

Mediation in the Perspective of Islamic and Manmade Laws

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Abstract

The research article: Mediation in the perspective Islamic and manmade laws is basically such type of research that contains the status and importance of mediation in perspective Islamic. Mediation and reconciliation in civil and criminal matters will be narrated briefly in this research article. . Matters relating social behavior are solved in the light of *Qur'ān* and Sunnah. Five kinds of Hoodoos are mentioned in *Qur'ān* extra-marital sexual intercourse (*Zinā*), False Parole of Extra-Marital Sexual Intercourse (*Qaḍf*), alcohol consumption (*Šurb-al-kḥamr*), theft (*Sariqa*) and street robbery (*Hirāba* or *Qaṭ' al-tarīq*) and are also analyzed. The Retributive Justice (*Qisās*) and Compensation (*Diyah*) are the ones where the punishment is fixed by Allāh. Blasphemy laws are also introduced through sections 295-Band 295-C of the Pakistan Penal Code. According to Sec.295-c capital punishment is sanctioned for the accused after the approval of evidence. As human beings are social beings, disputes among them are inevitable. Judicial agreement of disputes is alas highly-priced, time eating and open for public. However Islamic regulations present for agreement of disputes by way of many methods of full inclusive of mediation. The motive of the paper is to take a look at ideas on mediation laid down in the *Qur'ān* and the Sunnah of Prophet *Muḥammad* (ﷺ) and the manmade laws. There is numerous training that may be found out from the exemplary conduct of the Prophet (ﷺ) who became a politically righteous individual with maximum moral and ethical values of the Prophet (ﷺ) to become civilized in settling their differences.

Keywords: Formal Judicial System, Non-State Judicial System, Human Right, Reconciliation, Mediation, Challenges, Potential, ADR (Alternative Dispute Resolution)

Introduction:

Mediation is a process in which an impartial third party helps to assist the rival parties for approaching the acceptable decision. Mediation technique is very useful to get the speedy solution between the parties for the final decision. Mediation is totally different from formal court system. In other words, Mediation is actually ADR (Alternative Dispute Resolution) process to provide relationship and mutual confidence to achieve peaceful settlement. Due to low of cost and less time mediation (ADR) process is very useful for both the parties. Islam delivered the rule of law to remedy disputes and make certain the easy running of our worldly affairs. Matters relating to social behavior will be discussed in the light of *Qur'ān* and Sunnah. Mediation in financial matters and three kinds of sulah in the light of Fiqh discussion will be discussed. Jurisdiction of mediation and reconciliation in criminal matters will be pointed out in non-compoundable offences and compoundable offences. Mediation is not applicable in Hudūd cases. Five types of *Hadd* are mentioned in *Qur'ān*; which are extra-marital sexual intercourse (*Zinā*), False Parole of Extra-Marital Sexual Intercourse (*Qaḍf*), alcohol consumption (*Šurb-al-kḥamr*), theft (*Sarīqa*) and street robbery (*Hirāba* or *Qaṭ' at-tarīq*). These all will be narrated in this article in the light of Islamic law. Retributive Justice (*Qisās*) and Compensation (*Diyah*) will also be explained in this article.

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Blasphemy laws will be analyzed through sections 295-B and 295-C of 1973 constitution of Islamic republic of Pakistan. According to Sec.295-c capital punishment is sanctioned for the accused after the approval of evidence. In the end, offences of individuals are compoundable in the light of Islamic law will be discussed.

Mediation is extracted from *sulah*. In other words, its purpose is to eradicate the contradiction and abhorrence among the people. According to the Jurists, it is the process in which disputed parties reach an agreement to finalize the disputed matter with the help of the mutual consent or understanding. According to *Aḥnāf* agreement after the occurrence of dispute is called mediation while according to *Malikī* agreement to avoid mistake in the future is also called mediation.

The Holy *Qur'ān* highlights the importance of mediation. The Almighty Allah says, ¹وَالصُّلْحُ خَيْرٌ “Mediation is the best act”. Then further says, ²أَنْ تَبْرُوا وَتَتَّقُوا وَتُصْلِحُوا بَيْنَ النَّاسِ you must do the righteous deeds, adopt piety and ensure reconciliation among the people. He says, ³وَأِنْ تُصْلِحُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا “And if you ensure reconciliation among the people and adopt piety, Allah is also forgiving and beneficent”. ⁴لَا خَيْرَ فِي كَثِيرٍ مِّنْ نُّجْوَاهُمْ إِلَّا “There is no goodness in most of the whispering except for the one who persuades others to generosity, righteousness and reconciliation among people”.

If two groups of Muslims indulge in some quarrel, it is strongly advised to enact reconciliation between them. Allah says in the Holy *Qur'ān*, ⁵وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا “If two groups of Muslims fight with each other, then ensure reconciliation between them. If one of them inflicts cruelty on the others, do fight against him till he returns to the word of God. And if he returns, ensure reconciliation between them on the basis of justice and fair play. Always do justice and Allah loves those who ensure justice”.

For mediation of criminal affairs, The Almighty Allah says, ⁶وَجَزَاءُ سَيِّئَةٍ سَيِّئَةٌ مِّثْلُهَا فَمَنْ عَفَا وَأَصْلَحَ فَأَجْرُهُ عَلَى اللَّهِ “The reward of offence is offense of the same kind and if someone forgives, and accepts reconciliation, he will surely get his reward from Allah”. The verses of the Holy *Qur'ān* enlighten that the best solution is mediation for all the disputes personal, social, national or international, criminal or civil.

Many incidents of mediation can also be found in the Sunnah of the Holy Prophet which can form a base for the establishment of an institution of mediation. Ḥaḍrat Umar (R.A) had advised the judges to motivate the disputed parties for the reconciliation first and if the disputing parties do not agree on reconciliation after repeated persuasion, then the proceedings of the court should start. In this context, there is a clear instruction of the Holy Prophet that mediation among Muslims is desired unless

¹ Al-*Qur'ān*, An-Nisa:128

² Al-*Qur'ān*, Al-Baqarah:224

³ Al-*Qur'ān*, An-Nisa:129

⁴ Al-*Qur'ān*, An-Nisa:114

⁵ Al-*Qur'ān*, Al-Ḥujrāt:9

⁶ Al-*Qur'ān*, Shūrā:40

its results substituting the right with wrong. For example, if someone sues for a house and he is convinced to mediate on the condition to accept the defendant's right to live in the house for a fixed period, such a reconciliation is allowed in the view of Aḥnāf and the common scholars (Jamhoor *Ulamā*) of *Shafī* ṭ ṭ.

Mediation and Reconciliation in civil Matters:

In a civil matter, the person or company who brings a claim is called the Claimant (they were formerly known as a plaintiff) and the person who the claim is brought against is the Defendant. It is the process in which an individual or company brings the claim against another individual or company.

Matter relating to Social Behavior:

All the Muslims are representatives of God's will on earth. Its duties are all surrounded or covered completely by the will of God. The Holy Prophet (ﷺ) said that believe in one God instead of any arrangement, a plane or said in the same way especially when it is not sincere to relate with others. It is not enough for a particular purpose to show deep respect for God without involving a lot of effort or trouble. It is informed to the Holy Prophet (ﷺ) that once a pious old man at prayer with a white whisker. The Holy Prophet was told that old man was much devoted in worshipping Allāh throughout the day. The Holy Prophet (ﷺ) was then told about a merchant who was famous for his fair dealing. The Holy Prophet commented about of the two, the merchant was more deserving. *Ḥaḍrat Muḥammad* (ﷺ) said to companions:

عَنْ أَبِي الدَّرْدَاءِ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَلَا أُخْبِرُكُمْ بِأَفْضَلِ مِنْ دَرَجَةِ الصَّيَّامِ وَالصَّلَاةِ وَالصَّدَقَةِ؟ قَالُوا: بَلَى، يَا رَسُولَ اللَّهِ قَالَ: إِصْلَاحُ ذَاتِ الْبَيْنِ، وَفَسَادُ ذَاتِ الْبَيْنِ الْحَالِقَةُ.⁷

Ḥaḍrat Muḥammad (ﷺ) said to Sahaba should not I tell you such thing which is superior to prayer, fast and to charity of which benefits you have heard? After hearing this Sahaba's with interest said to Holy Prophet to tell them that thing necessarily so that God give them more reward than these prayers. After this the Holy Prophet said that thing is if there is any fight, difference and separation between two Muslims and do not want to see each other's face then you should try to do such a thing which ends their fight till their hearts are united and they become one unity.⁸

عن انس بن مالك قال قال رسول الله ﷺ من ترك الكذب وهو باطل بني له قصر في ربض الجنة ومن ترك الجدال وهو محق بني له في وسطها.⁹

In a *Ḥaḍīth* *Ḥaḍrat Muḥammad* said, "I take responsibility of a house in the center of Heaven who is right in dispute but he backs out. Today our society is far away from Holy Prophet's saying that we are facing hatred, fight, disputes, that our life has become a hell. That He said that this thing is the cause of cutting of our religion. And it has actually cut our religion today

⁷ Abu Dawood, Sunan Abi Dawood, *Bāb fī ṭislāh dhāt al Bayyin*, *Ḥaḍīth*:4919.

⁸ Matthew S. Gordon *Islam: Origins, Practices, Holy Texts, Sacred Persons, Sacred Places*, (New York: Oxford University Press, 2002), 6.

⁹ Abu *ʿAbdullah*, *Muḥammad* bin Yazeed Ibn e Majah, Sunan Ibne Majah, *Ijtina bulbadeywal jadal*, (Karachi: Qadeemi Kutab Khana Aram Bagh), 6.

The Holy Prophet (ﷺ) said:

ليس الكذاب الذى يصلح بين الناس فيتمى خيراً أو يقول خيراً¹⁰

In a Ḥadīth the Holy Prophet (ﷺ) said that: if a person says such a thing for creating love in a Muslim's heart and for rooting out hatred, which in appearance should be against the incident, then he will not be included in liars.

Mediation in Financial Matters:

Fuqaha are of the opinion that the reconciliation is based on money for money, then it will be considered 'Baah' (trade) and if the money is replaced with profit, it will be declared as 'Ajarah'.

Kinds of Financial Mediation:

There are three kinds of mediation based on conditions between pleader and defendant.

- 1-The defendant accepts the suit and reconciles.
- 2-The defendant denies the suit and reconciles.
- 3-The defendant accepts reconciliation neither accepts the suit nor denies.

1-Reconciliation while accepting the suit

There can be two forms of reconciliation when the defendant accepts the suit.

- (a) The suit regarding corporeal property.
- (b) The suit regarding loan. It has further two categories.

(i) Mediation with reduction.

In first place, the reconciliation is reached by reducing the demanded amount.

(ii) Mediation with substitution:

In the second place, the reconciliation is reached by paying the demanded amount. If the suit is about the debt, the reconciliation is reached by receiving some part of demanded amount known as mediation of regarding remittance of debt. For example, the amount on wedding (*Mehr-al-Mu'ajal*) was fixed at Rs 1000/- to be paid (late) but the party agreed to receive Rs 500/-instantly. Thus the reconciliation is reached. In other cases, reaching the conciliation may be on payment of the whole amount.

2-Reconciliation despite insolence from the defendant:

If the defendant accepts reconciliation without accepting the connectors of the suit, the opinion of Fuqaha in this regard is s under.

According to the agreed group of Fuqaha like those Aḥnāf, Mālikīa, Ḥanablah etc, If the pleader is sure of himself being right in the suit and he defendant thinks that no right is due on him from the pleader, such reconciliation will be right and if anyone knows himself at fault, such reconciliation would be illegitimate because he is getting illegal right which is surely *ḥarām*¹¹.

3-The Mediation on the denial and silence of the defendant:

This kind of mediation is based on the position of "denial and silence in Sharī'ah". Keeping silence in the reply of a suit is equal to Defiance in the opinion of the

¹⁰Bukhārī, Muḥammad Aḥmad bīn Ismā'īl, *Al-Jām al- Ṣaḥīḥ-al-Bukhārī*, Kitubulsulh, (KPK Pakistan: Farooqi Kutab Khana Sardar Plaza Akorra Khattack), 371/1

¹¹Muḥammad bin Aḥmad, Allauddin, Samer *qandī*, Tuḥfah al Fuqahā, (Bairut: Dār al kutub Álima,1984), 3:418.

Fuqahā except Ibn-e-Abi Laila. Although, this silence can also be declared as acceptance, but the core in such affairs is that one should be free of such responsibilities in which he has to file a suit. So, in such affairs, the silence is considered equal to refusal. The writer of *Hidaya* has discussed on different forms of *sulah* in his *Fiqh* book *Al-Hidaya*

وقال الشافعي لا يجوز مع انكار اوسكوت لما روينا وهذا بهذه الصفته لان البدل كان حلالا على الدافع حراما على الاخر فينقلب الا امر ولا بد المدعى عليه يدفع المال لقطع الخصومة عنه عن نفسه وهذا رشوته ولنا ما تلونا واول ما روينا وتاويل آخره احل حراما لعينته كالخمر او حرم حلالا لعينه كالصلع على ابن يطا الضرة ولا بد هذا صلع بعدد عوى صحيحته فيقضى بجواز له لان المدعى ياخذه عوضا عن حقه في زعمه وهذا مشروع والمدعى عليه يرفعه الدفع الخصومة عنه نفسه وهذا مشروع ايضا اذ المال وقته النفس ودفع الرشوة لدفع الظلم امر جائز¹²

“Imam *Shafi’i* says that *sulah* with denial and *sulah* with silence are not lawful because the person who gives something for *sulh* was lawful for him but not on the receiver. So the conditions will be totally changed. It is so that the defendant gives money to get rid of from dispute and it will be considered as bribery”

According to Imam *Shafi’i* first kind of *sulah* is lawful means *sulah* with confession and Ibne *Hazam* also emphasize upon it and neither *sulah* with denial nor *sulah* with silence is lawful except *sulah* with confession. According to Ibne *Laila* *sulah* with confession and *sulah* with silence both are lawful but *sulah* with denial is unlawful in his eyes. The argument of Imam *Shafi’i* is according to this *Hadith* ¹³ الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِينَ، إِلَّا صُلْحًا حَرَّمَ حَالًا، أَوْ أَحَلَّ حَرَامًا.

The argument is that *sulah* with denial and *sulah* silence convert *halāl* to *harām* or *halāl* to *harām* which has been negated in *Hadith* because the money in return to *sulah* was *halāl* on the giver and harm on the receiver but the condition is totally changed as it has become *halāl* on the receiver *harām* on the giver.

In other words, if the petitioner was on right the money was *halāl* on him before *sulah* but it has become *harām* after the *sulah*. If he was wrong the money got before *sulah* was *harām* but after *sulah* it has become *halāl*. In the end, we can say that *sulah* has converted *halāl* into *harām* and *harām* into *halāl* and the second argument is that defendant gives money to get rid of the dispute, so it will be considered bribery which is *harām*. The followers of Imam *Shafi’i* alleges the *Aḥnāf* that if a person claims *Nkah* (wedlock) which the woman denies and he convinces her by giving some money which will not be lawful. Therefore, *sulah* with denial will even be unlawful according to *Aḥnāf* themselves.

¹² *Al-Murghīnānī 'Abū-al-Ḥasan, Alī bin Abī Bakr. Al-Hidaya, Kitab Al-Sulah, (Multan: Maktabah Shirkat Almyya, Boher Gate), 245*

¹³ Abu Isa *Muḥammad ibn Isā, Al-Tirmizī, Al-Jāmāy*، رسول الله صلى الله عليه وسلم، مكتبة الميزان لاہور، باب ما ذكر عن رسول الله صلى الله عليه وسلم، *Hadith:1352*

The main object of reconciliation is ending the dispute and differences. If the defendant accepts the suit, then in fact, there is no state of dispute. So, in case of defiance, the reconciliation is correct in the best possible manner.

“Mediation is a very acceptable process but if reconciliation is beneficial to the parties, it is considered compulsory. Mediation is acceptable even favorite if it is based on the blessings of Allah, freely consent of the disputed parties, the awareness and knowledge of the mediator, incidents and facts and his love for justice. But that mediation is not acceptable if it declares the right for wrong or wrong for right or whether it is to fulfill the wishes of the strong and results in cruelty or injustice to the weak”¹⁴.

ADR in Islamic finance has become great in number of cases and values for very firm request that are difficult and make you worried. Malaysia and Indonesia are the countries where the courts are completely aware with Islamic law. Islamic finance demonstrated an increasing need for the takeover of the present formal judicial system. The increasing number of cases in the year turns out that. The present formal judicial system and legal setup are not successful result and enough for particular purpose as much as you need to control the Islamic finance conflicts. The first statement of what is possible according to a particular system suggests that all kinds of gharar will not prove that an agreement is wrong. The Holy Prophet (ﷺ) forbids gharar that cannot be put up with or to allow that you do not agree with a reason for having particular feelings due to enhance conflicts. Gharar could only be accepted in the matter where there is no overall opinion that all members of a group agree with the process of learning of Islam. In this way a kind of gharar is the act of stopping being done especially by law or to prove that an argument is wrong for the agreement. Gharar produces a change in primarily two particular places of giving the same result whatever the order in which the questions are shown the activity of managing money especially by government or commercial organization that has been developed or produced from another thing.¹⁵

Mediation with profit of money:

If sulah is done by giving profit of money will be trusted because with permission the profit is to be hand over to the wife. Therefore, time limit statement will be conditional and sualh will become invalid with the death of anyone as it is Ajarah(Capitalistic approach).

وان وقع عن مال منافع يعتبر بالاجارات لوجود معنى الاجارة وهو تمليك المنافع بمال والا اعتبار في العقود لبعاء

نہا فی شتر التوفیت فیہا ویبطل الصلہ بموت احدہما فی المدۃ لانہ اجارۃ¹⁶

If sulah is done with acceptance of profit of money, it will be trusted with Ajarah because the meaning of Ajarah is the ownership of profit in return to money. For example, If Zaid claim upon Umar for something and Umer does confession and Zaid does sulah by riding on his animal, by wearing his clothes, by getting his as a slave or the cultivation of his land. This order will be like Ajarah as the Profit time limit is

¹⁴Ibn-al-Qayyam, *Al-Jozī, Muḥammad Bin Abū Bakr, Ilām-al- muqāiṇ an Rabal Ālāmīn*, (Bairut: 1973),vol1, 9-10.

¹⁵Cronin, *Stephanie Reformers and revolutionaries in Modern Iran: new perspectives on the Iranian left*. Routledge 2004, 273.

¹⁶ Abu-ul-Hasan, Ali bin Abi Baker. *Al-Hidaya, Kitab Al-Sulah*, (Multan: Maktabah Shirkat Almyya, Boher Gate), 246.

conditional in Ajarah. As Ajarah is become unlawful with the death of one party the sulah will also become unlawful in this regard.

Abu Muḥammad Abdullah bin Qudma Al-Humbli:

Has discussed about reconciliation in Kitab Al-Sulah of his book Al-Mughni:

وإن صالح عن المنكر أجني صح, سواء اعترف للمدعي بصحة دعواه أو لم يعترف وسواء كان بإذنه أو غير إذنه وقال أصحاب الشافعي: إنما يصح إذا اعترف للمدعي بصدقه وهذا مبني على صلح المنكر , وقد ذكرناه ثم لا يخلو الصلح إما أن يكون عن دين أو عين فإن كان عن دين , صح سواء كان بإذن المنكر أو بغير إذنه لأن قضاء الدين عن غيره جائز بإذنه وبغير إذنه¹⁷

If a stranger has reconciliation with the defender, it is correct. It is equal whether the defender concedes the correctness of the suit or not and even if it is with or without his permission. The *Shafi'i* school of thought is of the opinion that the reconciliation is correct only if the defender concedes the truthfulness of the suit of the pleader. This has been so interpreted by this reconciliation cannot be implemented except the case of loan or something tangible. If the reconciliation is related to some loan, only then it is correct and is equal whether it is with or without permission of the defender because here, the debt is to be paid by third party.

Ḥaḍrat Alī and Ḥaḍrat Abu Qatadah both paid the debt on behalf of a deceased person and the Holy Prophet allowed it. If the reconciliation is with something tangible and fixed, it must be with the permission of the defender. It is because the advocate acts on behalf of the suiter. If this reconciliation is without permission of the defender it is like paying on behalf of the defender as a subtitle of the quarrel and be free from the suit which is allowed. And in both cases, (with or without permission) nothing should be received from the defender without his permission.

فإن قال الأجنبي للمدعي : أنا وكيل المدعى عليه في مصالحتك عن هذه العين , وهو مقر لك بها وإنما يجحدها في الظاهر فظاهر كلام الخرقى أن الصلح لا يصح لأنه يجحدها في الظاهر لينتقص المدعي بعض حقه أو يشتريه بأقل من ثمنه , فهو هاضم للحق يتوصل إلى أخذ المصالح عنه بالظلم والعدوان-¹⁸

So, if the stranger tells the pleader that he is the advocate of the defender as he wants reconciliation as he accepts suit. Apparently, he denies the suit, so it is clear that it is a double mind of talk and this reconciliation is not right as he is denying apparently and that the pleader lessens his right or purchases it at a less prize. So, he is one who is usually someone's rights and getting the thing with cruelty and injustice. It is like face to face deal. Therefore, it is as defender says that he knows the connectors of the suit and the disputed things belong to you but I will neither hand it to you nor accept your suit in front of the court, until you reconcile at the cost of some part of it or pay the compensation and Qāḍī declares it concert. This is the opinion of Shawafe. Their argument is that it will be observed if the defender accedes the claim, then the fixed thing will be if the pleader who then will turn to the stranger and the amount that has been paid to him.

¹⁷ *Al-Humbli, ʿAbdullah bin Qudama, Abū Muḥammad, Al-Mughnī, (Kitāb Al-Ṣulāh) Volume 12, (Lahore: Maktaba Al-Mezan), 13*

¹⁸ *Ibid, 17*

وإن صالحه على إقرار بجزء معلوم من ثمرها أو بثمرها كله فقد نقل المروزي وإسحاق بن إبراهيم ، عن أحمد أنه سئل عن ذلك فقال: لا أدري فيحتمل أن يصح ونحوه وقال مكحول ، فإنه نقل عنه أنه قال: أيما شجرة ظللت على قوم فهم بالخيار بين قطع ما ظلل أو أكل ثمرها ويحتمل أن لا يصح وهو قول الأكثرين وإليه ذهب الشافعي لأن العوض مجهول ، فإن الثمرة مجهولة¹⁹

And if he has reconciliation on his acceptance at some part or the whole front of the tree and so the labour. Ishaq bin Ibraheem quoted from Imam Ahmad bin Hambal as he was questioned in this matter, he replied that he is not sure whether it is correct or not or it may be equal to be correct. Imam Makhoor said that it has been quoted by Imam Ahmed bin Hambal. He said if a tree provides shade to the people, they have the prerogative about cutting it or enjoying the fruit. This is the saying of the majority. So it is the trend of Imam *Shafi'i* because the compensation is unknown and also the fruit is unknown.

1.2-Jurisdiction of Mediation and Reconciliation in Criminal Matters:

Non- Compoundable Offences:

Hudood Laws:

In Islamic law, there is a great vastness as regards lawlessness, punishment and role of the arbitrator. The lawlessness and punishment has been divided into two parts according to Islamic criminal law.

The first part consists of Qasas and Hadd which are determined by Allah Almighty. The second part consists of the punishments on various crimes which can be inflicted on committing certain moral and legal crimes. There is no certain limits fixed for them and these are called tazir.²⁰

Hadd:

This is the punishment fixed by Allah and cannot be altered at any rate. While inflicting punishments even in these, the commandments of the Almighty must be kept in view. According to the experts the following crimes come under Hudood.²¹

- Theft
- Qazaf
- Adultery
- Drinking
- Robbery
- Revolt against Islam
- Riddah (apostasy)

There is no concept of Arbitration or reconciliation in Hudūd crimes while giving his verdict, the judge has not right to increase or decrease the punishment once the crime is proved. However, the Holy Prophet made utmost efforts to ensure transparency. In such cases, the punishment cannot be inflicted if there is any doubt and the proofs are not absolutely clear. The ability and the honesty of the one who provides proof also kept in view. Mediation is not available in cases where the law is clear and explicit.

¹⁹ Ibid, 33

²⁰ The Prohibition (Enforcement of Hadd) Order, 1979 - P.O. No. 4 of 1979

²¹ Lau, "Twenty-Five Years of Hudood Ordinances", 2007, 1296

For example, The Holy Prophets rejection of the mediation of Úsamah Ibn Zaid, who was ‘beloved one of the Holy Prophet (ﷺ), in the case of the Makhzumī women to avoid the punishment of theft. The Holy Prophets reply to the request of Usamah Ibn Zayed was stern: “Do you intercede regarding one of the punishments prescribed by Allah? He then stood up and addressed the people: “O people, those who have gone before you were destroyed, because if any one of high rank committed theft amongst them, they spared him; and if anyone of low rank committed theft, they inflicted the prescribed punishment upon him.”²²

Qisās and Diyat:

The crimes of Qasas and Diyat are the ones where the punishment is fixed by the Almighty Allah. The judge or the state has no right to change them. However, if the affected person or his family adopts the way of reconciliation and allows some decrease in the punishment, it is all according to Islam. According to the *Qur’ān*, murder demands capital punishment in Qasas while his family can accept Diyat and forgive this murder.²³

The legality of Ṣulh in qisas and diyah offences is helped or encouraged in many *Qur’ānic* verses and the legality of Sulah in qisas and diyah offences is helped or encouraged in many *Qur’ānic* verses and Ḥadīth of the Holy Prophet. In case of murder, According to the Holy *Qur’ān*:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنْثَىٰ بِالْأُنْثَىٰ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبَعْ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ فَمَنِ اعْتَدَىٰ بَعْدَ ذَلِكَ فَلَهُ عَذَابٌ أَلِيمٌ²⁴

“O those who believe!, The law of equality has been prescribed to you in case of murder-freeman for a freeman, slave for a slave and female for a female ...But if any remission is made by the brother of the slain ,then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and mercy from your Lord”.

According to the above verse of the Holy *Qur’ān*, the sentence recommended for a murder is qisas or action that a person takes against who has harmed them in some way, however, if the person who has legal right to receive the property or money for a person who has been attacked, injured or killed to apologize the murderer due to the struggle by mediation process.

It is narrated in the Journal of Islamic and comparative law: The Holy Prophet ﷺ said:

“He who causes intentionally the death of another, it is left to the family of the deceased to decide on qasas or the taking of diyat... and if they agree on sulh, it is for them”²⁵.

²²Moeen H. Cheema, Cases and Controversies: Pregnancy as Proof of Guilt Under Pakistan's Hudood Laws, 32 BROOK. J. INT'L L. 121, 128 n.20 (2006), (discussing the commissions that have recommended the repeal of the Hudood Ordinances)

²³ The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979

²⁴ Al-*Qur’ān*, Al-Baqarah:178

²⁵Ahmad, Ali, Journl of Islamic and comparative law. 1980, 40

According to Alqama-Ibn-Wail, his father elaborate that a man brought as a murderer of his kith and kin to the Holy Prophet. After the investigation, the person who is on trial for committing a crime, the Holy Prophet (ﷺ) asked:

“Do you have anything to pay blood wit on your behalf”? The accused said, I do not have any property except the rope and axe of mine. The Holy Prophet (ﷺ) said, “Do you think your people will pay ransom for you”? He said, “I am more insignificant among many people than this. The Holy Prophet threw the strap towards the claimant of the blood-wit saying, “Take this man away”. The man returned and said, God Messenger, I have heard you saying that, “If I like him, I would be like him. Where upon the Holy Prophet (ﷺ) said, do not you like that he shoulder the burden of your sin and the sin of your brother? He said, why not, The Holy Prophet said, if it is so then let it be. He threw away the strap (that tied away the accused) and set him free”²⁶

All the law experts recognize that Sulah or mediation process is acceptable in all qisas and diyyat offences comprising due to injury due to the process of newly born baby before it is fully developed and able to survive and concerning crimes as pointed out in the Holy *Qur’ān*. Allah says in the *Qur’ān*:

وَجَزَاءُ سَيِّئَةٍ سَيِّئَةٌ مِّثْلُهَا فَمَنْ عَفَا وَأَصْلَحَ فَأَجْزُهُ عَلَى اللَّهِ إِنَّهُ لَا يُحِبُّ الظَّالِمِينَ²⁷

“The recompensed for an injury equal there to but if a person forgives and makes reconciliation, his reward is due from Allah, for Allah loves not those who do wrong”

Allah says in the Holy *Qur’ān*:

وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنَّ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنْفَ بِالْأَنْفِ وَالْأُذُنَ بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ قِصَاصٌ فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَهُ وَمَنْ لَّمْ يَحْكَمْ بِمَا أَنزَلَ اللَّهُ فَأُولَئِكَ هُمُ الظَّالِمُونَ²⁸

And therein, we have prescribed for them: life for life, eye for eye, nose for nose, ear for ear and tooth for tooth; and for wounds, an equal retaliation. Then, whoever forgives it that will be expiation for him. And whoever does not judge by what Allah has sent down, then, they are the unjust.

According to the citation from the verses of the Holy *Qur’ān*, it is clear that Sulah or mediation in the matter of qisas and diyyat is allowed and prescribed to receive the property or money when that person dies. If the settlement of dispute arrives at a particular point then it is allowed by law as a guardian to represent not having the skill or ability to do as a person having the legal right to receive the property or money like the infant baby or unable to live in normal society.

The Holy Prophet (ﷺ) said:

“Avoid condemning a Muslim to a hadd punishment whenever you can, and when you can find a way out for a Muslim then release him for it. If the imam errs, it

²⁶ Al-Hajjāj Al-Qusheiri, *Muḥammad bin Muslim, Saḥīḥ Muslim*, (Beirut: Al-Maktab Al-Islamī, 1987), 273

²⁷ Al-*Qur’ān*, Al-Shoora:40

²⁸ Al-*Qur’ān*, Al-Maidah:45

is better that he errs in favor of innocence (pardon) then in favor of guilt (punishment)²⁹

The above Ḥadīth narrates about hadd sentences and their enforcement that there is no option of Sulah when hadd offence has been committed from the accused and decided officially in court that is guilty of a crime. After this stage, the recommended sentences must be enforced on him. If the matter is not brought to the prescribed authority or court of a law, Sulah can play its role in decreasing or minimizing the sentence. Sulah can be taken place between the offender and the victim before the offence brought to the court. This is narrated in Ḥadīth as:

Tazīr:

“It includes the crimes relating to violation of some law or regulation. In such cases, the judge can inflict some punishment keeping in view the mind of the offense. In Islam, refusing to offer prayers and keeping fast in Ramadān without any reason also comes as offense under Tazeer because it is like the violation of Allah’s law. According to the experts, in tazir, the judge has the authority to fix the amount of punishment and can also turn to reconciliation as well”.³⁰

But in case of Tazir, it is necessary for the government in inflict some punishment in order to keep peace in the society but it cans also forgiveness on the basis of reconciliation.

“The punishment in such cases can only be inflicted if the case is brought before the court. Govt. cannot announce any punishment or forgiveness without the consult of affected person. However, Arbitration and reconciliation can also be adopted in such cases as well”.³¹

Blasphemy Laws:

The blasphemy laws were introduced through Sections 295-B and 295-C of the Pakistan Penal Code during the regime of General Zia ul Haq. Section 295-C, which was added by an act of the parliament in 1986, made it a criminal offence to use derogatory remarks in respect of the Holy Prophet (PBUH).³²

The article 295/c states if the person humiliates the name of Holy Prophet, he/she will face the punishment of either imprisonment or capital punishment. In 1990, a petition was filed requesting to suggest alternate punishment to life Shariah court. The petition was accepted for trial and the federal Shariah court ordered the explanation of the matter in the light of the Holy *Qur’ān*. The court further directed that a copy of the petition should also be sent to the president of Pakistan so that the change may be brought by adopting the legal procedures and if the said change may not be brought before 30th April, 1991. The word life imprisonment would be change according to 295/c. the change by the federal Shariah court will not be exercised in the taziraat e Pakistan. As a result, the life imprisonment will be a part of 295B/c. In

²⁹Ibne-Majah, *Muḥammad*, Sunan Ibne Majah, (Cairo: Isa Al-bābī Al-Habībī, 1975), 850

³⁰Mark Cammack (2012), *Islamic Law and Crime in Contemporary Courts*, Berkeley J. of Middle Eastern & Islamic Law, Vol. 4, No.1, 1-7

³¹Wasti, Tahir (2009). *The application of Islamic criminal law in Pakistan Sharia in practice*. Brill Academic. p. xix, 72–73

³² Sections 295-B and 295-C , the Pakistan Penal Code.

the light of the verdict, the previous position of 295B/c is retained and the capital punishment is compulsory in case of humiliation of the Holy Prophet (ﷺ).³³

Such factors are forbidden not only in the *Qur'ān* and Sunnah but even in the Bible also. Such activities are considered quite seriously against the Christianity and other religious norms. That is why it should be tried to keep aside the irresponsible attitude. For this reason, the humiliation of prophet hood law is not only enlight the Muslims but also guarantees the safeguard of the rights of the minorities.

“However, as said earlier, the misuse of law is also seen in regard to other laws, e.g., those relating to intentional murder cases. As per ACT-302 of Pakistan’s Constitution there is a death sentence, but complaints of its misuse are being heard throughout the country. The wrong use of a law does not justify its repeal in any society, but a social reform is needed to stop its misuse”.³⁴

The 1973 constitution has more emphasized for ionic status in this aspect, especially establishment of Federal Shariah court and inclusion of objective resolution 1949 in the constitution (which was previously an introductory document). This has formed the foundations of the country on strong religious basis.³⁵

2-Compoundable Offences:

Offence of individuals is Compoundable in Islamic Law:

The *Qur'ān* allows legal guardian to claim qisas or right. The legal guardian can also pardon the person who is on trial for committing a crime by set aside the claim. The value of the Diyat (compensation of blood) has also been fixed as follow:

“The Holy Prophet (P.B.U.H) ordained the value of the Diyat 800 Dinar or 8000 Dirham”. In the regime of Ḥaḍrat ‘Umar, Government enhanced the rate of Diyyat and fixed 1000 dinar or 12000 dirham”.³⁶

In the draft ordinance connected with the law of qisas and diyyat to change the opinion or plan by Islamic Ideology Council in Qatal-e-Āmid are stipulated as under Sulh in intentionally murder case:

“In this situation the matter of intentionally murder in which a young person seriously hurt and unable to line in normal society. The pardon of qisas in the form of sulh takes place before the starting process of act of killing as a legal punishment in the autonomous forum in the formal judicial process”.³⁷

In particular circumstances, when government or state in the Wali, it can maintain the situation to establish Badal-i-Sulh. This Badal-i-Sulh should equal the state of diyyat.

³³Mohamed S. El-Awa (1993). *Punishment In Islamic Law*. American Trust Publications. 1–68

³⁴Wasti, Tahir (2009). *The application of Islamic criminal law in Pakistan Sharia in practice*. Brill Academic. 283–288

³⁵Hakeem, Farrukh. *Policing Muslim communities comparative international context*. (New York: Springer, 2012), 16–20

³⁶Basuni, Izzuddin (2014-05-17). "Ta'zir offences explained". *The Brunei Times*.

³⁷ Ibid.

Punishment for Parents or Guardian in a Child Marriage:

The manner that is produced for other humans to apply together with a female for marriage as *vani* or *Badl-i-sulh* isn't allowed according to the circumstance that must be regularly occurring earlier than an agreement to sub-section (1) of phase 310 and 338-E of Pakistan Penal Code. But, the condition must be accepted or applicable by passing the order of the formal justice gadget for *badl-i-sulh* to state officially especially in writing that is real.

It is suggested that the National Judicial Committee can adopt rules in a particular position or situation especially when it is done gently or carefully. According to section 310 or section 338-E of Pakistan Penal Code, the court may stress to state officially, especially in writing that it is true about crime. Therefore, it is not *Badl-i-sulh* due to refusal for obedience of law or an agreement.

“The chief Justice of Lahore High Court may launch guide lines to all subordinate courts and the court which people can appeal against made in other court of law to forcefully obey the conditions or an arrangement in a legal document of sections 310 and 338-E of Pakistan penal code. These courts should keep the written account that is looked and used in the future and you say or write to give information about *Badli-e-Sulah* of *Qisas* in *Qatl-i-Amd* or due to hurt which is legally responsible for paying the cost of *Qisas* and *Tazir*. It is confirmed that the conditions to finish the controversy between the parties. In this type of cases, the women are not provided as *Badli-e-Sulah*. For the firm requirements to make sure that people obey a particular law or rule of the Child Marriage Restraint Act, 1929.”³⁸

According to the citation from the verses of the Holy *Qur'an* is that *Sulah* or mediation in the matter of *qisas* and *diyyat* is allowed and prescribed since it has the power of quietening for trying hard to make believe that is true because angry and bitter arguments between two people or group that continue over a long period of time, and want for something that you do in order to make suffer because they have made you suffer by the recognize person who has legal rights to receive the property or money when that person dies.³⁹

There are situations or circumstances depend upon such, which are as under: The act of thinking carefully about property must be legal and very useful or important.

The property must well inform to the rival parties. The settlement of dispute should not be greater than a particular number or amount of normal *diyyat*.

Conclusion:

Every society believes on peace and peaceful environment but there are some situations that provoke conflicts and disputes between individuals and communities. Consequently they seek resolution of the disputes and conflicts because a society can never develop with the anarchical system. So the society follows its religious norms to resolve the disputes. With the development of the

³⁸ Child Marriage Restraint Act, 1929

³⁹Rapport, Yossef "Legal Diversity in the Age of Taqlid: The Four Chief *Qādis* Under the Mamluks", *Islamic Law and Society*, v.10, n.2 (2003), 221

society and a modern era has emerged with certain issues and world has changed in to different shapes. So people found the solution of their dispute and conflicts according to the traditions and modern cultural norms. The traditional Muslim societies follow the Islamic law. Although they believe that the Islamic law is a God's will but during certain situations they follow their cultural norms and rules as well as self-made rules and laws to resolve their disputes and issues. The mediator is a leader and elder of the local community and he always follows Islamic teachings to resolve issues between two parties in Islamic countries as well as in Pakistan. But there are some places where tribes follow their own cultural traditions, norms and historical values, rule and law to settle the disputes and conflicts. The formal mediation process involves various representatives from the society who build the consensus for decision making and conflict resolution. However, the practice of mediation is fascinating by the both course (Islamic and Cultural) of life and sometimes the mechanism does not provide insight clarity and transparency. But the combination of Islamic and man-made laws supports the mediator to understand the deeper middle way to resolve the issue. The regular practice of mediation is an integral part of dispute and conflict resolution and make possible to upload peace and good relations among the individuals and within the societies.