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and Pakistan's Mediation Framework

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Islamic Mediation Principles (Islah and Sulh) and Pakistan's Mediation Framework

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Abstract

Rich concepts of conflict resolution were developed in classical Islamic jurisprudence, such as islah and sulh, whose meanings emphasise reconciliation, the restoration of harmony among people, and the fulfilment of rights within the scope of Shariah. Although many of the functional attributes of these classical mediation systems are common to contemporary mediation, Islamic connotations of sulh and Western statutory mediation systems are disputed in Muslim-majority countries. This article explores Qur'anic and prophetic (Sunnah) grounds for islah and sulh, examines the way these concepts have been worked out in the four Sunni schools of law, and reviews the extant Islamic theories of amicable settlement that have been introduced into modern notions of ADR in jurisdictions like Malaysia, Indonesia, and the Gulf regions and compares them with the ADR Act 2017 and the Islamic framework for family law in Pakistan. It ends with a three-step integration model that can enable Pakistan to bring its mediation into closer alignment with Islamic principles, without compromising constitutional rights and international obligations.

Keywords: Islah, Sulh, Islamic Mediation, Pakistan, Shariah, ADR, Reconciliation and Family Disputes.

Introduction

In many cases, mediation is not a foreign concept to litigants in Pakistan, especially in family and community conflicts. However, it is rather the familiar norm, much like the notions of islah and sulh in Islam. These ideas, which are based on the Qur'anic advice on reconciling believers who conflict with each other and settling disputes amicably, have underpinned Muslims' understanding of conflict management for centuries. Many people would call the bringing together of parties to resolve a quarrel 'sulh', a process undertaken by a local imam, elder, or respected community member, without the term 'mediation' being applied. Mediation should thus not be viewed as a value-neutral technical process (Kamali, 2008), but rather as a serious dialogue with Pakistan's Islamic heritage of "islah" and "sulh".

Meanwhile, the unintelligent equating of emerging forms of informal dispute resolution with classical Islamic sulh means that results inconsistent both with Shariah and with the constitutional assurances that Pakistan has given can be legitimised. As mentioned in previous articles of this series, the informal dispute settlement of jirgas and panchayats frequently leads to very unfair results for women and other vulnerable sections of society. The need to resort to Islamic principles to justify those practices cannot be understood in terms of Islamic principles themselves; at least, those practices do not use the language of sulh. To differentiate between the classical and cultural aspects of the sulh method as a normative principle, and its present version as a social practice and to develop mediation approaches which adopt the former and reject the latter, and which can be integrated into the normative approach of Islamic legal

scholarship and policy making, is the critical task for a contemporary Islamic legal scholarship and policy making (Menski, 2010).

The ADR Act 2017 and the Punjab ADR Act 2019 have been formulated using legal terminology that does not explicitly mention Islamic ideas. However, they function within a constitutional system that affords Islam a pivotal role in the legal framework and in a society traditionally accustomed to a multifaceted sense of legal consistency with Islamic principles. This article is not about the need to Islamicize mediation law in Pakistan, but about what can be done to make the current mediation laws legitimate expressions of Islamic values of justice, mercy, and reconciliation, and to safeguard constitutional rights and international standards of ADR as well.

Section 2 looks at *islah* and *sulh* in the context of the Qur'an and the prophetic *sunnah*. In section 3, classical juristic discussions about *sulh* in the four Sunni schools of jurisprudence are analysed. Section 4 explores modern implementations of Islamic mediation concepts in several Muslim-majority countries. Section 5 evaluates the approach taken towards mediation in Pakistan from an Islamic perspective. The proposed 3-level integration model for Pakistan is proposed in section 6. Section 7 presents conclusions.

Often, the debate concerning the encounter between Islam and mediation in Pakistan is polarised, with people saying the mediation is only possible through traditional community-based processes, as that is the only way to do mediation in an Islamic manner, and others saying, " Why should it be Islamic at all? Mediation is value-neutral. A more positive way will acknowledge that today's institutions can be re-expressed in Islamic values. But it's not about an either-or between *sulh* and mediation; it's about how the two can inform one another and make Pakistan's ADR system an honouring of its religious roots and a commitment to professional, rights-respecting dispute resolution.

Qur'anic and Prophetic Foundations of *Islah* and *Sulh*

Numerous verses in the Qur'ān speak directly to the issue of reconciliation between Muslims who are at odds. The Quran teaches that Believers are brothers and should make peace among themselves; see Surah al-Hujurat, verse 10. In the case of differences or disagreements in Surah al-Nisa, reconciliation is encouraged; if that doesn't take place, arbitrators are appointed, one from each side. The above verses, and others to come in this text, offer a scriptural basis not only for allowing but also for positively encouraging reconciliation in Islamic moral etiquette. Such reconciliation aims not just to end the conflict, but also to restore the harmony of society and to fulfil their rights in a way that leaves room for all to remain in harmony (Kamali, 2008).

The practice of prophecy is related to and builds upon these instructions in the Qur'ān. There are many hadiths in which the Prophet s.a.w.s. would encourage amicable settlement of disputes; personally intervene in situations to reconcile the two sides; and praise those who forgave and compromised in search of community harmony. Prophetic practice puts boundaries on settlement in the meantime. *Sulh* is praised if it neither prohibits what God has prohibited nor allows what God has prohibited. Settlements denounced by the Prophet to the extent that they would have resulted in depriving someone of a clear right, as mentioned in several hadiths.

The essence of these two principles for Islamic mediation can be traced from these narratives. First, amicable settlement in and of itself is of great worth. Secondly, the settlement shall not be at odds with the right that is obvious under the Shariah.

Also, salvation and mediation are related to intention, which is emphasised by the Qur'anic and prophetic positions. Just because a settlement is reached under pressure or through deception does not mean it reflects the Islamic concept of sulh, however much it may have the superficial effect of being resolved. Part of the moral value of settlement lies in the parties' desire to achieve peace and justice and in the genuineness of their acceptance of the settlement. This focus dovetails nicely with contemporary mediation theory, which sees informed and voluntary consent as a fundamental ground rule to successful mediation results (Moore, 2014).

This implies that the Islam-based mediation model should be centred on restoring relationships and upholding rights and property through voluntary, informed, and fair settlement, and that any institutional mediation system in a Muslim-dominant society should be measured by its contributions to restoring relationships and satisfying rights and property. They also suggest a spiritual and ethical dimension of mediation beyond procedural and legal aspects, which, in turn, have practical implications for the curricula of mediator training and a code of ethics for mediation in Pakistan.

The classical exegetes also pointed out the social context of the Qur'anic verses of agreement. It was as if the verses were written with communities in mind as they struggled to give up old tribal systems of outrage, retaliation, and revenge for injuries, and to embrace a new way of dealing with misdeeds that they understood forgiveness and appropriate restitution to have replaced. In that sense, the encouragement of sulh was very radical. It could turn a man's glory from victory in battle towards generosity in settlement, and urged powerful parties to settle for less than total vindication of their cause in the interest of communal peace. The historical perspective is important for modern Pakistan, where some conflicts persist within a context embedded in honour norms and patterns of retribution. Islamic principles of sulh can be utilised to promote non-violent, non-coercive solutions and to support mediation-based settlements that uphold dignity and safety.

Based on this history, current Pakistani scholars can make a stronger case that the adoption of structured mediation (through the courts) for suitable disputes does not undervalue Islamic tradition, but in fact, is its development.

Classical Juristic Treatment of Sulh

In the context of classical Islamic jurisprudence, the concept of sulh was elaborated in chapters on contract, litigation, and family law, among others. There are differences of detail between the various Ahzaab (schools), Hanafi, Maliki, Shafi'i, and Hanbali; however, over a certain number of points of contention, there are commonalities. In the first place, sulh is validated as a contract and applied to the resolution of myriad other disputes, such as debt, property, and personal injury cases. Second, sulh is governed by the general rules of contract, such as capacity, consent, and lawful subject matter. Third, sulh cannot be used when the claims of any rights are

determined. Either there are rights entitlements determined by Shariah, or rights references clearly stipulated in the Qur'ān or Hadīth, such as rights to inherit, rights to punishment, rights regarding certain financial obligations set by law, etc. (Al Zuhayli, 2003).

One particular aspect of sulh highlighted by the Hanafi jurists, whose views underpin much of the Personal Status law in Pakistan, is the contractual dimension. As a contract, they interpreted sulh as a process for transforming the contested claim into an agreed-upon one. As a consequence, they argued that after the sulh agreement was concluded, the contending parties could not return to litigate the original claim, but only in specific circumstances, for example, on the grounds of fraud or coercion. Such an understanding corresponds to the modern notion of 'mediated settlement agreement' which has the status quo of an agreement and is binding and enforceable by court order for the usual reasons of contract law (Kamali, 2008).

Also, classical jurists discussed the role of a third-party neutral in conducting a sulh. In some discussions, the neutral is a binding arbitrator called hakam, and the other differences between the two groups lie in their vocabulary, the rules they use to refer to each other, and the structure of their courts. In some, the neutral is much more of a mediator – facilitating the parties' negotiations but not forcing a decision in either direction. The distinction between arbitration and mediation, which was not always clearly drawn in classical doctrine, but in which the conception of a friendly neighbourhood man helping parties to arrive at a friendly solution to a dispute without adjudication of the dispute itself clearly permeates the concept. The neutrality of this mediator, and even his knowledge of the law, wisdom, and integrity, are expected and would not be questioned, because in modern ADR systems, the qualities of such mediators are by no means different from those of this mediator (Ghouse & Ali, 2016).

In particular, classical works in the field of fiqh have admonished against oppressing weak groups through sulh. More than a few jurists expressly state that judges should not approve sulh agreements that appear to have been obtained through coercion or that are obviously in violation of the legitimate rights of one of the parties. The doctrinal caution offers a solid foundation for understanding power imbalances in mediation, grounded in Islamic jurisprudence. It will, in turn, support the idea that all mediation principles in Islam require some form of protection for imbalanced parties, as there is a need for settlement without stressing 'settlement at any cost', especially in a gendered setting.

In the juristic literature, issues regarding evidence in sulh are also carefully examined. Attorneys wondered how a court could confirm the existence and terms of a sulh agreement if there are only verbal statements, and what would happen if the content of a sulh agreement is disputed. Their responses highlighted how documentation and witnesses play a crucial role in substantial recovery and subsequent issues with the enforceability of informal settlements. In Pakistan, where many community-based sulh processes still exist but remain largely unwritten, these classical discussions are helpful for contemporary policy arguments in support of written, mediated settlement agreements, which can also be taken to the courts if required.

Contemporary Islamic Mediation Frameworks in Other Jurisdictions

Incorporating aspects of Islamic notions of sulh in mediation practice has been tried in a few majority-Muslim jurisdictions. Malaysia, for instance, has integrated sulh procedures to alleviate family and inheritance conflicts within the Sharia court's mediation mechanism. Often, legally qualified, trained sulh officers hold structured settlement sessions followed by formal hearings. The process is rooted in Islamic principles of reconciling but grounded in the mediator style of modern mediation, such as private caucuses, interest-based negotiation, and a written settlement agreement, which has been endorsed by the court (Rahim & Rahman, 2011).

The religious courts of Indonesia, which also handle Islamic family law matters, have mediation mechanisms that explicitly reference the values of reconciliation and community harmony in Islam. However, empirical research indicates that in divorce and maintenance lawsuits, they can and do secure high rates of compliance with the schemes, and that many litigants find their religious imbuing and procedural informality to be a virtue. While internationally the rights of women are well respected, concerns remain about the extent to which their statutory rights are observed in negotiated settlements, as has been expressed during debates in Pakistan (Cammack & Feener, 2012).

Court-annexed reconciliation committees, which address certain aspects of business and family conflicts, are found in Gulf states such as the UAE and Saudi Arabia. All of these committees combine Shariah-grounded reasoning with modern mediation skills and are complemented by members who are more or less familiar with Shariah and mediation. Pakistan's ADR institutions can learn from the institutional design of these committees: how they are placed within the court system and how they can record and implement binding settlements.

Based on these comparative experiences, three factors should be considered for integrating Islamic mediation conception in the modern ADR framework, namely: (1) local community participation and control in the process; (2) treatment of the mediation process as an Islamic sacred ritual; and (3) a formal mechanism for handling mediation cases, separate from standard courts or arbitration bodies. Firstly, mediators should be familiar with Islamic law itself and the skills of the mediation process. Secondly, there is a need for clear rules within the institutional system to enforce settlement agreements and protect statutory rights. Thirdly, there must be a continuous empirical study of the outcomes to ascertain whether the justice system, in fact, affects them and to disaggregate the results by gender.

A second lesson from comparative jurisdictions is the location of institutions. In Malaysia and Indonesia, sulh and mediation units are part of the structure of religious courts, making them natural fora for parties who consider family and inheritance conflicts to be issues to be settled in the religious forum. Disputes involving family and inheritance are resolved by Family Courts or civil courts, which operate under Islamic law but are technically not defined as Shariah courts in Pakistan. To increase the perceived Islamic legitimacy of mediation in Pakistan, this can be done by introducing specially designed mediation cells in family courts that clearly state on paper that they are sulh cells and that the mediators are legally and Islamically trained. These

sorts of branding and staffing decisions could send a clear message that mediation is not an alternative to an Islamic (or Islamicising) approach to adjudication, but a form of institutionalised sulh in line with Pakistan's legal tradition.

Assessing Pakistan's Mediation Framework Through an Islamic Lens

The provisions of the Act and the Rules of ADR, 2017 of Pakistan, do not mention Islamic concepts. However, they include principles that are broadly compatible with the principles of sulh mentioned above. The voluntary nature of mediation, obtaining informed party consent to a settlement, and the emphasis on impartial mediators who facilitate rather than impose settlements align with the Islamic emphasis that fair reconciliation is sought through a voluntary process and that this process does not involve simply sacrificing one party's rights in favour of another. Mediated settlements under Section 17 of the Act are akin to a contract picture, which transforms the parties' claims into obligations that the court can enforce, as understood in classical fiqh.

Meanwhile, there are still holes to be filled. Most training programs for mediators in Pakistan contain little information on Islamic legal principles applicable to the cases before them, particularly in family and inheritance law, where the Shariah-based (Islamist) doctrine plays a key role. Mediators without an understanding of Shariah may find it difficult to determine when a settlement they propose would infringe upon a right or rights of a party that are non-negotiable in accordance with Shariah, such as the fixed amount of inheritance for daughters. This void could lead to settlements that are contrary to Islamic law, thus abating the religious recognition of negotiations and their lawfulness.

There is also a perception gap in parts of the society in Pakistan where formal ADR institutions are perceived as imports and secular. In contrast, traditional community-based sulh is perceived as a genuine Islamic process. This perception is reducing some communities' appetite for accessing IMAC and provincial mediation centres, especially in rural and conservative communities. This can only be achieved with a conscious policy of Islamic framing, in which mediation will be viewed as an institutional implementation of Qur'anic and prophetic injunctions to reconcile (rather than as an imported legal system).

The intentions and institutional culture, too, must be taken into account when assessing the mediation setup in Pakistan from Islamic perspectives. Mediators are perceived as only case managers to ease the court backlog, and they may not consider the ethical aspect of reconciliation in Islamic teaching. However, mediators who appreciate that they are a public service with a mission to serve justice as much as to serve efficiency are more likely to spend the time and care necessary to ensure that the result minimises the effects of the process and can satisfy the parties that this result reflects not only the efficiency of the process, but also the quality of the outcome. The only way to embed this ethic is to have the hand of the judges, bar councils, and religious scholars who are to articulate a shared vision of mediation as an institutional platform for both legal and moral purposes.

In the background of the third, the constitutional perspective of Mediation Practice under Islamic law also underpins Pakistan's obligation under Article 227 of the constitution, where

every law already in existence shall be made consistent with the injunctions of Islam as provided in the Qur'an and Sunnah. No law shall be enacted which is repugnant to the injunctions of Islam. The provisions of mediation laws, in some fields such as family or inheritance law, are purely procedural, but the effect of the mediation has substantive consequences. Preserving this religious legitimacy of the system and the fixed Shariah entitlements by ensuring that mediated settlements will not, on the one hand, be before the Federal Shariah Court and, on the other, is an invaluable asset for mediation law. Proactive Alignment can therefore be considered both a 'should' and a 'must' for Pakistan's ADR policy makers.

A Three-Level Integration Model for Pakistan

The three-level approach proposed in this article seeks to integrate Islamic mediation principles into Pakistan's ADR framework. The first level is interpretive. Reconciliation and justice in Islamic perspectives should be used to interpret existing Mediation legislation in judicial decisions and in the development of official explanatory materials. When addressing the question of why sulh is cherished in voluntary and fair settlement, courts can cite relevant Qur'anic verses and classical works as appropriate. When the settlement is not voluntary, there must be a limit; the court can then quote relevant Qur'anic verses and classical methods accordingly. This is an interpretive approach that does not require a change in law but can shape the perceptions of relevant practitioners and citizens of mediation.

The second level is educative. There should be a separate module on the Islamic basis of mediation in the mediator training course, based on consultations with renowned Islamic law scholars. The sources in the Qur'an and Sunnah regarding sulh, classical jurisprudential sources on sulh, modern-day fatwas on ADR, and case studies in which mediators would have to identify and act on the possibility of conflict with the proposed settlement and Shariah-based rights should be discussed. This would benefit a common understanding of the interaction between Islam and statutory mediation frameworks if both judges, lawyers, and mediators were trained on the material.

The third level is at the institutional level. In complex cases where questions may be raised regarding the permissibility of a specific structure in mediation, Pakistan should establish a 'Shariah Advisory Panel' for IMAC and provincial mediation centres, composed of qualified Islamic legal scholars who can issue their opinions on the matter. Replacing courts and mediators' powers would certainly not be the case with this panel, which would rather offer direction that would give religious credibility to mediation results and give peace of mind to the parties negotiating that their outcomes would be Shariah-compliant. Over time, the panel's advisory opinions might continue to create a corpus of modern sulh in practice in Pakistan.

From an operational perspective, the proposed Shariah advisory panel can start with "limited cases," such as inheritance issues involving multiple heirs from multiple generations, which can be very complicated. Mediators might seek non-binding input from the panel on potential settlement models the parties may wish to consider, and the panel's roundtable input could help the parties revise the models so that all heirs receive the base amount required

under Islamic law. In the future, the mediator training might be updated with patterns developed from these advisory opinions. It will then not seek sources elsewhere but develop an "eclectic" knowledge of patterns when it comes to structuring mediated settlements in Shariah-compliant aspects, with recurring fact patterns.

Lastly, any such Pakistan MO must be sensitive to pluralism in general when it comes to Islamic principles. In Pakistan, there are several schools of law (Sunni/Shia), which also include non-Muslim minorities' personal law schools. Thus, the Shariah advisory panel should be formed from those who respect diversity, using an advisory model rather than a single school code. Mediation is a flexible process with a variable outcome, thereby providing parties the liberty to tailor the process and the outcome to their situation. Islamic integration must allow for that flexibility while ensuring the settlement does not breach the basic rights at stake under the applicable legal traditions of both parties.

Conclusion

The two concepts of *islah* and *sulh* provide a rich narrative and a normative framework for thinking about mediation in Pakistan. As such, when they are properly understood, they do not detract from the development of professional, rights-respecting mediation institutions. The key challenge lies in overcoming the rhetorical references to *sulh* that render them acceptable and legitimate in the context of Pakistan's unfair practices, and in moving towards a principled integration of Islamic mediation concepts into the design, training, and implementation of Pakistan's ADR system.

The three-level integration model proposed here is a pragmatic one that brings that integration about through three approaches – interpretive, educational and institutional. It not only upholds the constitutional resolve of Islam in the country but also lends the mediators greater legitimacy and effectiveness in dispute resolution by supporting Pakistan's international legal agreements. The immediate advantage this integration would bring to Pakistani citizens is a system of mediation that is not only religiously legitimate but also legally secure, and that can mediate in a manner respectful of religious beliefs and rights.

Of course, this translates to the *realpolitik* that Islamic argumentation and international good practice need to not be considered competing points of reference in future debates on ADR policy in Pakistan. Instead, policymakers should explore, in each area, which aspects of Islamic doctrine on *sulh* and which aspects of the experience of mediation in the modern world can be used to strengthen one another. Insofar as they point in the same direction, such as when it comes to the issue of voluntary settlement, fairness, and the protection of the vulnerable, that should have special salience in legislative and institutional design options.

A study of this Islamic framing of mediation will be necessary in the future to further refine the integration of mediation and ensure that it indeed has a positive impact on access to justice and public trust in Pakistan.

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