences under Islamic law is discussed below.

3.3.2 *Sulh* in Homicide Cases

In criminal cases involving homicide, the viability of *Sulh* therein is also contemplated under Islamic law depending upon whether it is an intentional, semi-intentional or unintentional homicide. The application of *Sulh* in each category of homice has been further examined below.

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[116] al-Zaila'i, Uthman ibn Ali, *Tabyin al-Haqaa'iq Sharh Kanz al-Daqa'iq*, Dar al-Kitab al-Islami, (nd) Vol. 6, p. 98

[117] *Tabyin al-Haqaa'iq*, op cit, Vol. 5, p. 35

[118] al-Sarkhasi, Shamsuddeen al-Hanafi, *Al-Mabsuud*, Dar al-Ma'arifa, Vol. 9, p. 21

3.3.2.1 *Sulh* in Intentional Killing

Islamic jurists differ as to what is the proper legal ruling on intentional crimes as to warrant conclusion of *Sulh* therein. Some jurists say *Qisas* is the proper ruling (legal consequences) on intentional homicide. For this, it was opined by Muslim jurists that it is not open to the killer to pay *Diyyah* even if the victim (*Wali-ad-Dam*) requires such compensation. So, the only thing (i.e., legal ruling) is either for the execution of the *Qisas* or for the victim's family to forgo it (forfeit) their right especially where the killer did not agree to the payment of *Diyyah*. This is the view of Hannafi, Maliki and some Shafii Jurists.[119] The legal authorities of the first view are that Allah (swt) said in the Holy Qur'an: "O you who believe, *al-Qisas* is prescribed for you in the case of murder…"[120] From the provisions of this verse, Allah (swt) made mention of *Qiyas* expressly alone without mentioning *Diyyah*. So also, from the *Sunnah*, the Prophet (saw) was reported to have said: "whoever kills intentionally, his punishment is retaliation".[121] This hadith has the legal effect of nullifying (i.e., it negates) the option for the payment of *Diyyah* in such circumstances.

A second view (regarding the legal consequences) of intentional killing is the availability of two options of either retaliation (*Qisas*) or payment of *Diyyah*. Under this view, the victim's family (*Wali-ad-Dam*) is at liberty to request for either payment of *Diyyah* or

[119] Abdul-Ghani al-Ghanimi al-Hanafi, *al-Lubaab fi Sharh al-Kitaab*, Dar al-Kitab al-Arabi (nd) vol. 3, 141; Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, Dar al-Kutub al-Islamiyyah (nd) vol. 2, p. 491; Shamsuddeen Muhammad al-Ramli al-Shafii, *Nihaayat al-Muhtaj ila Sharh al-Muhtaj*, Dar al-Fikr, (nd) vol. 4, p. 49

[120] Qur'an 2:178

[121] See Musnad Imam Ahmad, Vol. 1, p. 63; Sunan Abu Dawud, Kitaab ad-Diyyaat, Vol. 4, p. 183; Ibn Majah in *Kitaab ad-Diyyaat*, Vol. 2, p. 880

retaliation. If the victim's family chooses *Diyyah*, the killer would be obliged by the court to pay it. This is the view of Hambali and some scholars of the Zahiri School. It was also the view of Sa'id Ibn Musayyib, Ibn Siyrin, Ada'u, Mujahid, and many more plus other view of Imam Malik.[122] The legal authorities of this second view are that it has been narrated by Ibn Abbas (RA) regarding the interpretation of the meaning of the portion of the verse which states: "…but if the killer is forgiven by the brother (relatives, etc.) of the killed …"[123] Ibn Abbas (RA) said the term "*al-Afwu***"** (forgiveness) means to accept *Diyyah* in intentional killing.[124] In another Hadith, the Prophet (saw) was reported to have said: "whosoever someone among his relatives is killed, he is at option to either go for *Qisas* or accept *Diyyah*.[125]

However, looking at the above two juristic views together with the authorities advanced by these jurists in support of their views, the second view which provides for an option of accepting *Diyyah* (which may at will) be compromised by the victim or *Wali ad-Dam* carries more preponderance because the killer himself is at times, by the principle of *Istishan,* required to maintain his life and that the payment of *Diyyah* is also a legal

[122] Ali ibn Suleiman al-Mardawi al-Hanbali, *Al-Insaaf fi Ma'arifati al-Raajih min al-Khilaf ala Mathabi al-Imam Ahmad*, Maktabatu ibn Taymia, Cairo, (nd), Vol. 4, p. 10; al-Sharbini, Muhammad al-Khadib, *Mughni al-Muhtaaj ila Ma'arifati Ma'ani Alfadh al-Muhtaj*, Dar al-Fikr (nd) Vol. 4, p. 48; ibn Hazm, Muhammad ibn Ali al-Andalusi, *Al-Muhalla bil Athar*, Dar al-Fikr (nd) Vol. 10, p. 239

[123] Qur'an 2:178

[124] Reported by Bukhari in *Kitaab-ut-Tafsir*, *Fathul Baari*, Vol. 8, p. 25

[125] Reported by Bukhary in *Kitaab-ud-Diyyat, Fathul Baari*, Vol. 12, p. 213

penalty prescribed by the Sharia.[126] But the legal authorities of the first opinion is clear in establishing *Qisas* and it did not also wipeout the possibility of accepting *Diyyah* because the option of *Diyyah* is also authenticated by other authorities. So the second option has combined both authorities in arriving at the option for either *Qisas* or *Diyyah*.

3.3.2.2 *Sulh* in Unintentional Killing

As to unintentional killing, its legal consequences is only *Diyyah* and the value of *Diyyah* is quantified by the Sharia, thus, an increment over the value of due *Diyyah* is a subject of different juristic opinions. To Maliki and Shafii (in one of his opinion) are of the view that only camels, Dinar or Dirhams are to be accepted as the property to be given in *Sulh* in place of *Qisas* over intentional killing because this is the kinds of properties that falls within the genus of properties that are offered for the payment of *Diyyah*. But to Abu Yusuf, Muhammad Ibn Hassan and Ahmad Ibn Hambal Diyyaf is to be paid from camel, Dirhams, Dinar, cows, sheep, and jewelry.

The first five items above are the properties considered to be the genus of things out of which *Diyyah* should be paid as far as Hambali jurists are concerned. The later opinion of Shafii says that only camels should be paid as *Diyyah* or its equivalent. Thus, these classes of property are the valuable properties that are normally paid in those days as *Diyyah*. However, the opinion of Imam Shafii together with Ibn Qudamah that an equivalent amount of the kind of properties that is normally collected for should be accepted is much more sound and relevant to our contemporary setting wherein camels

[126] *Fathul Baari*, Vol. 12, p. 214; *Al-Mughny*, Vol. 9, p. 475; *Sharh Mughny al-Athar*, Vol. 3, p. 177

may not be available in some localities or is less attractive to those to whom it is to be given.[127]

If an intentional killing becomes established with its legal consequences of being *Qisas* as opined by the Muslim jurists, it would be lawful for the *Wali ad-Dam* to conclude *Sulh*, i.e., to accept *Diyyah* in lieu of *Qisas* and for a property normally used to settle payment of *Diyyah* to be given (e.g., camels, Dirhams, Dinar cows, sheep, etc.). This implies that if the *Sulh* is concluded, the right of *Qisas* becomes vitiated (extinguished). When the quantum of the property to be paid for the *Sulh* is lesser than the normal amount of due *Diyyah*, the jurists are unanimous in accepting this position.[128] But if it is more than the amount of the *Diyyah* as for example, 200 camels, it is allowed by the majority of the Islamic jurists except Shafii jurists who doesn't agree to this.[129] Thus, the sound view should be taken to be that of the majority.

3.3.3 *Sulh* in Criminal Cases Other Than Those of Homicide

There are some categories of criminal cases that do not involve killing but that *Qisas* (retaliation) is applicable in such cases. The possibility of Sulh in these types of cases has been examined below.

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[127] *Bada'i al-Sana-i*, op cit, Vol. 7, p. 253; *Bidayat al-Mujtahid*, op cit, Vol. 2, p. 401; *Mughni al-Muhtaj*, op cit, Vol. 4, p. 53; *Mughni Ma'al-Sharh*, op cit, Vol.9, p. 4 82

[128] *Mughni al-Muhtaj*, op cit, Vol. 4, p. 50; *Mughni Ma'al-Sharh*, op cit, Vol.9, p. 478

[129] *Bada'i al-Sana-i*, op cit, Vol. 6, p. 49; *Al-Mabsuud*, op cit, Vol. 21, p. 9; as-Sawii, Ahmad ibn Muhammad, *Balghat-us-Saalik ila Mathab al-Imam Malik*, Mustafa al-Babi Publishers, (nd) Vol. 2, p. 351; *Sharh al-Khirshi*, op cit, Vol. 8, p. 27; *Al-Muhalla*, op cit, Vol. 6, p. 471; *Mughni al-Muhtaj*, op cit, Vol. 4, p. 50; Al-*Insaaf*, op cit, Vol. 10, p. 4; *Al-Furu'u*, Vol. 4, p. 270 & Vol. 5, p. 668

3.3.3.1 Sulh over Offenses of *Qisas*

A victim of a criminal act has the right to the exercise of *Qisas* (retaliation) under Islamic law. The law of *Qisas* is based upon proportionality rule as contained in Qur'an 2: 194. The Islamic jurists are unanimous that in any crime which is not that of murder (i.e., where the victim remains alive), the victim is the proper person with whom the right to the exercise of *Qisas* is vested. But if the crime concerns murder (where the victim is a deceased person), then *Wali-ad-Dam* are the proper persons with whom the right to the exercise of *Qisas* is vested only that a divergent juristic views exist as to who is *Wali-ad-Dam*. The majority view is that *Wali-ad-Dam* can be considered to be his/her legal heirs and this is the view of Abu Hanifa, Shafii, Hambali, Ada'u, Ibrahim Nakha'i, Al-Thauri, etc.[130] Thus, *Wali-ad-Dam* are those with whom the legal capacity to conclude *Sulh* in cases of *Qisas* is vested. The Islamic jurists in their discussion of *Sulh* in *Qisas* have recognized the following the legal issues as itemized below:

a) *Sulh* over *Qisas* where the claimant is a single person

There exists a consensus among the jurists that if the person claiming the right to exercise *Qisas* is a single person with full legal capacity, he can conclude *Sulh* and such a *Sulh* would remain legally valid in Islamic law.

b) Who exercises the right to *Qisas* among the group of claimants

If there are joint claimants and they both agree by consensus to make over their right of *Qisas*, such *Sulh* is valid. But if they differ among themselves, the jurists are of the view

[130] *Tabyin al-Haqaq'iq*, op cit, Vol. 6, p. 114; Ash-Shawkani, Muhammad ibn Ali, *Naylul Awdar Sharh Muntaqa al-Akhbar*, Dar Ar-Rayyan, Vol. 7, p. 28; *Mughni al-Muhtaj*, op cit, Vol. 4, p. 39; *Mughni Ma'al-Sharh*, op cit, Vol. 9, p. 46

that those who agree to *Sulh* would collect what they agree upon; and as to those that did not agree, still the execution of *Qisas* become extinguished and that they are to be obliged to accept an amount equivalent to their *Diyyah*.[131]

c) Who exercises the right to *Qisas* among minor heirs

If *Qisas* is to be administered, the maturity and recovery of insane bearers of such a right could not be waited for; meaning those of full legal capacity among them can conclude the *Sulh* in such cases and thus represent the interest of the other minor heirs.[132]

d) Who exercises the right to *Qisas* when the right rest with a minor

If the person with whom the right to *Qisas* is vested is a minor, the jurists are of divergent opinion whether his lehal guardian (Wali) would conclude *Sulh* on his behalf. The majority view according to Maliki, Hannafi, Hambali and Zahiri is that, in case the *Wali* or *Wasiyyi* is to conclude *Sulh* on behalf of his minor ward, the legal guardian cannot accept anything lesser than the normal amount of due *Diyyah*. This is based upon what the Prophet (saw) have said that to whoever his relatives is killed; he is at option to accept *Diyyah* or *Qisas*.[133] Thus, the exercise of this option in circumstances of this

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[131] *Bada'i al-Sana-i*, op cit, Vol. 7, p. 250; Al-Dasuqi, Shamsuddeen Muhammad, *Hashiyat al-Dasuqi ala Sharh al-Kabir*, Isah al-Babi al-Halabi Publishers, Vol. 3, p. 319; Ash-Shiyrazii, Abu Ishaq Ibrahim ibn Ali, *Al-Muhazzab fi Fiqh al-Imam al-Shafii*, Dar al-Ma'arifah, Vol. 2, p. 190; al-Wazir Yahyah ibn Hubairah, *Al-Ifsaah an Ma'anii al-Sihaah*, al-Mu'assah al-Sa'idiyyah Riyadh, Vol. 2, p. 195

[132] *Al-Mudawwanah*, Vol. 4, p. 491; *Al-Mughni*, Vol. 9, p. 460; Abdurrahman ibn Qasim et al (ed.), *Majmu'u Fatawa Ibn Taymia*, Maktaba ibn Taymia, Egypt, Vol. 3, p. 139

[133] Ibn Hajar, *Fathul Baari*, Vol. 5, p. 360; *Al-Mabsuud*, op cit, Vol. 21, p. 41; *Hashiyat al-Dasuqi ala Sharh al-Kabir*, op cit, Vol. 4, p. 258; *Al-Muhazzab*, op cit, Vol. 2, p. 189; *Mughni Ma'al-Sharh*, Vol. 9, p. 390

manner that involved a minor, rest with his/her legal guardian (*Wali* or *Wasiyyi*) to do so on behalf of the minor. This view is also much closer to the flexibility that underlies the principles of the Sharia, in that, the culprit may be languishing in prison awaiting the maturity of the minor to exercise his right of *Qisas* over him. Therefore, as *Sulh* is meant to end disputes and restore peace to its normal condition, so also would concluding such a *Sulh* be beneficial to the minor as the amount of money realized out of the *Sulh* may help in the provision of his necessaries.

e) Where the victim has no *Wali* to exercise the right of *Qisas*

Here, the view of Hannafi, Shafii and Hambali is that the Imam (Muslim ruler) can stand on his behalf and exercise this right of *Qisas* and thus, the capacity to conclude *Sulh* rest with the Imam because he is the *Wali* to whoever lacks a *Wali*.[134]

f) *Sulh* in *Qisas* when there are joint perpetrators

As to *Sulh* in *Qisas* where there is a joint perpetrator**,** the majority jurists among Maliki, Hannafi and Shafii are of the view that as to unintentional killing by joint actors, the victim's *Wali* may conclude *Sulh* with some of them or all of them, i.e., he may do *Sulh* with some and request for *Qisas* with some of them.[135]

g) *Sulh* by *Aqilah* (perpetrator's next of kin): their obligation

The obligation of *Aqilah* (perpetrator's next of kin) in *Sulh* from what has been understood to be the practice among the Sahaba (RA), *Aqilah* does not bear the legal responsibility for the settlement of an obligation arising out the *Sulh* entered into in lieu

[134] *Bada'i al-Sana-i*, Vol. 7, p. 245; *Al-Mabsuud*, Vol. 21, p. 16; *Al-Mughni*, Vol. 9, p. 477; *Al-Muhazzab*, Vol. 2, p. 189

[135] *Hashiyat al-Dasuqi*, Vol. 3, p. 318; *Bada'i al-Sana'i*, Vol. 7, p. 251; *Nihaayat al-Muhtaaj*, Vol. 7, p. 274; *Al-Mughni*, Vol. 9, p. 474

of *Qisas*. It was reported from Ibn Abbas (RA) that *Aqilah* should not bear the responsibility for intentional killing, ransom for a slave or the responsibility as to what arises out of one's admission of liability (*Iqrar*).[136] Thus, *Aqilah* according to Maliki, Hannafi, Shafii and Zahiri are not obliged to bear the responsibility for intentional or semi-intentional killing.

3.3.3.2 Sulh over Offences of *Diyyah* (intentional or semi-intentional killing)

If *Sulh* is concluded instead of payment of *Diyyah* in intentional or semi-intentional killing, the amount to be given as consideration for the *Sulh* must be lesser or equal to the value of *Diyyah* but not any higher amount. This is the view of the majority of Islamic jurists including Maliki, Shafii, Hannafi and Hambali, because accepting a higher amount above the level of *Diyyah* would constitute taking interest (*Riba*) and the eating of people's money without lawful cause which is an evil act that is not allowed under Islamic law.[137] But to Imam Ahmad Hambal and Ibn Taymia, an increment may be accepted.[138]

3.3.3.3 Sulh over injuries to the head (*Shujaaj*) and other than on the head (*Juraah*)

Shujaaj is an injury done to the head and *juraah* pertains to other parts of the human body. These two classes of injuries have varying degrees of punishments. The original

[136] Reported by Imam Ahmad in Al-Musnad, Vol. 2, p. 355; Al-Baihaqi, Sunan al-Bayhaqi al-Kubra, Vol. 8, p. 104

[137] *Hashiyat al-Adawy ala Sharh al-Khirshi*, Vol. 8, p. 27; *Al-Insaaf*, Vol. 5, p. 238; *Al-Mabsuud*, Vol. 6, p. 47; *Al-Mughni*, Vol. 5, p. 28

[138] Ad-Damashqi, Ala'udden Ali ibn Muhammad al-Ba'ali, *Al-Ikhtiyaraat al-Fighiyyah min Fatawa ibn Taymia*, Dar al-Fikr, p. 134

(*Asl*) of the punishment to be awarded regarding both injuries is *Qisas* (retaliation) but they also attract a secondary punishment which is *Arsh* (compensation for serious bodily injury other than homicide). *Shujaaj* (injury on the head) is customarily known among Arabs to encompass ten different degrees of injuries that includes: (1) *Al-Haarisah,* (2) *Al-Baazilah,* (3) *Al-Baadhilah,* (4) *Al-Mulaahimah,* (5) *Al-Samhaaq,* (6) *Al-Muudhibihah [5 camels],* (7) *Al-Hashimah [10 camels],* (8) *Al-Mutanaqqilah [15 camels],* (9) *Al-Mu'amamah [one-third of Diyyah],* (10) *Al-Damighaf [one-third of Diyyah].*[139]

The above five classes of injuries are those that only the court can determine the value (quantum) of what may be given in *Arsh* (compensation).[140] Among all the categories of *al-Shujaaj,* none of them attract *Qisas* except *al-Mudhihah* as opined by many Islamic jurists.[141] *Sulh* is allowed in any of the above injuries because it is based upon the mutual consensus between the perpetrator and the victim.[142]

There was no difference of opinion among the jurists regarding *Sulh* over intentional injuries to the head or the body. This may be done in two instances based on:

a) The description of the offence (*lafzul jinayah*), i.e., the kind of injury occasioned;

b) The extent of the offence, i.e., the degree or intensity of the injury occasioned.

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[139] *Al-Mughni*, op cit, Vol. 9, p. 420

[140] *Al-Ifsaaf,* op cit, Vol. 2, p. 204; al-Buhuti, Mansur ibn Yunus, *Al-Raudh Murabbi'i Sharh Zaad al-Mustaqni'i,* Dar al-Kitab al-Arabi, p. 498

[141] *Al-Mughni*, op cit, Vol. 9, p. 420

[142] Al-Suyudi, Jalal al-Din Abdurrahman, *al-Ashbaah wa al-Nadha'ir fi Qawaa'id wa furu'i Fiqh al-Shafi'iyyah*, Dar al-Kitab al-Arabi, p. 712

This is based upon what has been reported from A'isha (RA) regarding the episode of Abu Jahm Ibn Huzaifaf – the hadith earlier mentioned above, as *Sulh* here is an established right of the victim which he can relinquish upon consideration (*iwad*).[143]

If the *Sulh* was not concluded based upon the description of the offence but extent of the injury (and the likely consequence that may follow), if the victim later dies as a result of such an injury, there are divergent juristic opinion on this. First, if the victim dies, the *Sulh* is nullified. This is the view of Abu Hanifa. In cases of this nature, i.e., where a *Sulh* had been concluded based upon the descriptive nature of the offence rather than the extent of the injury occasioned and later on the injury aggravate leading to death, *Qisas* comes into being but for reasons of *Istihsan* (as to Maliki jurists),[144] the perpetrator may be obliged to pay *Diyyah* but that the *Wali* of the victim must be put to oath to the effect that the victim's death resulted from that particular injury. But if the *Wali* refused to swear to an oath, they must be obliged to hold unto the *Sulh* as earlier concluded.[145] As to Shafii jurists, the perpetrator would be obliged to pay *Diyyah*.[146]

The second view is that the former *Sulh* remain valid even if the victim later dies as a result of such an injury. This is the view of Abu Yusuf, Muhammad Ibn Hassan and Hambali.[147] Because of the above differences of opinion among the jurists, some scholars

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[143] *Bada'i al-Sana-i*, Vol. 7, p. 249; *Al-Mabsuud*, Vol. 21, p. 10; *Hashiyat al-Dasuqi*, Vol. 3, p. 317; An-Nawawi, Imam Yahya ibn Sharf, *Raudhatul Dalibyn wa Umdatul Muftyn*, al-Maktab al-Islami, Vol. 4, p. 194; *Al-Muhalla*, Vol. 6, p. 372

[144] *Al-Mabsuud*, Vol. 21, p. 9; *Bada'i al-Sana-i*, Vol. 7, p. 249

[145] *Hashiyat al-Dasuqi*, Vol. p. 317; *Sharh al-Khirshy*, Vol. 7, p. 28

[146] *Al-Muhazzab*, Vol. 2, p. 190

[147] *Al-Mughni*, Vol. 9, p. 473; *Al-Mabsuud*, Vol. 21, p. 10; *Al-Fatawa al-Sa'adiyyah*, p. 582

discourage making *Sulh* in such circumstances except after the eventual recovery of the victim.[148]

3.3.3.4 *Sulh* over Injuries to the Fingers

As to *Sulh* over parts of fingers or other useful organs, there is no difference of opinion among the jurists for *Sulh* over intentional criminal act done to human fingers or other useful organs. This is because *Qisas* may be done over injury to fingers by *Ijma'a*. But the importance of *Sulh* would further come to light here. The jurists have conjunctively raised the legal question as to the position when a finger is injured and *Sulh* concluded over this injury and later on such a finger shrinks as a result of the injury. For example, to accept one million naira and later on, another finger also shrinks, what then would be the legal position regarding the second finger? To this end, there are two different juristic views. The first view is that there is no any compensation over the second finger to be paid to the victim and this is the view of Abu Yusuf and Muhammad Ibn Hassan al-Shaybani.[149]

The second view is that the second finger should be compensated and this is the view of Maliki, Abu Hanifa and Hambali.[150] These second view seem to carry much legal preponderance as if not for the injury which later aggravate, the later damage or harm would not have come into being. In line with this opinion, it was reported from Ibn Abbas

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[148] Ibn Rushd, Abul Walid al-Qurdabi *Al-Bayaan wa al-Tahsiyl wa al-Sharh wa al-Tawjiyh wa al-Tahleel fi Masa'il al-Mustakhrijati*, Dar al-Gharb al-Islami, Vol. 16, p. 186; *Hashiyat al-Dasuqi*, Vol. 3, p. 319

[149] *Al-Mabsuud*, Vol. 21, p. 9

[150] *Hashiyat al-Dasuqi*, Vol. 3, p. 317; *Al-Insaaf*, Vol. 10, p. 7; *Bada'i al-Sana-i*, Vol. 7, p. 249

(RA) regarding a person whose hand was cut-off and the man later died. Ibn Abbas said: "*Sulh* must be rejected and *Diyyah* to be paid".[151]

3.3.4 Conditions for *Sulh* in Criminal Cases

Sulh in this sense is by means of replacement, i.e., compensation and this replacement has certain prerequisite conditions attached to it. Some of these conditions are general (and must be there in concluding *Sulh* over intentional and unintentional killing). These conditions among others are that:

a) The compensation must be a valuable property. But if it is valueless or impurity or that which its use is not allowed in Islamic law, under normal circumstance, it cannot be the object-matter of *Sulh*; otherwise it would remain null and void.
b) It must also be something well-known. If what to be settled as the compensation is a debt, it is a condition that such a debt must be determined instantly to be paid to the victim's family. So also, it should be a well-established legal right of the party (*al-Musaalih anhu*).[152]

But there exist divergent juristic views as to the scale or value of what can be paid as compensation in *Sulh* in place of *Qisas* between intentional and unintentional killing. As regards intentional killing, its legal consequences are only retaliation (*Qisas*) not blood money (*Diyyah*). So, the claimant has the right to take more or less than the amount of

[151] Reported by Inb Abi-Shaibah in *Musannaf, Kitaabu-ud-Diyyaat*, Vol. 5, p. 458

[152] *Al-Mughni*, Vol. 2, p.127; *Tabyin al-Haqaa'iq*, Vol. 5, p. 36; *Bada'i al-Sana-i*, Vol. 6, p. 48; *Al-Insaaf*, Vol. 5, p. 247; *Al-Mabsuud*, Vol. 21, p. 11

Diyyah. There is no contradiction among the Muslim jurists on this, even if there exist an opinion apart from this, it is a weak opinion.[153]

Similarly, it is also allowed under Islamic law for parties to conclude *Sulh* over property other than with those properties that are normally offered for the payment of the amount of *Diyyah* with the condition that it be paid promptly even if it is higher or lesser than the quantum of due *Diyyah*. The jurists on this point are of the view that accepting a higher or lesser amount of *Diyyah* would not constitute *Riba* (interest) because the initial or original legal consequences of intentional killing is retaliation (*Qisas*) not *Diyyah*.[154]

Manfa'a (usufruct) or *Maslaha* can also be the basis upon which *Sulh* contract can be concluded. It is allowed to conclude *Sulh* the object of which is a usufruct or by rendering services to the claimant (holder of the right) instead of *Qisas*. This is unanimously agreed by the Muslin jurists.[155]

It is pertinent to mention also that *Sulh* would come with such terms to the effect that the perpetrator be placed on permanent or temporary exile. *Sulh* may be concluded that the perpetrator may be put on exile permanently or it may be for certain period of time. This kind of *Sulh* is peculiar to Maliki jurists and is agreed to by Ibn Taymia and Saudi Scholar Sheikh Ibrahim Aal al-Sheikh.

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[153] *Al-Mughni*, Vol. 9, p. 478

[154] Bada'i al-Sana-i, Vol. 7, p. 250; Tabyin al-Haqaa'iq, Vol. 6, p. 113; Sharh al-Khirshy, Vol. 8, p. 27; Raudhat-ud-Dalibiyn, Vol. 9, p. 240; Mughni al-Muhtaj, Vol. 4, p. 45; Mansur ibn Yunus al-Buhuti, *Sharh Muntaha al-Iradaat*, Dar al-Fikr, Vol. 2, p. 226; Al-Muhalla, Vol. 6, p. 471

[155] Al-Mabsuud, Vol. 21, p. 12; Al-Mudawwanah, Vol. 4, p. 460; Mughni al-Muhtaj, Vol. 4, p. 52; ibn Qudama, *Al-Muqna'a fi Fiqh al-Imam Ahmad*, Maktabah al-Riyadh, Vol. 2, p. 127; Al-Muhalla, Vol. 6, p. 474

But if the perpetrator returns from the exile in breach of what has been agreed to in the *Sulh* contract, the *Wali ad-Dam* can seek to return to *status quo ante* over their right and be at option to either accept *Diyyah* or *Qisas*. This is because, it is well established principle of Islamic law that Muslims must keep to their conditions and as the *Wali* and the perpetrator had agreed to such an exile, it is not open to either party to unilaterally withdraw.[156]

3.4 *Sulh* in Matrimonial Disputes

Human crisis knows no bound as even spouses are caught up with misunderstanding and conflicts. Because of the sensitive nature of matrimonial relationship, couples are not expected to storm the court initially for the settlement of their dispute. Instead, the Sharia enjoins spouses to exhaust all reconciliatory avenues before resorting to litigation.[157]

Though *Sulh* is available to resolve all manner of civil disputes, its use is most prevalent in the domestic arena. The relationship-based focus of *Sulh* makes it particularly attractive to parties seeking to resolve domestic conflicts.[158] In fact, *Sulh* generally serves as the primary vehicle for resolving matrimonial disputes, especially given the unfavorable standing of divorce in Islamic law.[159]*Sulh* in the matrimonial context can be slightly different from other negotiations. However, in such circumstance of family

[156] Hashiyat al-Dasuqi, Vol. 4, p. 263; Al-Ikhtiyaraat al-Fighiyyah, p. 296; Ibn Taymia, *Mukhtasar al-Fataawy al-Misriyyah*, Muhammad ibn Ali al-Ba'ali al-Hanbali (ed.), Dar al-Taqwa, p. 592; Majmu'u Fatawa Ibn Taymia, Vol. 34, p. 157; Muhammad ibn Ibrahim Aal al-Sheikh, *Fatawa ibn Ibrahim*, Muhammad ibn Qasim (ed.), Vol. 11, p. 288

[157] Abubakar, M. S., op cit., p. 22

[158] Lukito, *op. cit.,* at p. 332.

[159] Lukito, *Op. Cit.,* at pp. 332-33.

disputes, members of the family often serve as facilitators in the dispute. This practice is expressly sanctioned in Qur'an as Allah (SWT) has said: *"If you fear breach between them twain, appoint two arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation…"*[160]

In large part, the rationale for this approach stems from Islamic views of family and its importance.[161] Because marriage is often viewed as the union of two families rather than two people, marital disputes represent a shared problem that both families must cooperate to resolve.[162] Thus, the use of family facilitators helps in resolving the dispute while reinforcing the importance of Islamic family life. More so, what is of particular interest about *Sulh* in matrimonial cases on the authority of Qur'an 4:35 is that, Allah (SWT) have preferred assurance that if those brokering a reconciliation between spouses have ventured into it desiring in good-faith the success of their effort, Allah (SWT) has guaranteed their consensus and agreement. This has gone to show the extent of Allah's preference for *Sulh* in matrimonial conflicts than through adversarial litigation.[163]

In a family dispute, *Sulh* can be exercised in a matter relating to either property rights, for example, arrears of maintenance, settlement of deferred dowry, etc. It may also involve non-property rights such as consummation (of the marriage), cruelty and ill-treatment,

[160] QUR'AN 4:35

[161] Amir Abdallah, *Principles of Islamic Interpersonal Conflict Intervention: A Search within Islam and Western Literature*, JOURNAL OF LAW & RELIGION (2002) Vol.15, pp. 151, at p. 175.

[162] Ibid

[163] Abubakar, M. S., op cit., p. 22

etc. so also, it may pertain to rights that arise either during the marriage or after divorce, such as *muta'ah* (consolatory gift), *hadanah* (custody), maintenance during *iddah*, etc.

Issues of divorce, child custody and support, guardianship of infants and domestic violence are highly sensitive and emotional family issues that may not be entirely appropriate to be resolved by the court system which is mainly adjudicatory in nature. To this end, this may be seen as the rationale behind the stand taken by Islamic law at the outset of event in recommending *Sulh* in the resolution of matrimonial disputes with such approach further qualified as being the best.[164]

Although *Sulh* is often used in divorce cases, it should increasingly be seen not only as a tool for facilitating the resolution of families but also as a tool for keeping them together. *Sulh* helps couples to identify the main issues that cause problems in their relationship and change the behaviors that lead to these problems.[165] The result might be a formal agreement or it might be an oral agreement by both parties to change the way they behave.

It is inevitable that during the subsistence of matrimonial life, instance abound where quarrels may likely arise between spouses either on the part of the husband or on the part

[164] See Qur'an 4:128 which recognize that *Sulh* is the best and that on a particular occasion, when Caliph Ali (R.A.) counsels some Muslim couples to explore arbitration and upon the efforts of the arbitrators (*al-Hakamain*) to settle the parties, the husband boasted out that as for separation, he would never agree. Caliph Ali avowed that 'You are lying, by Allah, until you accept the same things she has accepted.

[165]Susan K. Boardman et al., *Marital Mediation: An Emerging Area of Practice*, May 2009. An Online Article available at http://www.mediate.com/articles/maritalmediation1.cfm# (accessed August 10, 2012).

of the wife or from them both. Sometimes, a wife may prove recalcitrant as Allah (swt) has said in the Qur'anic verse *"... as to those women on whose part you see ill conduct, admonish them (first) next refuse to share their bed and last beat them lightly ... but if they obey you, seek not against them means of (annoyance) ..."*[166] Ibn Abbas said regarding this verse that it is that woman who refuses to obey her husband and neglect his rights but if she mends her attitudes that is alright otherwise the husband may beat her lightly in such a manner that would not break her born or injure her. If she obeys her husband, he is not allowed to maltreat her.[167]

Marital discord do at times emanates from the side of the husband as Allah (swt) have said in the Qur'anic verse "if a woman fears cruelty or desertion from her husband's part, there is no sin on them both if they make terms of peace between themselves and making peace is best …"[168] Scholars of *Tafsir* interpreted the word *"Nushooz"* as discord or separation in such a way that a husband may not talk to his wife or have conversation with her. And from the plain meaning of this verse, it was made lawful to conclude *Sulh* with all its connotations in such circumstances wherein the wife may relinquish some aspects of her conjugal rights (e.g., sexual intercourse, subsiding the burden of maintenance or the right to *Sadaq*, etc.,).[169]

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[166] Qur'an 4:34

[167] Tabari, *Tafseer al-Tabari op. cit.*, Vol. 5, pp. 305-310; Al-Shawkaani, *Nayl al-Awdar,* Vol. 1, p. 521; Al-Waseed, Vol. 5, p. 305

[168] Qur'an 4:128

[169] Al-Ghazaali, Abu Hamid, *al-Wajeez fi Fiqh al-Shafi'iyah*, Vol. 5, p. 305; An-Nuhaas, Vol. 2, p. 205

Likewise, in some instances, the *Shiqaq* (breach) stems from both spouses as Allah (swt) has described such instances in the Holy Qur'an: *"And if you fear a breach between them twain (husband and wife) then appoint two arbitrators one from his family and the other from hers, if they both wish for peace, Allah will cause their reconciliation."*[170] The word *Shiqaq* as mentioned in this verse of the Holy Qur'an linguistically means contradiction, discrepancy, conflict, or to break apart.[171] It connotes an instance where one of the spouses betrays or deprives the other of his/her marital rights. On the part of the woman, it refers to her refusal to discharge her matrimonial obligation towards the husband. From the husband's side, it refers to an instance where he neither retains the wife on honourable terms nor released her with kindness.[172] In a nutshell, *Shiqaq* implies a quarrel or dispute in such a way that makes the continuance of matrimonial life difficult or unbearable wherein none of the spouses is readily identified to be at fault.

From the provisions of Qur'an 4:35, the phrase *"... **if you fear a breach** ..."* has some important legal connotations regarding when should effort towards matrimonial arbitration be initiated under Islamic law and this become a subject of two juristic interpretations. According to Ibn Abbas (RA), it means knowledge about such a breach, i.e., when it became clearly known. The second interpretation is expectation or its likely occurrence or precaution about its occurrence.[173] Hence, from these two interpretations, the term "*Khauf*" (fear) as used in Qur'an 4:35 would mean a knowledge or presumption

[170] Qur'an 4:35

[171] Al-Ta'areef al-Manaawi, pp. 433-434; Ibn Faaris, Vol. 3, pp. 170-171

[172] Tabari *Jaami' al-Bayaan fi Tafseer al-Qur'an, op. cit.*, Vol. 5, pp. 170; Tafseer Abi al-Sa'ud, Vol. 2, p. 175

[173] Majma'ul Bayaan, Vol. 2, p. 44; Al-Tibyaan, Vol 3, p. 192; Tafseer Abi al-Sa'ud, Vol. 2, p. 175

of its occurrence. Similarly, as to who is addressed by the phrase "twain appoint two arbiters" as commanded in same verse 35 of *Surat al-Nisaa,* the jurists offered three explanations. The majority of the jurists opined that it is addressed to the *Haakim* (imam or judge). Ibn Hazm said if there is a breach between a husband and a wife, is upon the judge to appoint two arbitrators, one from the husband's family and one from the wife's family. This is also the saying of Imam Hassan al-Basry, Qatada, Qais Ibn Sa'ad, Sai'd Ibn Jubair, etc., and this is also in accordance with Hambali and Imamiyyah School and most of the Qur'anic exegetists are on this view.[174] To Imam al-Baidaawy, the appointment of the arbitrators is addressed to judges when the matter becomes ambiguous as to who among the spouses is at fault.[175] The second opinion is that the command is addressed to the spouses themselves who are at conflict with one-another.[176] It is said that among the two persons that can make such an appointment, i.e., either the Imam/Judge or the spouses may be represented by their proxies. Thus, Imam Abu Ja'afar al-Tabary said the sound interpretation is that such a command was addressed to all stakeholders to the matter among the Muslim *Ummah*; as the command did not specify some people and exempted others.[177]

[174] Tabari, *Tafseer al-Tabari, op. cit.,* Vol. 5, pp. 70-72; Zaad al-Maseer, Vol. 2, p 77; Tafseer al-Baidhaawi, Vol. 2, p. 186; Majma'ul Bayaan, Vol. 2, p. 44; Al-Tibyaan, Vol 3, p. 192

[175] Tafseer al-Baidhaawi, Vol. 2, p. 186

[176] Tabari, *Tafseer al-Tabari, op. cit.,*Vol. 5, pp. 72; Al-Qurtubi, *Al-Jaami' li-Ahkaam al-Qur'an*, Vol. 5, p. 72; Al-Tibyaan, Vol 3, p. 192; Majma'ul Bayaan, Vol. 2, p. 44

[177] Tabari, *Tafseer al-Tabari, op. cit.,* Vol. 5, pp. 75

3.4.1 Legal Position on the Appointment of *Al-Hakamain*

There exists a consensus among the Islamic jurists regarding the permissibility (*Ijaazah*) for the appointment of *al-Hakamain* (two arbiters) when a conflict occurs between husband and wife in a circumstance where it became uncertain as to whom among the spouses is at fault.[178] But the jurists differ as to the legal position on such appointment. Imam Al-Nawawy and Ibn Taymia said it is *Wajib* (obligatory) because Allah (swt) said "*fab'athuu*" (appoint) and that the verb used here implies a command which indicates an obligatory legal ruling.[179] But to Al-Rawiyyaani, it is *Mustahab* (recommended).[180]

The two arbitrators (*al-Hakamain*) are to be appointed from the families of the husband and the wife because they are much acquainted with the private affairs of the spouses than anyone else. They are also the persons that best desires a peaceful co-existence between the spouses. The spouses would also remain more comfortable in disclosing their mind to the arbitrators categorically either to continue with the marriage or in opting for separation. Thus, Allah (swt) specified clearly that the appointment of the arbitrators

[178] Ibn Rushd, *Bidaayat al-Mujtahid*, Vol. 2, p. 74; Tafseer al-Baidhaawi, Vol. 2, p. 186; Raudha al-Daalibyn, Vol. 7, p. 371; Al-Khadeeb al-Sharbeeni, *Mughni al-Muhtaj*, Vol. 3, p. 378; Al-Khadeeb al-Sharbeeni, *Al-Iqna'a*, Vol. 2, p. 434; Al-Sayyid al-Bakry, *I'anat al-Daalibyn*, Vol. 3, p. 378

[179] Ibn Taymia, *Majmu' al-Fataawa*, Vol. 32, p. 25; Al-Aamili, *Al-Raudhat al-Bahiyyah*, Vol. 2, p. 133; Tabari, *Tafseer al-Tabari*, *op. cit.*,Vol. 5, p. 75; Al-Mubda'a, Vol. 7, p. 216; Al-Insaaf, Vol. 8, p. 375; Al-Mudawwanah, Vol. 5, p. 367; Ahkaam al-Qur'an, Vol. 3, p. 151; Al-Tibyaan, Vol. 2, p. 192

[180] Raudha al-Daalibyn, Vol. 7, p. 371; Al-Khadeeb al-Sharbeeni, *Mughni al-Muhtaj*, Vol. 3, p. 261; Al-Khadeeb al-Sharbeeni, *Al-Iqna'a*, Vol. 2, p. 434; Al-Sayyid al-Bakry, *I'anat al-Daalibyn*, Vol. 3, p. 378

should be from the spouses' family.[181] It has been stated by Ibn Rushd that there exist a consensus among the jurists to the effect that *al-Hakamain* should not be appointed except from the family members of the spouses concerned. When where there is an absence of a qualified (competent) person among the members of two families, then someone else could be appointed.[182]

Would it be lawful to appoint one single matrimonial arbitrator? The Maliki School as stated in *Mudawwanah* accepts so if the spouses agree to the appointment of one person, then it would be in order because it is their own affairs, thus they have the right to do so. And if they co-opted another person with such a condition that may not be a non-Muslim, slave, minor, woman or lunatic as all these persons cannot qualify to be appointed as matrimonial arbitrators.[183]

Among the pertinent legal questions regarding the appointment of *Al-Hakamain* is whether the Consent of Spouses should be sought in the appointment of Arbitrators (*Al-Hakamain).* The jurists are of two divergent opinions on the consent of spouses to the appointment of arbitrators. Some jurists consider that it could not be proper to appoint the two arbitrators without the consent of the spouses, as the arbitrators have no right to decree a divorce without the express consent of the spouse concerned, especially the

[181] Tafseer al-Baidhaawi, Vol. 2, p. 186; Tafseer Abi al-Sa'ud, Vol. 2, p. 175; Tafseer al-Nasfi, Vol. 1, p. 211

[182] Ibn Rushd, *Bidaayat al-Mujtahd*, Vol. 2, p. 274; Abu al-Walid al-Baaji, Al-Muntaqaa, Vol. 4, p. 114; Al-Qurtubi, *Al-Jaami' li-Ahkaam al-Qur'an*, *op. cit.*, Vol. 5, p. 175; Fath al-Qadeer, Vol. 1, p. 463

[183] Al-Mudawwanah, Vol. 5, p. 368

husband. This is the view of Shafii, Hambali and Imamiyyah sect of the Shi'a.[184] The other view is that it is lawful to appoint arbitrators without the spouses' consent and this is the view of Imam Malik and some other views of Shafii and Hambali.

However, if it is for the *Hakim* (ruler/judge) making the appointment of the arbitrators, they can only appoint two arbiters rather than one because the majority view among the jurists while relying on the provision of Qur'an 4:35, they say that only two arbiters can be appointed.[185]

3.4.2 Conditions Governing *Al-Hakamain*

The exercise by *al-Hakamain* of their arbitral role in trying to reconcile disputing spouses under Islamic law is hinged upon certain legal requirements. These include:

a) Complete legal capacity, i.e., he must be an adult and sane as agreed to by all Islamic jurists.[186]

b) He must be a male person. This is a condition agreed to by the Maliki, Shafii and Hambali, but to some Shafii and Hambali jurists, a female can be appointed an arbitrator, because their role is to act as arbiters only rather than as judges. This is also the view of Dawud Zahiri.[187]

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[184] Shafii, Al-Umm, Vol. 5, p. 116; Zaad al-Maseer, Vol. 2, p. 78; Al-Mubda'a, Vol. 7, pp. 211-212; Al-Insaaf, Vol. 8, p. 379; Al-Kaleeni, *Al-Kaafii*, Vol. 6, p. 146; Al-Wasaa'il, Vol. 21, p. 325; Mustadrik al-Wasaa'il, Vol. 15, p. 106; Majma'a al-Bayaan, Vol. 2, p. 44

[185] Raudha al-Daalibyn, Vol. 7, p. 371; Zakariyyah al-Ansari, *Fath-ul-Wahhaab*, Vol. 2, p. 111; Mughni al-Muhtaaj, Vol. 3, p. 261; Majmu' al-Fataawa, Vol. 35, pp. 386-387

[186] Al-Mudawwanah, Vol. 5, p. 367; Raudha al-Daalibyn, Vol. 7, p. 371

[187] Mughni al-Muhtaaj, Vol. 3, p. 261; Al-Insaaf, Vol. 8, p. 380; Al-Furuu', Vol. 5, p. 263; Al-Qawaanyn al-Fiqhiyyah, Vol. 1, p. 142; Fath-ul-Wahhab, Vol. 2, p. 111

c) Justice (*Adaalah*): the requisite person must be known to be just, trustworthy and upright. He must have been a law abiding, rational and reputable somebody.[188]

d) Freedom (from slavery): a slave cannot be an arbitrator because his testimony is unacceptable as per the view of Imam Malik, Hambali, Qadi Abu Ya'ala' and Shafii. But a somewhat weaker opinion from among some Shafii jurists is that two slaves can serve as arbitrators based on the understanding that they are only arbiters not judges.[189]

e) Islam: an arbitrator shall be a Muslim and that a *Kaafir* (unbeliever) cannot be appointed as an arbitrator, because under the Sharia, it is not lawful for an unbeliever to be a *Haakim* (ruler/judge) over the affairs of Muslims. This is in accordance with what Allah (swt) has said in Qur'an 4:141 and 4:60.[190] In Qur'an 4:141, Allah (swt) said, "… *And never will Allah grant to the unbelievers a way [to triumphs] over the believers".* And in Qur'an 4:60, Allah (swt) said, "*Hast thou not turned Thy vision to those who declare that they believe in the revelations that have come to thee and to those before thee? Their [real] wish is to resort together for judgment [in their*

[188] Al-Waseed Vol. 5, p. 307; Al-Mubda'a, Vol. 7; p. 216; Al-Qurtubi, *Al-Jaami' li-Ahkaam al-Qur'an, op. cit.*,Vol. 3, p. 396; Fath al-Qadeer, Vol. 1, p. 463; Ibn Juzay al-Gharnaady, *Al-Qawaanyn, al-Fiqhiyyah*, Vol. 1; p. 203; Al-Sayyid al-Bakry, *I'anat al-Daalibyn*, Vol. 3, p. 270; Al-Mubda'a, Vol. 10, p. 219

[189] Al-Muhazzab, Vol. 2; p. 70; Raudha al-Daalibyn, Vol. 7, p. 371; Fath-ul-Wahhab, Vol. 2; p. 111; Al-Khadeeb al-Sharbeeni, *Al-Iqna'a*, Vol. 2, p. 434; Al-Sayyid al-Bakry, *I'anat al-Daalibyn*, Vol. 3, p. 378; Al-Insaaf, Vol. 8, p. 380

[190] Fath al-Qadeer, Vol. 1, p. 482-484; Tafseer al-Baidhaawy, Vol. 2, p. 207; Al-Qurtubi, *Al-Jaami' li-Ahkaam al-Qur'an*, Vol. 5, p. 248; Tafseer Ibn Kathir, Vol. 1, p. 520; Tafseer Abi Sa'ud, Vol. 2, p. 194; Tafseer al-Tabari, 5, p. 154; Tafseer al-Baghawy, Vol. 1, p. 446-448; Al-Darrul Manthuur, Vol. 2, p. 582

disputes] to the Evil One, though they were ordered to reject him. But Satan's wish is to lead them astray far away [from the right].

f) Knowledge: the requisite person to be appointed as arbitrator should possess the necessary knowledge and experience about matrimonial affairs. But must the person be of juristic capability? According to some scholars, if the arbitrators are to pass a legal verdict, they must possess a juridical knowledge but if they merely arbitrators no matter the person's status of knowledge, he can be appointed as an arbitrator.[191]

3.4.3 The Role of *Al-Hakamain* in Settling Dispute between Spouses

Al-Hakamain is to try their possible best to understand the root causes of the disagreement or conflict between the spouses. On this, there was no specific means of achieving this role fixed by the Sharia for the arbitrators to mandatorily follow, thus their effort at bringing harmony among the couples is not limited in this regard.[192]

Now, what is the proper legal ruling to be passed by *Al-Hakamain?* To Maliki School, the *Al-Hakamain* can properly decree divorce and their decree of divorce is valid whether they have been empowered by the spouses to do so or not. But some jurists say that they can only decree a divorce if expressly empowered to do so by the spouses.[193] Pertinently**,** if *Al-Hakamain* can decree divorce, what would be the legal position of their pronouncement of divorce, is it single *talaq*, final or triple divorce? To Maliki and Ibn

[191] Al-Mughni, Vol. 7, p. 244; Al-Mubda'a, Vol. 7, p. 216; Al-Insaaf, Vol. 8, p. 379; Al-Furuu', Vol. 5, p. 246

[192] Al-Qurtubi, *Al-Jaami' li-Ahkaam al-Qur'an*, Vol. 5, p. 175; Tafseer al-Tabari, 5, p. 72; Al-Muntaqaa, Vol. 4, p. 144; Raudha al-Daalibyn, Vol. 7, p. 372

[193] Ahkaam al-Qur'an, Vol. 3, p. 151; Al-Mughni, Vol. 7, p. 244; al-Kaafi, Vol. 6; p. 147; Al-Wasaa'il, Vol. 21; p. 352; Mustadrik al-Wasaa'it, Vol. 15; p. 107

Qasim, a triple divorce by *Al-Hakamain* should count as one *talaq* whereas to Mugheera, Ibn Majishun and Asbaq, a triple divorce would remain valid, i.e., it would count as three.[194]

3.5 *Sulh* in Armistice (Truce and Cease-Fire Agreement)

It is earlier on discussed in this research that the term *Sulh* literally means a reconciliation, compromise or adopting a path of peace, thus terminating a dispute. When it comes to situation of war or armed conflict, *Sulh* is also a means of terminating a war (or armed conflict [*Hurubul Baghyi*]).[195] It is a contract in which reconciliation would take place between two or more warring parties, and it can be between Muslims and non-Muslims.

When it comes to the field of war or armed conflict, the term *Sulh* has a varying legal connotations depending upon the kind and nature of the context in which the *Sulh* is intended. In that, *Sulh* in connection with war or armed conflict may mean a treaty as an agreement entered into between Muslims and non-Muslims which may take such forms as *Dhimmah* pact, *Aman* (safe conduct), *Hudnah* (cease-fire), etc.[196]

Examples of *Sulh* (armistice) concluded by the Prophet (saw) includes:

1) The *Sulh* conducted between the Prophet (saw) and the tribe of *Juhainah* to the effect that they are protected regarding their life and property; a mutual assistance in case of

[194] Al-Mudawwanah, Vol. 5, p. 376; Bidaayat al-Mujtahid, Vol. 2; p. 74; Al-Qurtubi, *Al-Jaami' li-Ahkaam al-Qur'an*, Vol. 5, p. 175; Fath al-Qadeer, Vol. 5; p. 177

[195] Al-Wasid, p. 522

[196] Wahbah al-Zuhaily, *Figh al-Islaam wa Adillatuhu,* Dar al-Fikr, (1984) Vol. 5, p. 256; Aun Sheriff Qasim, *Nasha'at Da'awat al-Islamiyyah,* p. 295

any attack against either party with the exception of a conflict that has to do with faith (religion).[197]

2) The *Sulh* conducted between the Prophet (saw) with Buhta Ibn Ru'aba with the people of 'Ilya on his way back from the expedition of *Tabuka* to the effect that it is a protection from Allah (swt) and the messenger (saw) to the people of Buhta Ibn Ru'aba and 'Ilya that their boats could not be raided, their merchants also could not be raided either on land or at sea. They are all under the protection of Allah (swt) and the messenger (saw) and all those that are allies to the people of 'Ilya from the people of Sham (Syria), Yemen, Bahar (Bahrain).[198]
3) Other people (nations) with whom the Prophet (saw) concluded treaties of peace are the people of Nejran, Thaqif, Azraf, Muluuk Himyar, Maqnah, etc.[199]

So also, after the demise of the Prophet (saw), his companions have also continued with the practice of concluding peace treaties with other non-Muslims nations. Examples include the treaty concluded by Khalid ibn Walid (RA) with the people of Iliyas. The treaty entered into between Ibn Baqalah (RA) and the people of Nahr al-Mulk and another treaty with the people of Ahl al-Ambar and Basrah (Iraq).[200] Similarly, Khalid Ibn Walid (RA) and Abu Ubaidah (RA) had entered into a treaty with the people of Damascus and Hemus (a city in Palestine); Ba'alabakkah (a city in Lebanon); Al-Jusiyah.[201]

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[197] Aun Sheriff Qasim, *Nasha'at Da'awat al-Islamiyyah*, p. 295

[198] Ibid, at pp. 310-323

[199] Az-Zahaby, *Tarikh al-Islam*, pp. 127-91

[200] Al-Waqidy, *Fath-ul-Sham*, Vol. 1, p. 54

[201] Ibid

3.5.1 The Object-Matter of Armistice Treaty

The consideration to be presented for the acceptance of an offer for a peace treaty can be the payment of certain amount of money or property; reparation of some wrong; a requirement (obligation) as to temporal cease-fire for a certain period of time as in *Sulh* of Da'if with Bani Qiffar; etc.[202]

3.5.2 Principles Governing Armistice Agreement In Islamic Law

The conduct of *Sulh* in an armistice or cease-fire agreement demands the observance of certain principles under the *Shari'ah*. This includes:

1) **To conduct *Da'awah* (Preaching):** preaching precedes the use of force and that the readiness of non-Muslims to a peace treaty is a welcome event for the Muslim authority. In that, the primary principle guiding the conclusion of a peace treaty between Muslims and non-Muslims is focus on the possibility of Muslims to carry on with performance of *Da'awah* and any condition that may negate this fundamental objective is unacceptable. Thus, as a matter of principle, Muslims shall not resort to the use of force in armed conflict to kill and defeat the enemy senselessly, but to strive to keep people alive as to be able to have contact with the message of Islam so that they may eventually embrace it.[203]
2) **To Promote the Acceptance of Islam:** Truce in Islamic is meant to promote the acceptance of Islam as any nation that enters into a peace treaty with the Islamic State would remain protected and free from any form of hostility against lives and

[202] *Al-Wasa'iq Al-Siyasiyyah*, p. 60

[203] *Al-Marawadatu Kaamilt al-Sirah al-Nabawiyyah*, Vol. 4 p 539

property; thus, the state of peace is guaranteed to non-Muslims in exchange for the opportunity available to the Muslims to propagate Islam.[204]

3) **Imposition of *Jizyah*:** remittance of *jizyah* by non-Muslims to Islamic authorities is part of the principles of peace treaty between Muslims and non-Muslims. Consequently, any non-Muslim nation that is at war with the Islamic State and refused to accept Islam must be obliged to pay *Jizyah* (poll tax) as a precondition to the acceptance of *Dhimmah* pact with them.[205]

4) Part of the guiding principles is that, Muslims shall not agree to any treaty obligation that would turn lawful into unlawful or vice versa (e.g., consumption of alcohol, licensing of brothels, prostitution, etc.). Similarly, no treaty obligation would be agreed to, if it is to the effect of lessening or abandoning the full operation or practicing certain aspects of the Sharia.[206] This is in accordance with the Hadith that any condition (obligation) which contradicts what the Qur'an and *Sunnah* established, such a condition remained prohibited (null and void).

3.5.3 Legal Consequences of an Armistice Agreement in Islamic Law

A validly concluded armistice agreement under Islamic law has the legal effects of ending a war or armed conflict, thereby restoring peace among the warring parties.[207] The parties have no legal right to act contrary to the terms of the truce agreement while the

[204] ibid

[205] Az-Zahaby, *Tarikh al-Islam*, pp. 127-91

[206] ibid

[207] *Al-Marawadatu Kaamilt al-Sirah al-Nabawiyyah*, Vol. 4, p 539

treaty is in force, i.e., reinforcement of the principle of good-faith.[208] It also circumvent blood-shed and afford greater protection of lives and property.

Moreover, it provides an avenue for mutual diplomatic communication between Muslims and non-Muslims; a state of affairs that may facilitate non-Muslims to understand and appreciate Islam as is the case with what went on when Islam spread to Egypt, Illya (Rome), Tripoli (Libya), etc. It can also impose on either party a shift from one stand to another with the obligation of respecting this arrangement, i.e., recourse to mutual tolerance with one-another. In a nutshell, *Sulh* is a procedure employed under the *Shariah* for terminating or avoiding a war or armed conflict.

[208] *Al-Wasid*, p. 522

CHAPTER FOUR

THE LAW AND PRACTICE OF *SULH* IN KATSINA STATE SHARIA COURTS

4.1 Introduction

This chapter provides an analysis on the practice of *Sulhu* in Katsina State Sharia Courts. Katsina State is one of the 36 States of the Federal Republic of Nigeria.[209] As a State within the Federal Republic of Nigeria, i.e., it operates as a second tier in the structure of government in Nigeria. Thus, it has its own Legislative Assembly, Executive and the Judiciary.[210] It is located in the North-Western region of Nigeria. The Katsina State Judiciary presently consists of two types of courts: one administering the common law based legislations and the other administering some aspects of Islamic law.

It is worthwhile restating that Islamic law is an independent legal system in Nigeria[211] and the courts in Katsina State that are bestowed with jurisdiction to administer Islamic law are the Sharia Courts. Although the term "Sharia Courts" refers to Islamic law based courts, their organizational structure consists of two levels, Sharia Courts and Upper Sharia Courts,[212] a structure somewhat akin to the then Area Courts and Upper Area Courts. These two categories of Sharia Courts are serving as the recognized lower courts at the State level as far as jurisdiction over Islamic law cases in Katsina State is

[209] See Part I, First Schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011).

[210] See sections 4(6)(7), 5(2), 6(2)(4), ibid

[211] See Alkamawa v. Bello (1998) 6 SCNJ 127

[212] See Section 3(1), *Sharia Courts Law,* 2000, Cap 173, Laws of Katsina State of Nigeria.

concerned. Moreover, the Sharia Court of Appeal being a constitutionally recognized court operates as an appellate court over Islamic law cases in Katsina State.[213]

It is, however, noteworthy that the scope of this research covers only the Sharia Courts and Upper Sharia Courts as the lower courts as the new courts introduced by virtue of the reintroduction of Sharia in Katsina State and vested with original jurisdiction over cases relating to Islamic law.

4.2 Legal Basis on the Application of *Sulh* in Katsina State Sharia Courts

The Katsina State Sharia Courts [KSSC] are established in the year 2000 following the re-introduction of Sharia in the State. These courts which were formerly known as Area Courts are now renamed Sharia Courts under a new State legislation with additional original jurisdiction to try cases involving Muslims or persons subject to Islamic law, in Katsina State. The law that establishes the Sharia Courts is the *Sharia Courts Law 2000.*[214] This law provides for the two grades of Sharia Courts in the State as mentioned above, i.e., Sharia Court and Upper Sharia Court.[215]

The Sharia Courts Law provides only an enabling basis in respect of the practice and procedure as well the substantive law to be applied in the Katsina State Sharia Courts. Section 8 of this legislation provides that, the law and rules of procedure to be applied in both criminal and civil cases shall be as prescribed under the Maliki School of Islamic Law, which includes among others the following sources, i.e., the Holy Qur'an; the *Hadith* (*Sunnah*) of the Prophet Muhammad (SAW); *Ijmaa*; *Qiyas*; *Ijtihad*; and *Al-*

[213] See sections 275-277, Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011); See also Sharia Court of Appeal Law, Cap. … Laws of Katsina State of Nigeria

[214] Sharia Courts Law, 2000, Cap 173, Laws of Katsina State of Nigeria

[215] See Section 3(1), Sharia Courts Law, 2000, Cap 173, Laws of Katsina State of Nigeria.

Uruf.[216] It may therefore be observed that, the proper guidance in terms of practice and procedure are not well stated or enunciated under these enabling legislation, but it only allows reference to sources of islamic law generally. It may further be observed that, this enabling legislation adopts the doctrines of the Maliki School of jurisprudence as the applicable school of Islamic law in respect of administration of justice in the Katsina State Sharia Courts.

Likewise, as the Sharia Courts are empowered to hear and determine both civil and criminal cases in the State, the *Islamic Penal System (Adoption) Law*[217] serves as the legal basis for the application of Islamic penal system over criminal cases coming before the Sharia Courts in the Katsina State. This law, i.e., the *Islamic Penal System (Adoption) Law* also provides for the resort to Islamic Law of the Maliki School by the Katsina State Sharia Courts. This law further provides that proceedings in the determination of any criminal matter before any Sharia Court shall be governed by the primary sources of Islamic Law, i.e., the Qur'an and the *Sunnah* and that a Sharia court is empowered in any proceedings before it to refer to and apply the texts in the Maliki School of Law.[218] The provisions of this law has the implications of allowing a wider latitude for Sharia Court judges, lawyers and litigants to refer to and rely on the Islamic law books of the Maliki School of Islamic law in support of their cases or legal arguments before Sharia Courts in Katsina State and the law only serves as an enabling legislation but that the principal tests to be relied on are those of the Maliki School of Islamic law. Thus, as the Islamic law

[216] See Section 8, Sharia Courts Law, 2000, Cap 173, Laws of Katsina State of Nigeria.

[217] Islamic Penal System (Adoption) Law 2000, Cap 174, Laws of Katsina State of Nigeria.

[218] See Section 3, Islamic Penal System (Adoption) Law 2000, Cap. 174, Laws of Katsina State of Nigeria

relating to the institution of *Sulh* is also a matter that the Maliki jurists have also discussed, referring to their works in the enabling laws of the Katsina State Sharia Courts is quite relevant.[219]

In furtherance to the objectives of the above stated laws, in the year 2008, the Katsina State *Sharia Courts Civil Procedure Rules*[220] was promulgated and made applicable to all Sharia Courts and Upper Sharia Courts of the State.[221] Under these Rules of Court, **Order 12** provides for reference to arbitration (*Sulh*) of cases duly initiated before the Sharia Courts. **Order 12 Rule 1** of the Rules provides that:

> A court may, with the consent of the parties to any proceedings, order the proceedings to be referred for arbitration to such person or persons and in such manner and on such terms as it thinks just and reasonable.[222]

In an intervirew with Katsina State Director of Sharia Courts, it is gathered that the above quoted provision of Sharia Court Rules serves as the legal basis and guidance on Sharia Courts in respect of amicable settlement of disputes and that litigants are at liberty to have their disputes referred by the court to professional arbitrators as an out of court settlement, to which arbitration is also a process well established under Islamic law and is one of the mechanisms for the attainment of *Sulh* (amicable settlement) of disputes.[223]

But it is noteworthy that, although the language of this Civil Procedure Rules, i.e., **Order 12 Rule 1** has somewhat an emphasis on arbitration, yet it is impliedly discernible that

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[219] Interview with Nuruddeen A. Mashi, a Honorouble Qadi of the Katsina State Sharia Court of Appeal, Katsina, 8th January, 2013

[220] Katsina State *Sharia Courts (Civil Procedure) Rules* 2008

[221] See Order 1 Rule 2, *Sharia Courts (Civil Procedure) Rules* 2008 of Katsina State

[222] Order 12 Rule 1, S*haria Courts (Civil Procedure) Rules* 2008 of Katsina State

[223] Interview with Gambo Aliyu Dutsin-Ma, Director of Katsina State Sharia Courts, 8th January, 2013

the import of the Rule is to allow for viability of amicable settlement of disputes within the Sharia Courts of Katsina State. Thus, in line with this objective, the Katsina State Judiciary has also established Multi-Door Court House (KTMDCH) to facilitate alternative dispute resolution (ADR) in the State. Essentially, the Multi-Door Court House is an ADR facility that is court connected and modeled along Western conception of ADR.[224]

In an interview with the Director of the Katsina State Multi-Door Court House (KTMDCH), it is gathered that the KTMDCH offers various processes of alternative dispute resolution to litigants including cases coming from the Sharia Courts. It is further gathered that the KTMDCH exercises its functions through referral from the Sharia Courts in which case, it is the court that will advise the litigants to explore ADR procedures to settle their disputes. On the other hand, it can also be at the instance of the parties themselves where they agree to refer their dispute to the Multi-Door Court House for the resolution of their dispute. The utilization of the Multi-Door Court House also involves instances where cases filed in court go through a process of in-take screening in order to determine the appropriate door to use.[225]

In the year 2011, the Katina State Multi-Door Court House was actually set up with a special provision for the practice of *Sulh* within the judicial environment. In line with this, some formal rules of procedure in the form of practice direction was promulgated by the office of the Chief Judge (CJ) of Katsina State, i.e., the *Sulhu*-Door Rules.[226] These *Sulhu*-Door Rules further provides the legal basis and guidance on the conduct of *Sulh* in Katsina

[224] Interview with Ibrahim M. S. Jibya, Director of the Katsina State Multi-Door Court House (KTMDCH), 8th January, 2013

[225] Ibid

[226] Katsina State Multi Door Court House (*Sulhu* Door Rules) 2011

State Sharia Courts as per some provisions of Islamic Law. It establishes the *Sulhu* Door as one of the doors of the Katsina State Multi-Door Court House designed to facilitate alternative dispute resolution in the State.[227]

4.3 Jurisdiction and Commencement of *Sulh* in Katina State Sharia Courts

For sharia courts to play any role or exercise any judicial powers in respect of cases amenable to *Sulh*, they are required to possess, as a matter of law, jurisdiction to try, pass and enforce judgment on such cases as a court-connected process.

4.3.1 Jurisdiction of Katina State Sharia Courts Over Cases Amenable to *Sulh*

The practice of *Sulh* among litigants in Katsina State, especially under the auspices of the *Sulhu* Door within the Multi Door Court House is a process attached to a court of competent jurisdiction.[228] Generally, the jurisdiction of the Sharia Courts consist of the hearing of cases that pertain to civil and criminal litigation wherein Muslims are the parties to the action although non-Muslims can by consent, accept to be bound by the rules of Islamic law in any case before Sharia Courts. The *Sharia Courts Law* as the enabling law has set out clearly the civil and criminal jurisdictions of Katina State Sharia Courts. It provides that the Sharia Courts shall have jurisdiction to hear and determine:

a) Civil proceedings in Islamic law which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim (due to a Muslim or Muslims or the State) is in issue; or

[227] Interview with Ibrahim M. S. Jibya, Director of the Katsina State Multi-Door Court House (KTMDCH), 8th January, 2013

[228] See Rule 13(b), Katsina State Multi Door Court House (*Sulhu Door Rules)* 2011

b) Criminal proceedings in Islamic Law involving or relating to any offence, penalty, forfeiture, punishment or other liability in respect of an offence committed by a Muslim or against the State.[229]

It follows, therefore, that in any matter, civil or criminal, which is subject to the jurisdiction of the Katsina State Sharia Courts, the Courts do also possess the jurisdiction to play a part and foster the amicable settlements of disputes concerning legal issues on cases that are within the ambit of Islamic law. Unlike the Sharia Court of Appeal of the State whose jurisdiction is restricted to Islamic personal law that has to do with marriage, *waqf* (endowment), gift, succession, guardianship of infants, etc.,[230] the Sharia Courts are bestowed with wider civil and criminal jurisdictions as to cover all aspects of disputes that relates to the activities of Muslims on whom the *Shariah* rules apply in the state. Thus, any matter that ordinarily falls within the jurisdiction of the Sharia Courts is also a matter that is amenable to *Sulh* should the parties to such a case apparently consent to out of court settlement.

However, while Muslims are the persons upon whom Islamic law essentially applies, other persons, i.e., non-Muslims are afforded sufficient latitude to avail themselves of Islamic system of administration of justice. In that, the *Sharia Courts Law* provides that the Sharia Courts shall have jurisdiction and power over all persons professing the Islamic faith and all non-Muslims who voluntarily submit themselves to the jurisdiction of the Sharia Courts.[231] Thus, the Katsina State Sharia Courts are vested with unfettered legal power to the exercise of jurisdiction over all persons within Katsina State who are

[229] See Section 5(1), *Sharia Courts Law,* 2000, Cap 173, Laws of Katsina State of Nigeria.

[230] See section 277, Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011)

[231] Section 7(1), S*haria Courts Law 2000,* Cap 173, Laws of Katsina State of Nigeria

Muslims, and it can as well exercise consensual jurisdiction over non-Muslims following their express consent to be so bound by the principles of Islamic law.[232] It is pertinent to mention also that, in the alternative, non-Muslims have the right to institute actions at the High Court or Magistrate's Court and that where a Muslim is suing a non-Muslim, such a Muslim shall be free to sue the non-Muslim in a court other than Sharia Court.[233]

The types of cases amenable for *Sulh* before the Katsina State Sharia Courts are normally cases that fall within the jurisdiction of Sharia Courts in matters involving the application of Islamic Law over disputes arising between Muslims. These include cases involving women seeking divorce. The purpose of some of them initially from coming to court was to either attain divorce or seek judicial help to save the marriage. Instances abound wherein complaint are filed involving legality of marriages, divorce, pregnancy/parentage, custody of children after divorce, lack of or insufficient maintenance of wives and of their children during the subsistence of marriage and post-divorce, cruelty, violence, desertion either by the husband or the wife, demand for *Khul'u*, etc.[234]

Regarding matrimonial cases, upon institution of an action before the Sharia Court, the parties are usually given the opportunity to explore avenues for out of court settlement otherwise termed *Biko* in Hausa which is a respite period given to the parties to return home to consider the issues at stake with a view to its settlement. Thereupon, the courts

[232] Section 7(2) S*haria Courts Law 2000,* Cap 173, Laws of Katsina State of Nigeria

[233] Section 40, ibid

[234] Interview with Gambo Aliyu, Director of Sharia Courts, Katsina State Judiciary, interview conducted on 19/9/2012 at the Katsina State High Court Complex, Katsina.

would request the *al-Hakamain* (arbitrators) to be appointed from amongst the relatives of the parties to come forward and present their own opinion about the practicability of the continuity of the marital relationship between the litigating spouses. In most of the cases coming before the Sharia Courts, the *Hakaman*, where separation is inevitable, consider the dissolution of the marriage. Thereupon, the Sharia Court would then decree divorce acting upon what the parties through their *Hakaman* had agreed upon.[235]

4.3.2 The *Sulhu* Door under the Katsina Multi-Door Court House

The Katsina State Multi-Door Court House is a court-connected system that offers variety of Alternative Dispute Resolution (ADR) processes. The House operates based on various options available to litigants including case evaluation, mediation, arbitration, *Sulhu*, etc., which are processes designed to supplement litigation. Cases are matched with an appropriate process with neutral, skilled and experienced Mediators, Evaluators, Arbitrators and *Hakams*, etc.[236]

The *Sulhu* Door of the Katina State Multi-Door Court House [KTMDCH] introduced in the year 2011 is one of its doors within the Katsina State Judiciary designed to facilitate alternative dispute resolution (ADR) in the State. The *Sulhu* Door is locally designed for the Katsina State setting taking into consideration the peculiar values, practices, customs and beliefs of the people within the State. Primarily, it aims at capturing certain cases that clog the litigation process and are subjected to great delays while by their very nature are amenable to amicable settlement.[237]

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[235] Ibid
[236] Interview with Ibrahim M. S. Jibya, Director of the Katsina State Multi-Door Court House (KTMDCH), 8th January, 2013
[237] Ibid

However, the types of cases contemplated to be handled by Katina State Multi Door Court House (KTMDCH) under Rule 2 of the *Sulhu Door Rules*[238] include inheritance matters; maintenance matters; custody cases; and any other matrimonial conflict. They also include various types of contracts, land matters, criminal cases which are compoundable as well as any other case that may be filed in any other court in the State.[239]

Access to the *Sulhu* Door, i.e., initiation of its proceedings is triggered by any of the following means, i.e., upon application by any person interested in the dispute personally or through his legal representative; referral of a dispute to the *Sulhu* Door by a Court or Tribunal; referral of a dispute or matter by a Community Leader or Family Elder, etc.[240]

4.3.3 The *Sulhu* Agreement

The ultimate purpose of undertaking a *Sulh* is initially to resolve a dispute amicably and it is the expected wish of all stakeholders that at the end, an agreement (i.e., award, terms of settlement, determination, etc.) may be reached by the parties thereby bringing an end to the dispute. This overall outcome of the *Sulh* process by the parties is termed "*The Sulh Agreement*".[241] When the outcome concerns the efforts of a panel from the *Sulhu Door* of the KTMDCH, it is termed "determination" and it is such a determination that is referred to the court for entry as consent judgment.[242]

[238] Katsina State Multi Door Court House (*Sulhu Door Rules) 2011*

[239] See Rule 2, Katsina State Multi Door Court House (*Sulhu Door Rules) 2011*

[240] See Rule 1, ibid

[241] See Rule 7, ibid

[242] See Rule 16, ibid

4.4 Admissibility and Enforcement of *Sulh* Agreement in Katsina State Sharia Courts

The outcome of a *Sulhu* process is acceptable by the courts and may be so adopted and enforced as the judgment of the court. But for confidentiality purposes, all records (e.g., reports, or other documents) arising in relation to the *Sulhu* process is a privileged communication under the *Sulhu Door Rules* and cannot be relied upon or be admissible as evidence in subsequent litigations or arbitration except in so far as is necessary to enforce such a settlement.[243] Having effectively surrendered all rights to claims on the matter, subsequent attempts by either party to initiate a related suit will, therefore, be summarily rejected by a Sharia Court.[244]

As to enforcement, once the parties ultimately reach a settlement, such a settlement is considered as a binding judgment. The Sharia Courts are obliged under **Order 12 Rule 2** of the Sharia Courts Civil Procedure Rules to consider and adopt a report or awards of arbitrators, i.e., enter it as the judgment of the court or set it aside.[245] **Order 12 Rule 2** specifically provides that:

> On consideration of the report or award of the arbitrator the court may:- (a) confirm any award of the arbitrator and enter it as the judgment of the court; or (b) set aside the award and fix a date for the hearing of the case by the court and proceed to the hearing of the case accordingly.[246]

From the above rule, it is therefore obvious that two options are available to Sharia Courts upon receipt of a report of settlement or the award of an arbitrator, it being either to accept such a settlement and adopt same as judgment of the court or set it aside and

[243] See Rule 18(b)&(c), Katsina State Multi Door Court House (*Sulhu Door Rules) 2011*

[244] Ibid

[245] Katsina State Sharia Courts (Civil Procedure) Rules 2008

[246] Order 12 Rule 2, Katsina State Sharia Courts (Civil Procedure) Rules 2008

continue with the trial of the case accordingly.[247] As it has been earlier mentioned, the practice of *Sulh* among litigants especially under the auspices of the *Sulhu Door* within the Multi Door Court House is a process attached to a court of competent jurisdiction.[248] Hence, in line with this principle, the *Sulhu Door Rules* further provides that the determination of a *Sulhu Panel* is to be referred to the appropriate court for entering as judgment of the court.[249]

But although the Sharia Courts have been given the power to set aside an award or determination, what is somewhat problematic was the prerogative of judicial review conferred on Sharia Court judges of moderating or reviewing the agreement reached by the parties before adopting same as judgment of the court to see whether such an agreement are in consonance with the spirits of Islamic law. This means that the courts are obliged to reject agreement or settlement reached by parties to a dispute if such an agreement contravenes the established rules of Islamic law on the issue. The *Sulhu Door Rules* specifically provides:

> The Court to which the decision is linked may first go through the determination. Where, in any matter, the judge detects or observes any contradiction with the provisions of the Holy Qur'an and/or Sunnah in the determination, he [the judge] shall return the determination to the Panel along with his observations. The Panel;
> i) May then make amendments and return the determination,
> ii) May request a conference with the judge to resolve the issue.[250]

It is contended that this provisions of the *Sulhu Door Rules* has the effect of drawing the hand of the clock backward and of further depriving the parties of the fruits of their

[247] Interview with Gambo Aliyu, Director of Sharia Courts, Katsina State Judiciary, interview conducted on 19/9/2012 at the Katsina State High Court Complex, Katsina.

[248] See Rule 13(b), Katsina State Multi Door Court House (*Sulhu Door Rules)* 2011

[249] See Rule 16(a), ibid

[250] See Rule 16(b), ibid

amicable settlement by technical means which has the effect of serving as a tool for delay rather than fast tracking the resolution of the dispute concerned. The problem is that of dealing with the indiscreet personal interest of the judges in such circumstances. The judges may, when interested, refuse or fail to sincerely review the 'determination' in good faith as to favour a particular party. However, the judges may also in bad faith, seek to reject such a 'determination' in order to restore their adversarial role in the proceedings. This rule is, therefore, in need of redraft as to carry with it the ethical responsibilities of judges in reviewing a 'determination'. Furthermore, it is also desirable that the parties to the dispute shall be invited to participate in the reevaluation of the award, terms of settlement or 'determination' as to ensure that their legitimate interests are taken on board.[251]

It is further contended that if the parties to a dispute can legitimately reach a settlement of their dispute when duly represented by their lawyers and adequately guided by experts on the field from the *Sulhu Door,* such an agreement, it is submitted, should be made to be readily accepted for onward enforcement by the Sharia Courts and to be executed as such, unless objected to by the parties.

On the other hand, once the courts accept the determination of a resolution panel of the *Sulhu Door,* the court is obliged to enforce such a determination. The *Sulhu Door Rules* provides that it shall be the duty of the court to which the panel is liked to enforce the 'determination' of the resolution panel.[252] In this respect, the normal procedures

[251] Interview with Ibrahim M. S. Jibya, Director of the Katsina State Multi-Door Court House (KTMDCH), 8th January, 2013

[252] See Rule 20(a) of the Katsina State Multi Door Court House (*Sulhu Door Rules) 2011*

employed for the enforcement of a judgment of the courts are followed.[253] The courts based upon a 'determination' may further direct it to be forwarded to the probate registry for the issuance of letters of administration in respect of the properties, shares, instruments, etc., that may be covered thereby.[254]

It is observable that, in many respects, the process of enforcing *Sulh* in the Sharia Courts outwardly appears no different from the Western-style of mediations enforced as consent judgment. In fact the *Sulhu Door Rules* emphatically provides that Sharia Courts may enter an amicable settlement of parties as consent judgment.[255]

4.5 Analysis of Some Cases from the Sharia Courts

It is pertinent to review some of the decided cases of the Sharia Courts that are illustrative of the principles of Islamic law on *Sulh* within the judicial system. However, as these cases are unreported decisions from the Sharia Courts, they have been obtained through the researcher's field visit to some of the Sharia Courts.

In ***Hadiza Yahaya v. Shu'aibu Marafa,***[256] the Plaintiff complained of deprivation of sexual union and for bad inter-personal relationship by her husband thereby seeking for the dissolution of their marriage. The husband disputed the allegation that it was the wife who was not co-operating with him and the husband requested that the wife should return back all what he had spent on her in the process of contracting the marriage for him to

[253] See sections 26-27 S*haria Courts Law 2000,* Cap 173, Laws of Katsina State; Orders 17-19, Katsina State Sharia Courts (Civil Procedure) Rules 2008

[254] See Rule 20(a) of the Katsina State Multi Door Court House (*Sulhu Door Rules) 2011*

[255] See Rule 17(c)&(d), ibid

[256] (Unreported) Case No. 118, Complaint No. 10, Sharia Court Kaita, judgment delivered on 7/05/2012

agree to their separation. The court sought for the appointment of *Hakaman* for the parties. Following the agreement of the parties, i.e., their mutual consent of ending the dispute through *Khul'u*, the court eventually ordered the separation of the parties by way of *Khul'u* for the wife to payback the amount of dower settled upon her by the husband.

In another case of ***Zainab Ibrahim v. Ibrahim***,[257] the plaintiff complained of lack of maintenance thereby seeking divorce from her husband. The husband requested for *Biko* in order to explore out of court settlement and eventually the *Hakaman* of the parties convened agreeing to the separation of the parties upon *Khul'u*. The wife thus refunded the amount of dower already paid by the husband. This *Sulhu* of the parties is somehow inconguruent with the tenets of Islamic law because lack of maintenance is itself a ground that would entitle a wife to divorce if established to be true. This means that it is improper to resort to *Khul'u* in the name of amicable settlement of a matrimonial dispute when the justification or substance of the complaint, in this case lack of maintenance, is itself a the valid ground for divorce. To do so is compromising the fault of the husband to the advantage of the wife which is grossly improper as it is in breach of clear guidance of the sharia on the matter.

Similarly, in ***Zulai Idris v. Muda***,[258] the plaintiff complained of being beaten by the husband and sought divorce. But the husband and the wife agreed by way of *Sulh* that the wife is to return the articles she received during the marriage contract. But the court rescinded their *Sulh* in view of the fact that the marriage has been consummated, thus all what has been previously offered to the wife in the name of the marriage has become

[257] (unreported) Case No. 125, 2012, Sharia Court Mahuta, judgment delivered on 11/06/2012.

[258] (unreported) Case No. 48, 2011, Sharia Court Funtua, judgment delivered on 16/04/2012.

forfeited by reason of consummation of the marriage. The parties further agreed to separate upon *Khul'u* but for the husband to retain the deferred *Sadaq* (dowry) which he had not yet settled and for the wife who was pregnant to cater for the pregnancy in lieu of the *Sadaq* to be refunded till her delivery. This *Sulhu* of the parties is inevitably in line with the principles of Islamic law because, as regard *Khul'u,* the compensation for the value of the *sadaq* to be reimbursed by the wife is negotiable and out of such a negotiation, it may be reimbursed in exchange of relinquishing her right or entitlement of deferred dower, arrears of maintenance, or maintenance during pregnancy and *iddah* (waiting period).[259]

In the case of ***Raliya Usman v. Usman***,[260] the plaintiff complained of 7 months desertion by the husband. The husband requested for *Biko* so as to explore avenues for out of court settlement, whereupon the parties were unable to settle between themselves. The court ordered them to come along with their *Hakaman.* Upon hearing the views of their respective *Hakaman*, the court eventually separated the parties by *Khul'u* for the wife to pay back the amount of dower settled by the husband. Under Islamic law, in circumstances of this nature, for a husband to desert his wife for a period morethan four months, this alone is a valid ground that would entitle the wife to seek divorce by way of judicial separation. Thus, for the parties or their respective representatives (*hakaman*) to narrow down the resolution of the dispue to the option of *Khul'u* is a bit a subtle alternative to the advantage of the husband. Otherwise, the wife should have been granted divorce upon establishing the husband's desertful conduct because under *Khul'u,* she is

[259] See al-Kaafi, *Ihkamul Ahkam ala Tuhfah al-Hukkam, op. cit.*, pp. 102-103

[260] (unreported) Case No. 120, 2012, Sharia Court Kaita, judgment delivered on 18/06/2012.

obliged to remit something in order to secure her release which is not the case had it been that the case went through judicial separation as the fault emanates from the husband. But be that as it may, in case she lacks the requisite proof at her disposal, resort to *Khul'u* is the best option open to her.

In the case of ***Hajara Sani and 2 Others vs. Malam Suleiman Isa,***[261] the Plaintiff complained of refusal by the Defendant to return back to them the piece of land that was pledged by the Plaintiff's deceased father to the Defendant. The Defendant's ground of refusal to return back the said piece of land was that the Plaintiff's deceased father have not settled back the amount owed to him by the defendant. While the Defendant were not denying the transaction, between him and the Plaintiff's deceased father, the Defendnat demanded that the Plaintiffs should refund back the amount collected by their deceased father for the Defendant to release the piece of land to them. The plaintiff's failed to meet the Defendant's demand and they later agree by *Sulhu* that as the value of the piece of land is higher than what their deceased father had collected, it being an amount of N50,000 the Defendant should offer to the Plaintiffs an amount of N30,000 so that the Defendnat can thereby acquire ownership of the land in dispute. Upon settling these amount agreed in the *Sulhu*, the case came to an end. As far as Islamic law, this is a typical instance of *Sulhu* upon admission of liability (*as-sulh alal-iqrar*) and that is open to the parties in dispute, as in this case, to resort to *Sulh* even though there is an admission of liability by the party against whom the claim is made.

[261] (unreported) Case No. 226/197/ 2012, Sharia Court Mahuta, judgment delivered on 1/11/2012.

In the case of ***Alhaji Usman Ya'u vs. Lawal Musa,***[262] the Plaintiff who is a trader was approached by the Defendnat to grant hin 5 bags of fertilizer totalling N20,000 on credit, the Defendnat to settle the amount at the end of the farming season. It took on more than two months after the agreed period without the defendant appearing to give back the amount of the fertilizer he collected nor was he able to come and give information about what happened. The Plaintiff's complaint was therefore a demand of the N20,000 as debt against the Defendant. From his own side, the Defendnat requested the Plaintiff to passionately grant him more time till when the market price of his farm produce have increased for him to sale same and settle the Plaintiff or that the Plaintiff should agree to collect some bags of maize equivalent to the value of his money. The parties finally reached a *Sulhu* to the effect that the Defendnat should settle the debt within the next fourty days and as a result, the Plaintiff thereby agreed to withdraw the case whenever the amount is finally settled. It may hwever be observed that, these Sulhu of the parties is more of a plea for the extention of time within which to pay the amount claimed against the Defendant. But by and large, as the Defendant had agree to pay the amount claimed against him, this serve as an acknowlwdgment of indebtedness which goes to the advantage of the Plaintiff as the Plaintiff in this circumstance is relieved of the burden of proof in respect thereof.

In the case of ***Hamza Aliyu vs. Makama Abdullahi***,[263] the Plaintiff and one Alhaji Adamu Idris were neighbours who own adjacent lands and the said Alhaji Adamu Idris

[262] (unreported) Case No. 293/213/ 2012, Sharia Court Funtua, judgment delivered on 12/12/2012.

[263] (unreported) Case No. 107/122/2012, Sharia Court Kaita, judgment delivered on 16/08/2012.

sold his own plot of land to the Defendant. The Plaintiff complained that the Defendant had encroached upon certain portion of his land by building a fence that extends to almost three feets. When the Plaintiff complained to the Defendant, he replied that he only buids upon what has been sold to him by the Plaintiff's neighbour Alhaji Adamu Idris. But when Alhaji Adamu Idris was called by the court, it became evident that the Defendant had stepped into the Plaintiff's land by some three feets. The Defendant later pleaded with the Plaintiff that as he had already spent money by erecting a fence unto the Plaintiff's land, the Plaintiff should kindly collect something in place of the three feets encroached by the Defendnat. The parties therefore reached a *Sulh* that the Plaintiff should forgo his right over the piece of land encroached by the Defendnat and that the Defendnat should pay to the Plaintiff its monetary value. In this type of *Sulh*, it is much more reminiscent of a sale contract and that *Sulh* as a contract ordinarily have the effect of being a sale where there is exchange of something in lieu of the right relinguished by the other party.

4.6 The Role of Some Key Stakeholders to the *Sulh* Processes in Katsina State Sharia Courts

Positive achievement of an amicable settlement of a dispute requires at least the efforts of some responsible personalities whose participation in the *Sulh* processes may help to bring about positive result. Such persons may include, among others, the litigants themselves, Sharia Courts Judges, Lawyers, religious leaders, traditional rulers, and family members, etc. As independent third-party interveners either as mediators or agents (*Mutawassit or Wakil*), they can play a vital role in assisting the disputants to arrive at a mutually acceptable solution and avoid the hardships associated with attending court and

undergoing the rigors of trial.[264] The various roles of these stakeholders are, therefore, briefly explained below.

4.6.1 Role of Sharia Court Judges

Essentially, our consideration of the practice and procedure of *Sulh* before the Katina State Sharia Courts as provided for in Islamic law is in relation to its court-connected or with reference to its role in the judicial administration of justice under Islamic law. Thus, a closer look at the concept of *Sulh* reveals that Islamic law not only deals with *Sulh* as the preferred mechanism for dispute resolution between litigants outside the court but that the *Qadi* too is capable with multiple roles within the largely inquisitorial judicial system. The Q*adi* do also perform the roles of mediators and conciliators as parts of their judicial responsibility. Therefore, we find the Muslim jurists writing about *qada'u bil-Sulh* (adjudication by way of *Sulh*) as one of the alternatives open to a judge when a case has been duly initiated before him.[265] Therefore, the term *qada'* (adjudication) in Islamic law does not exclusively mean adjudication based on the strict rights of the parties in accordance with the law, but termination and resolution of the conflict within the judicial system.[266]

The practice of *biko* as regards matrimonial cases is very prominent in the Sharia Court. It is a practice whereby cases are adjourned at the instance of the husband with a view to exploring out-of-court settlement of the dispute. If they succeed in doing so, that brings

[264] Al-Kasani, *Bada'i al-Sana'i*, Vol. 7, pp. 490-491; Al-Tarablusi, *Mu'in al-Hukkam fi ma Yataraddad bayna al-Khasmayn, op. cit.*, pp. 122-123

[265] ibn Farhun, *Tabsirat al-Hukkam fi Usul al-Aqdbiyah wa Manahij al-Ahkam, op. cit.*, pp. 54-56

[266] ibn Farhun, op cit., pp. 54-56; Aidah Umar, op. cit., p. 7

an end to the matter, otherwise a full blown trial will be conducted and the erring party would be warned and disciplined accordingly.

4.6.2 Role of Lawyers

Lawyers, as ministers in the temple of justice, are not without prominent role in the processes of *Sulh* before the Katsina State Sharia Courts. As attorneys legally trained to represent clients, their participation in the *Sulh* process helps induce the confidence of their clients that their legitimate interest are taken onboard while agreeing to settle their dispute out-of-court. Lawyers, when representing their clients, may help put forward offers for settlement out of court as well as in the drafting and execution of the terms of settlement that may be agreed upon.

4.6.3 Role of Litigants

First and foremost, either of the parties in the case may choose to exercise the liberty of referring it to the *Sulhu Door* for out-of-court settlement.[267] For the attainment of the benefits of *Sulh* identified earlier in this work, a party is also of such a free will to respond to an invitation for a *Sulhu* session and to facilitate its resolution amicably.

It is indisputable, therefore, that no success could be recorded in any attempt for reconciliation between the parties without their cooperation in the process. It is, therefore, indispensable that their participation is necessary. Such participation may either be in person or through their representatives. In this respect, the the *Sulhu Door Rules* provides

[267] See Rule 1 & 4(a) of the Katina State Multi Door Court House (*Sulhu Door Rules) 2011*

an avenue for parties to be represented by persons of their choice or their legal representatives who must have their express authority to reach a settlement.[268]

4.6.4 Role of Religious Leaders and Traditional Rulers

Mediation and conciliation of disputes involving members of different communities within Katsina State are also facilitated by some prominent members of the community, such as religious leaders and traditional rulers. During the process, these facilitators assist the parties as they attempt to reach a voluntary settlement by inviting them to their palaces giving them words of counseling and suggesting various settlement proposals although they do not force a final agreement on the parties.

The quest for loyalty and the reputation of religious leaders and traditional rulers help in drawing litigants closer to the negotiation table to discuss their problems and eventually reach a settlement. Thus, it is normal that these categories of respected members of the society influence their followers, adherents, family members, friends, etc., to resort to amicable settlement of disputes rather than resorting to litigation adversarial proceedings because at times it do happen that they forms parts of the reliable witnesses for some of the parties to a legal action but their good office may not warrant their participation in the rigorous judicial proceedings.

Interestingly, the *Sulhu* Door Rules also explicitly contemplate the role of the community leaders in the *Sulh* process. In fact, they are listed as among those that are entitled to

[268] See Rule 10 of the Katina State Multi Door Court House (*Sulhu Door Rules) 2011*

trigger the activities of the *Sulhu* Door thereby inducing their subjects to amicable settlement.[269]

4.6.5 Role of Family Members and *Al-Hakamain*

In our society, the words of elders carries with it elements of bindingness among family members and it is normal to hear of parties alluding to out-of-court settlement simply because of intervention by their relatives. In fact, the simplest form of inducement to negotiation of a dispute out-of-court is for a litigant to plead with one's parents for whose intervention proposals for settlement are usually accepted by the contending party.

When the matter involves matrimonial disputes, it is already a principle of Islamic law that matrimonial arbitration should precede divorce proceedings.[270] In that, the courts usually as a matter of law and practice requires the attendance and participation of family members who are appointed as *al-Hakamain* to look into the problems of the marriage and report back to the judge what they consider best regarding the matter. This practice, therefore, owes it origin to the principles of Islamic law and is practiced as such in the Katina State Sharia Courts.

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[269] See Rule 1(c), Katsina State Multi Door Court House (*Sulhu Door Rules) 2011*

[270] See Qur'an 4:35 which provides: "If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers; if they both wish for peace, Allah will cause their **reconciliation**. Indeed Allah is Ever All-Knower, Well-Acquainted with all things." See also Qur'an 4:128 which provides: "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 is better**. And human inner-selves are swayed by greed. But if you do good and keep away from evil, verily, Allah is Ever Well-Acquainted with what you do".

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 INTRODUCTION

This chapter is the concluding aspect of this research work and it contains the summary of the major points of discussion in the preceding chapters of the work. The chapter specifically deals with findings of the study and the respective recommendations submitted thereby.

5.2 SUMMARY

Chapter one of this work lays the general background to this study identifying the the research problem(s), aims and objectives of the research, its scope, literature review, and justification. In chapter two, the concept of *Sulh* has been discussed wherein it is argued that *Sulh* serve as the Islamic law perspective of Alternative Dispute Resolution [ADR], it being a contract that is concluded by two parties, under which each party waives part of his rights for the purpose of reaching a mutual and final resolution of a conflict.[271] In this legal sense, *Sulhu* is the settlement of dispute grounded upon compromise negotiated by the disputants themselves or with the help of a third party. It can thus be said to be a legal mechanism intended not only for the purpose of private conciliation among individuals and groups in lieu of litigation, but it is also the procedural option that could be resorted

[271] ibn Alī, *Tabyīn al-Haqāʾiq Sharʾh Kanzu ad-Daqāʾiq*, Vol. 5, p. 29; Ibn Qudamah, *Al-Mughni*, Vol. 4, p. 476; See also Samir Saleh, The Settlement of Disputes in the Arab World Arbitration and Other Methods – Trends in Legislation and Case Law, ARAB LAW QUARTERLY (1985) Vol. 1, p. 198

to by a *Qadi* within the context of his courtroom or a *Hakam* (arbitrator) in his conference room, i.e., *al-Qada'u bil-Sulhu* (adjudication through *Sulhu*). Thus, *Sulhu* is part of every-day dispute resolution mechanism in Islamic law.[272]

However, in chapter three, the various categories and classifications of *Sulh* has been considered, i.e., its contextual application in contractual transactions, be it commercial or domestic; its use in the resolution of matrimonial disputes; its use in settling criminal cases; and its use in settling disputes arising out inter-state political relations which become worsen by military actions eventually culminating into armistice or truce between and among Muslims and non-Muslims, etc.[273]

In chapter four, the application of *Sulh* in the Katsina State Sharia Courts have been discussed and analyzed wherein additional formal adoption of *Sulh* within the administration of justice in Katsina State has been advocated. From the above discussions, our concluding remarks is that *Sulhu* is undoubtedly a very constructive method in resolving disputes amicably in both civil and criminal cases and that it is the Islamic perspective of alternative dispute resolution (ADR) as far as Muslims are concerned. That Islamic law encourages parties to a dispute to resolve their dispute amicably as litigation may not always result in decisions acceptable to both parties. For this, it is believed that further institutionalization of *Sulhu* processes in Katsina State as a court-annexed mediation when undertaken as provided for by the Sharia, even if it did

[272]Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration*, London School of Economics and Political Science [LSE] Law, Society and Economy Working Papers 12/2008, p.3, available at: http://ssrn.com/abstract=1153659 accessed on the 5/08/2012

[273] Al-Kasani, *Badai'ī al-Sana'ī fī Tartīb al-Sharīʿah, op. cit.,* Vol. 6, p. 47

not solve all the disputes in the proceedings, the issues to be litigated may be narrowed down. Additional recruitment and training of judges and for the establishment of *Sulhu* officers within the judiciary (as in Malaysia)[274] will further enhance full pledged implementation of *Sulh* in Katsina State and would help to manage and settle the problem of backlog of cases in Katsina State Sharia Courts and with this, it is believed that the practice of *Sulhu* as an arm of the Sharia justice would be promoted in Katsina State as per the dictates of Islamic law. Finally, it is posited that the Islamic concept of *Sulhu* remained time tested surviving the impact of time and space dimensions across centuries and that all efforts should be put in place by the Katsina State government and all other relevant stakeholders in the society to protect it from the encroachment of Western models of ADR and of other contradictory influences of un-Islamic laws and norms amongst the Muslims of Katsina State.

5.3 FINDINGS

From the foregoing discussions, the findings listed hereunder have been noted during the study:

1. It is found that to some extent, the formal practice of *Sulhu* as per the teachings of the Sharia is neglected in the Katsina State Judiciary. While it is earlier observed that *Sulhu* forms part and parcel of the Islamic system of administration of justice quite eloquently discussed by classical Muslim jurists, over the years and until of recent, we found that relatively little formal attention is paid within the judiciary

[274] In Malaysia, The Selangor Civil Procedures 2001 (Sulh Regulation) were formulated in 2001 and in 2002; eleven Sulh Officers have been appointed (8 males and 3 females). See Zainul Rijal Abu Bakar, *Sulh* In The Malaysian Syariah Courts, A Paper delivered on the 25th February 2011 at the 2nd AMA Conference titled "Rediscovering Mediation in the 21st Century" held in Sheraton Imperial Hotel, Kuala Lumpur, Malaysia, p. 4.

to the institution of *Sulhu* in Katsina State. This means that when attention to this out-of-court settlement as per the dictates of Islamic law was less than necessary, Muslims are thereby deprived of religious arbitration as part of the Sharia although we do find way being paved for customary and conventional arbitration amply in practice from the lowest court in Nigeria up to the Supreme Court. This shortcoming is glaringly not even restricted to non-full formal recognition within the judiciary but the problem cut across the training curriculum of both academic and professional institutions in Nigeria. This has rendered the concept of *Sulhu* and its practice less formalized and comparatively less specialized upon by practitioners and judges alike.

2. It is further found that *Sulhu* provides an avenue for the relaxation of the strict application of rules of evidence under Islamic law as parties in dispute may be relieved of the requirement of an oath (*al-yamin*) which is usually taken to strengthen or establish one's claim or denial. So also, the requirement of proof (*al-bayyinah*) may thereby be dispensed with where *Sulhu* is undertaken. Thus, where this dispute resolution model is carried out, it can no doubt speed up the trial of cases and eventually help in decongesting our courts of backlog of cases or in solving the problem of prolonging the trial. In the same vein, it is pertinently observed that *Sulhu* can technically be viewed as the easiest way of eliciting the admission of liability by a party to a dispute as where parties agree to a particular condition through *Sulhu*, it technically tantamount to admitting liability thereof fully or partially thus reducing the rigours of full blown trial. Its use can, therefore, serve as a truth eliciting technique by the sharia courts as parties to a

Sulhu agreement has undertaken voluntarily for themselves to be bound by a particular term or condition.

3. It is also found that unlike in English law where only some few misdemeanours (simple) offences are compoundable, in Islamic law; *Sulhu* is amenable in criminal cases. Its applicability in criminal cases relates to homicide and bodily injuries. In this regard, the elegance of the Islamic *Sulhu* model is that, contrary to what obtains under the English criminal justice system where neither the offender nor the victim has a say to settle the case amicably, *Sulhu* alternatively provides the victim a relief in getting compensation (*Diyyah*). The offender also gets the benefit of *Sulhu*, in that; his life may be preserved in cases of *Qisas* where the victim or his relatives agrees to *Diyyah* in lieu of *Qisas*. Therefore, *Sulhu* in criminal cases under Islamic law plays the role of mitigating or remitting the punishment of *Qisas* to that of *Diyyah* based upon mutual negotiation between the offender and the victim (or his relatives). In fact, not only does the offender get remittance of the sentence but that he may thereby secure a complete pardon (*afwu*) from his victim (or his relatives) by way of *Sulhu*.

4. It is further found that even the little effort so far by the government of incorporating ADR within the judiciary, fall short of adequate accessibility as the *Sulhu* Door facility of the Katsina State is not accessible to all and sundry. This is because; one particular problem with the now emerging Multi-Door Court House of the Katsina State Judiciary is that people are more accessible to courtrooms in terms of contact and closeness than the Katsina State Multi-Door Court House (KTMDCH). At present, what obtains is that the KTMDCH and its *Sulhu* Door

are centralized only in Katsina metropolis within the complex of the judiciary. People that are far away from the state capital are, therefore, technically disadvantaged in accessing the services and facilities of the *Sulhu* Door centre thereby making its patronage very minimal by those who live in remote areas and that they may have to incur additional expenses to avail themselves of such services.

5. It is also further found that the current Sharia Court Rules and the *Sulhu* Door Rules of Katsina State are largely reminiscent of the English Legal System and this need to be replaced with purely an Islamic one. To a greater extent, the present Sharia Court Rules and the *Sulhu* Door Rules are largely reminiscent of the English style civil procedure rules and arbitration models.

6. It is also found that there is the need for the government of Katsina State and all relevant stakeholders to endeavour to reorganize and restructure the practice of *Sulhu* to be made the Islamic perspective of alternation dispute resolution and to eventually establish a department for this within the Katsina Stae Judiciary and a special unit for this purpose in all courts with competent and qualified staffs to facilitate its practice.

7. It is found that the need arise for the Katsina State Sharia Commission as well as the Katsina State Judicial Service Commission to also focus on knowledge and experience on the practice of *Sulhu* as part of the requirements for the recruitment and promotion of Sharia Court Judges and some principal personnel of the Sharia Courts in Katsina State.

8. It is also found that to further enhance the formal practice of *Sulhu* within the judicial setting, the present *Sulhu*-Door of the Katsina State Multi-Door Court House [KTMDCH] should be reviewed and restructured to be more in consonance with the tenets of the Sharia rather than borrowing from Western models of ADR to the neglect of those of the sharia.

5.4 RECOMMENDATIONS

The following recommendations are accordingly submitted as per the above enumerated findings:

1. It is recommended that *Sulhu* should be formally recognized as an amicable dispute resolution mechanism alongside adjudication in the Katina State Sharia Courts. This is because it has been a viable and costless alternative dispute resolution model which is even more advantageous than the Western conception of ADR. Thus, where there is the option of *Sulhu* within the judicial setting, Muslims do not need Western model of ADR and in view of this, it is thereby recommended that for Sharia implementing states in Northern Nigeria and in particular Katsina State. The government and all relevant stakeholders should endeavour to reorganize and restructure the practice of *Sulhu* as the Islamic perspective of alternation dispute resolution and to eventually establish a department for this within the judiciary and a special unit for this purpose in all courts so as to facilitate its practice. It is, therefore, imperative that there should be increased formalization of the practice of *Sulhu* within the Katsina State Judiciary.

2. It is recommended that as Katsina State being one of the States in Nigeria that applies the Sharia, it is high time for the authorities to consider incorporating the elements of the concept of *Sulhu* and its practice in the Sharia criminal justice system in order to secure through *Sulhu* the best interests of the victims of crime, the accused and the society at large. For this reason, it is expedient that the Sharia Criminal Code[275] and the Criminal Procedure Code[276] be amended urgently to reflect the teachings of Islamic law on the practice of *Sulhu* in criminal cases. Thus, in view of the established legal basis of *Sulhu* in criminal cases under the Sharia as discussed earlier, the Katsina State Sharia Penal Code should be amended to reflect the legal teachings of Islamic law on the legality of *Sulhu* in criminal cases. Such amendment is necessary as to dispel the remnant of the still existing flavours of English criminal justice system inherent in the Katsina State Sharia Penal Code in that, the failure of the code to emphatically recognize viability of *Sulhu* in criminal cases shall as a matter of expediency be remedied. The option of *Sulhu* should be made available to the victims of crime as well as offenders alike so that the Islamic values of pardon (*afwu*) would have a place among the *Ummah*. Incorporation of *Sulhu* in criminal cases has since been done in some other Muslim countries such as in Sudan,[277] Pakistan,[278] Malaysia,[279] etc.

[275] Sharia Penal Code, 2001, Cap 179, Laws of Katsina State

[276] Criminal Procedure Code, Cap. 37, Laws of Katsina State, 1991

[277] See section 130 (2) of The Criminal Act of Sudan 1991

[278] See section 310 of The Criminal Law (Amendment) Act 1997 of Pakistan which provides: "*in the case of Qatl amd (intentional murder) an adult sane wali, may at any time on accepting badl al-sulh compound his right of qisas"*.

Therefore, all relevant sections of the Sharia penal Code that deals with offences that *Sulhu* is amenable therein should be amended, in particular, sections 82 on presumption of the right of *Diyyah* or damages;[280] section 101 on restitution or compensation that an offender may be obliged to remit or return to victims of crime (i.e., *raddul mazalim*); section 132 on remittance of the penalty for the offence of false accusation of adultery (*Qazaf*), section 135 on the remittance of the penalty of *Hadd* for theft; and section 143(b) on the remittance of the penalty for death penalty for intentional homicide with *Diyyah.* These various sections of the Katsina State Sharia Penal Code under which *Sulhu* may be feasible but not expressly codified need to be amended to expressly feature the viability of *Sulhu* in such circumstances. Such a desired amendment would carry on board the Islamic law principle that the right of the authorities to punish an accused person is not absolute, i.e., to a certain extent, there exists in Islamic law the right of the individual, the victim and the family of the deceased to determine their decision on the matter as unlike in common law where a criminal act is generally considered a breach of State rights (i.e., an offence against the State), in Islamic law, criminal acts offends against the rights of Allah (swt) and the rights of the

[279] See section 40(c) & (d) of Syariah Criminal Offences (*Hudud* and *Qisas*) Enactment 2002 of Terengganu which provides: "*Qisas Punishment shall not be imposed in the following cases: (a) ... (b) ... (c) Where pardon is given by the victim or his wali (d) where a settlement and agreement between the victim and the offender is made*".

[280] Section 82 of the Katsina State Sharia Penal Code 2001 provides that "nothing contained in the provisions of paragraph 66-69 shall preclude the right of Diyyah or damages in appropriate cases". And sections 66-69 to which section 82 refers are meant to absolve criminal liability arising out of lawful acts of public and judicial officers.

victim as well. So, the victim has a say in the proceedings whose *Sulhu* may compromise the original punishment to be administered on the offender.

3. It is recommended that the Katsina State Government, in consultation with the Judiciary and the Sharia Commission, should consider affording the people of Katsina State additional accessibility by all persons to the *Sulhu* Door facility of the KTMDCH. The *Sulhu* Door of the KTMDCH should be made readily accessible to all and sundry. Instead of being centralized in Katsina metropolis alone, it should be diversified all through the State by creating several branches at all Local Governments and possibly Development Areas. Alternatively, each Sharia Court may have a *Sulh* expert attached to it to advice and council parties on the availability and effectiveness of *Sulhu* Door facility within the judiciary.

4. It is recommended that the Sharia Court Rules and the *Sulhu* Door Rules of Katsina State should be amended to reflect the rules and principles of the Sharia or where possible their replacement with a purely Sharia-based rules of procedure for the Sharia Court and the *Sulhu* Door. Therefore, the needs arise for a Sharia-based than Sharia-guided rules of procedure for the Sharia Courts and the *Sulhu* Door Rules in Katsina State. We cannot continue to rely on English model rules of procedure and expect to reap the benefit of an Islamic institution of *Sulhu* in the resolution of disputes in our Sharia Courts. It is, therefore, necessary that in consultation with our *mallams* and *sheiks* at home, especially those who are knowledgeable within the Sharia Commission, the *Qadis* in the Sharia Court of Appeal, Muslim lawyers from the Ministry of Justice, Islamic law professionals from universities, colleges of legal and Islamic studies, etc. And these

professionals should be engaged to convene, discuss and design an Islamic Civil Procedure and *Sulhu* Door Rules as well as a curriculum for the training of judges and Sharia Courts' personnel. There should also be reform of the current legal framework on Katsina State Sharia Courts Law whereby *Sulhu* should be included. For this reason, the services of experts should be engaged to develop a code of procedure and practice capable of guiding the Sharia Court Judges, Lawyers, and all those who handle cases amenable to *Sulh*.

5. It is recommended that as the State is endowed with competent Islamic scholars, practitioners and academicians, it is suggested that these Islamic law experts should be engaged to translate and standardize rules of procedure for the practice of *Sulhu* as per the provisions of Islamic law to suit the requirement of the judicial system in Katsina State rather than borrowing from an un-Islamic legal system. Hybrid rules that are neither Islamic nor purely a common law based may not necessarily give room or allow the complete appreciation of the effectiveness of the tested benefits of *Sulhu* processes in the Katsina State Sharia Courts. Therefore, it is identified that a departure from this stand is necessary for the viability of *Sulhu* processes as per the teachings of Islamic law within the Katsina State Judiciary.

6. It is recommended that there shall be special training of judges and personnel of the Sharia Courts of Katsina State on the practice of *Sulhu*. In other words, there should be regular and continuing training and reorientation of Sharia Court judges and staffs on the principles of *Sulhu.* Such training should be impressively

conducted by expert practitioners and academicians on the field who have the requisite knowledge and experience on the practice of *Sulhu.*

7. It is recommended that the Katsina State Sharia Commission as well as the Katsina State Judicial Service Commission should endeavor to make it a matter of policy that in due course, the recruitment and promotion of Sharia Court Judges and some principal personnel of the Sharia Courts should have its key indicators to include not only knowledge and experience on litigation but also on the practice of *Sulhu*.

8. It is recommended that there shall be set up a committee of experts to review and restructure the current *Sulhu*-Door in Katsina State. The present *Sulhu* Door of the Katsina State Multi-Door Court House [KTMDCH] should be restructured to be more in consonance with the tenets of the Sharia rather than focusing on Western models of ADR. To achieve this, there shall be strict adherence to the procedural safeguards established under Islamic law on the training of persons to be entrusted by the State with the duty of administering the processes that are involved in *Sulhu*. In that, for no reason and at no cost shall there be any compromise on the requirement of Islamic law as to trustworthy personalities among those competent to be entrusted with the administration of justice through *Sulhu* and for the strict adherence to the principles of Islamic law in the selection and appointment as arbitrators within the *Sulhu* Door of the KTMDCH. Attaining this requirement may help to further safeguard the compatibility of arbitrators' and mediators' awards and settlements to be in line with the dictates of the Sharia and thus facilitating the attainment of amicable settlement acceptable to the parties in

dispute. At least or at best, the personnel of the *Sulhu* Door should desirably be those with the minimum qualification and experience equivalent to that of Sharia Court judges.

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