



THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN NIGERIAN COURTS: THE SHARI'AH (ISLAMIC LAW) COURTS IN PERSPECTIVE.

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Abstract

Disputes are an inevitable part of human existence hence the placement of various mechanisms to address them. Litigation is primarily used as the means of resolving rights-based disputes through the court system and this used to be the preferred choice for lots of litigants. However, the issues and challenges inherent in litigation such as its high costs, series of adjournments as well as destruction of relationships gave rise to other options. To address these issues and challenges, alternative dispute resolution (ADR), which is a means of settling disputes out of the courtroom, is utilised widely due to its numerous advantages. Nigeria is not an exception to disputes and the problems inherent in the adversarial system of dispute resolution hence the resolve of the Nigerian legal system in utilising ADR in courts. Consequently, courts such as the High Courts, Customary Courts as well as the Shari'ah Courts utilise provisions that are geared towards amicable resolution of disputes and in the context of the Shari'ah Courts, mechanisms such as Sulh (conciliation) and Tahkeem (arbitration) are used. This paper considers the use of ADR in Shari'ah courts of Nigeria and adopts the doctrinal research methodology from available literature. It is found out that the Nigerian legal system recognises and encourages the use of ADR in courts, where appropriate. Accordingly, it is recommended that ADR should be encouraged by judges and that awareness needs needs to be raised on the benefits of ADR.

Keywords: *Alternative-Dispute-Resolution-Shari'ah Courts-Nigeria*

Introduction

Prior to the formal introduction of Alternative Dispute Resolution (ADR), most aggrieved persons relied on customary ways of resolving disputes.³⁵ With the

35 Okpuwuru v. Okpokam (1998) 4 NWLR Pt.90, 554 at 586 (Per Justice Oguntade JCA (as he then was)

arrival of political authority in the form of the state, the establishment of dispute resolution mechanisms has been closely associated with the determination of those in power to govern.³⁶ Primarily, the preference of the state has been to provide processes and institutions that we would want to characterise as formal, with litigation and adjudication central to the state-sponsored system of civil justice. Thus, these institutions are there: to maintain social order; to avoid conflict; to restore harmony; to achieve equality; and to express communal identity. But, even as these formal systems of justice were being created, dissatisfaction with legal institutions increased as a result of incessant delays, absence of case management procedures, high cost, rigidity, unpredictability, destruction of relationships etc. As Auerbach has emphasised, the rejection of legal processes as an appropriate mode of decision-making in the perspective of disputes is often part of an attempt to develop or retain a sense of community: 'how to resolve conflict, inversely stated, is how (or whether) to preserve community'.³⁷

It is as a result of the problems inherent in the adversarial system of dispute resolution that ADR has become a well-recognised alternative to dispute resolution in jurisdictions such as the United States, the United Kingdom and Nigeria. Accordingly, the Nigerian legal system contains provisions on amicable resolution of disputes. However, the focus of this paper is on the use of ADR: *Sulh* (conciliation) and *Tahkeem* (arbitration) in *Shari'ah* Courts.

Definition of Terms

Sulh is derived from the Arabic word *Salaha*, which means to make peace with.³⁸ It literally means termination of a dispute (*qat'ul munaza'ah*)³⁹ or a transaction between parties to a case which is expected to lead to settlement of the dispute between them.⁴⁰ Technically, *Sulh* has been defined as a contract by means of which contention is prevented or set aside.⁴¹ Article 1531 of the

36Roberts, S., & Palmer, M., *Dispute Processes: ADR and the Primary Forms of Decision Making*, Cambridge University Press, UK (2005), p.11

37 Ibid, p.9

38 Elias, E.A., & Elias, E.E., *The School Dictionary: English-Arabic*, Dar Al-Jil, Beirut, p.227.

39Mustafa al-Khin et al., *Al-Fiqh al Manhaji 'ala Madhhab al-Imam al-Shafi'i*, Dar al-Qalam (1996), Vol. 3, p.149

40 Uthman, M.B., *An Overview of the Theory of Sulh in Civil and Criminal Cases*. p.151-152.

41 Yelwa, A.M., *Dispute Resolution Mechanisms in the Administration of Justice under Shari'a*. Being a paper presented at the Arbitration and ADR Workshop for Judges and Kadis at the National Judicial Institute on 9th-13th May, 2011.

Ottoman Code, “*Majalla*” defines *Sulh* as “a contract concluded by offer and acceptance, and consists of settling a dispute by mutual consent.” Therefore, *Sulh* is similar to sale and all that is lawful in sale is lawful in *Sulh* and all that is unlawful in sale is also unlawful in *Sulh*.

Tahkeem is an Arabic word which means the appointment of a judge or judges to adjudicate a certain dispute or issue.⁴² Article 1790 of the “*Majalla*” defines *Tahkeem* as arbitration which “consists of the parties to an action agreeing together to select some third person to settle the question at issue between them, who is called an arbitrator”. This process of *Tahkeem* is only acceptable in *Shari’ah* in matters that are pecuniary in nature. However, the only condition attached to an arbitrator is that he should be an expert in the area where he is to make arbitration.⁴³

It is instructive to note regardless of the similarity between *Sulh* and *Tahkeem* as mechanisms for the resolution of disputes, they differ in the following ways: unlike *Tahkeem* which results in a binding judicial decision, *Sulh* results in a non-binding proposal for settlement.

Mechanisms of Dispute Resolution under the *Shari’ah*

There are various mechanisms by which disputes are resolved under the *Shari’ah*. These include *Khusuumaah* (litigation), *Sulh* (conciliation/settlement), *Tahkeem* (arbitration), Med-Arb (a combination of *Sulh* and *Tahkeem*), *Muhtasib* (Ombudsman), *Fataawa* of *Muftis*,⁴⁴ *Raddul Madhaalim* (restorative justice) and *Wasaatah* (mediation).⁴⁵ However, this paper focuses on the concepts of *Sulh* and *Tahkeem* as mechanisms of dispute resolution under the *Shari’ah*.

The concepts of *Sulh* and *Tahkeem* were the predominant methods of dispute resolution in pre-Islamic Arabia. The first step towards dispute resolution was *Sulh*. However, in the event of failure to settle amicably, parties proceeded with *Tahkeem* or adjudication as the next step. Tribal solidarity was a key virtue in

42 Bouheraoua, S., & Kulliyah, A.I., *Foundation of Mediation in Islamic Law and its Contemporary Application*. Retrieved from <http://www.asiapacificmediationforum.org> on 27-3-17 at 2:50pm.

43 Yelwa, A.M., Op. cit. p.7.

44 An aggrieved person may ask for the opinion of a *Mufti* regarding his right, duty or that of the others in a matter. The *Mufti* then gives his legal opinion which may guide the party. However, such a legal opinion is not binding.

45 *Wasaatah* is a benevolent, non binding procedure to end a dispute.

pre-Islamic Arabia. As a result of this value and of the tribal organisation of society at that period, settlement of disputes through conciliation and peacemaking by elders and those in authority was practised through informal means and became part of the ethos of the society.⁴⁶ It is instructive to note that during that period, dispute resolution mechanisms were not in accordance with Islamic Law. For instance, a *Hakam* (an arbitrator) was sometimes chosen from *Kuhhaan* (healers) and soothsayers, who were believed to possess supernatural powers and whose opinions involved the invocation of deities.⁴⁷

With the coming of Islam, the pre-Islamic mechanisms that were used for dispute resolution were maintained by Islam with some modifications. For example, the *Kuhhaan* and soothsayers ceased to be appointed as *Hukkaam* based on verse 90 of *Suratul Ma'idah*, where Allah (the Most Glorified, the Most High) says: "O you who believe! Intoxicants (all kinds of alcoholic drinks), and gambling, and *Al-Ansab*, and *Al-Azlam* (arrows for seeking luck or decision) are an abomination of *Shaitan's* (Satan's) handiwork. So avoid (strictly all) that (abomination) in order that you may be successful."⁴⁸ Disputes were resolved in accordance with the *Qur'an*, *Sunnah*, *Ijma'* (consensus of opinion) and *Qiyas* (analogical deduction).

The Messenger of Allah peace be upon him served as *Waseed* (mediator)/arbitrator in addition to his role as the head of the Islamic state. For example the Prophet (peace be upon him) mediated and resolved the dispute that arose between leaders as to who will place the *Hajr al-Aswad* (black stone) in its rightful place.⁴⁹ With the expansion of the Islamic state, the Prophet (peace be upon him) delegated some of his companions to act as *Qudaah* (judges)/mediators/arbitrators.

After the demise of the Messenger of Allah (peace be upon him), the *Khulafaa ur-Raashidoon* (rightly guided caliphs), a *Qaadi* acted as a mediator/arbitrator. Also Sulh was widely used and promoted. This was evidenced in the letter

46 Jamal, A.A., *ADR and Islamic Law: the cases of the UK and Singapore*, "NUS Law Working Paper 2015/004 May 2015, p.4. Retrieved from <http://www.law.nus.edu.sg/wps/> on 30-3-17 at 7:22pm

47Wahed, H., *Sulh: Its Application in Malaysia*, Vol. 20, Issue 6, Ver. II (June 2015), P.9. Retrieved from <http://www.iosrjournals.org> on 26-3-17 at 4:45pm

48 Khan, M.M. and Al-Hilali, M.T.(1996). *Interpretations of the Meanings of The Noble Qur'aan in the English Language*. Dar-Us-Salam Publishers and Distributors, Riyadh, Saudi Arabia, p.170.

49 Ibn Ishaq, Muhammad Bin Yasar, *The Life of Muhammad*. Oxford University Press, London, (1955) p.85.

written by Caliph Umar Ibn Khattaab (may Allah be pleased with him) to Abu Musa Al-Ash'ari (may Allah be pleased with him) after his appointment as a judge: "Refer disputing parties to reconciliation for surely litigation breeds in hatred and enmities".⁵⁰

Also, during the Uthmaniyyah Caliphate, *Al-Majalla Al Ahkam Al Adaliyyah* (The Ottoman Courts Manual (Hanafi)) was codified.⁵¹ It is based on the Hanafi School of Islamic jurisprudence and provided for the application of *Sulh*, *Tahkeem* and *Waseeda* under the chapter on the administration of justice by the courts.

The Basis of *Sulh* in Islam

Sulh has its basis in the *Qur'an* and *Sunnah* and *Ijma'a*. For example, Allah (the Most Glorified, the Most High) says in *Surah Hujurat*, verse 9:

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 that which outrages until 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.

In *Surah Anfaal*, verse 1, Allah (the Most Glorified, the Most High) says: "They ask you (O Muhammad) about the spoils of war. Say: "The spoils of war are for Allah and the Messenger." So fear Allah and adjust all matters of difference among you, and obey Allah and His Messenger (Muhammad SAW), if you are believers."⁵²

Also, Allah (the Most Glorified, the Most High) mentions in verse 35 of *Suratun Nisaa'* 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 her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things."⁵³

50 Yelwa, A.M., Op. Cit. p.4.

51 Retrieved from <http://www.kantakji.com> on 26-3-17 at 6:00pm.

52 Khan, M.M. and Al-Hilali, M.T., Op. Cit. p.236.

53 Ibid, p.122.

Furthermore, verse 128 of *Suratun Nisaa*’ talks about reconciliation:

*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.*⁵⁴

The Messenger of Allah (peace be upon him) encouraged *Sulh* in the following *Ahaadith*: “*Sulh*, reconciliation between Muslims is in order except any reconciliation that allows *Haraam*, what is forbidden or forbids what is *Halaal*, lawful.”⁵⁵

“He is not a liar who lies in order to effect reconciliation between disputing parties.”⁵⁶

Conditions under which *Sulh* is Recommended

The conditions under which *Sulh* may be recommended by a judge are:⁵⁷

- Where litigation may damage blood relationship among disputants. On this, Caliph Umar (may Allaah be pleased with him) is reported to have said: “Avoid litigation among people tied by kinship. Litigation among them causes animosity”.
- Where the judge is unable to comprehend the nature of the claim presented before him.
- Where the evidence presented before the court by the litigants is of equal weight.
- Where the litigants are men of great standing in the locality.
- Where the litigants are influential people and in order to avoid a breach of peace when the judgment is delivered, the judge may recommend

⁵⁴ Ibid, p.139.

⁵⁵Wali, A.B., *The Viability of As-Sulh (ADR) to Sharia-Based States in Nigeria*. p..122.

⁵⁶ Ibid.

⁵⁷ Keffi, U.D., *The Legal, Social and Economic Roles of As-Sulh from the Perspective of Jurisprudence (Fiqh) of the Maliki School*, pp.193-194

Sulh.

Effect of *Sulh* and *Tahkeem* Agreements

It is instructive to note that parties are bound by the conciliation/settlement arrived at, provided it is in line with the *Shari'ah*. Therefore, it is not permissible to set it aside to pave way for the continuity of dispute between them. This was the holding in *Dutsi v. Tofa*,⁵⁸ where the court relied on 'Mukhtasar' and held thus:

*Where a valid reconciliation/settlement on the face of Sharia law is effected, a party to a dispute is not allowed to subsequently set it aside in order to continue disputing it as doing so will amount to a deviation from what is known on the settlement and reconciliation to what is unknown.*⁵⁹

The only condition where a *Sulh* agreement which is voluntarily entered into and is in accordance with the *Shari'ah* can be set aside is where the terms of such *Sulh* are subjected to the unilateral right of repudiation by any of the contracting party to it.⁶⁰

Application of *Sulh* in *Shari'ah* Courts

The use of *Sulh* in *Shari'ah* courts depends on whether the case before the court is civil or criminal in nature. At this juncture, we will examine whether *Sulh* can be used in criminal and civil proceedings.

Criminal Proceedings

The Islamic criminal justice system has its origin in Divine revelation. It stands out from all laws because it is revealed by the Ultimate Law Giver, Allah (the Most Glorified, the Most High) for the benefit, betterment and improvement of humankind. Thus the ultimate objectives of the *Shari'ah* include the preservation of essentials i.e. *Darooriyyaat* namely: the preservation of religion, life, lineage, property, intellect and dignity. However, these objectives

58 (2001) LRNN 406

59 Abubakar, A., *Islamic Law The Practice and Procedure in Nigerian Courts*, Adamu Abubakar & Co. (2008), p.57.

60 Wali, A.B., Op. cit., p.123.

can only be preserved through the application of penal sanctions, in the event of transgressing them. In Islam, the punishment for criminal offences is determined by whether a right (as conferred by Allah) belongs to Allah (the Most Glorified, the Most High) or worshippers.

In criminal proceedings, the power of a *Qaadi* to invoke *Sulh* depends on factors such as whether the act(s) for which a suspect is before the court falls under the definition of a crime described in the various categories of crimes or whether it is an act for which *Hadd*, *Qisaas* or *Ta'azeer* punishments become applicable. It is imperative to consider the categories of crimes under Islamic law namely: *Hudood*: *Hudood* is the plural of the Arabic word *Hadd*, which are “prohibitions ordained by Divine Law [*Shari'ah*], from which we are restrained by God with punishments decreed by Him; they form an obligation to God.”⁶¹ The punishments for *Hudood* offences are provided in the *Qur'an* and the *Sunnah*. These offences impinge on the Rights of Allah (the Most Glorified, the Most High) and the Rights of Worshippers and are against the interest and basic foundation of the Islamic society. Therefore, the imposition of punishments for such offences is to purify the soul which is a prerequisite of divine mercy, safeguard society and put an end to transgression as well as to serve as deterrent to others.

Crimes affecting the Rights of Allah (the Most Glorified, the Most High) are *Zina* (fornication or adultery), *Qadhf* (slander), *Sariqah* (theft), *Shurbul Khamr* (wine drinking), *Hirabah* (highway robbery), *Riddah* (apostasy) and *Baghyu* (rebellion). While crimes affecting the rights of worshippers include murder and inflicting injurious bodily harm. It is instructive to note that notwithstanding the encouragement of the use of *Sulh* as a mechanism for resolving disputes, a *Qaadi* has no power to advice on the option of *Sulh* in *Hudood* offences or to increase or decrease punishment once a crime has been proved. This is because such offences involve the rights of Allah for which punishment has been decreed under the *Qur'an* and the *Sunnah*. However, it is pertinent to note that in the matter of *Baghyu* (which is a *Hadd* offence), it is

61 Abdel Haleem, M., Sheriff, A.O., Daniels, K., *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, I.B. Taurus & Co Ltd, London (2003), p.18.

lawful to invoke *Sulh* between the rebels and loyalists if the rebels are toiling under an erroneous or ill-conceived justification for their actions.⁶²

Qisaas: *Qisaas* implies retaliation by slaying for slaying, wounding for wounding and mutilating for mutilating, etc and it is divided into two namely: *Qisaas* for homicide and *Qisaas* for wounds and injuries.⁶³ The basis of *Qisaas* is found in the following *Suwar*: *Suratul Baqarah*, verse 178, *Suratul Maa'idah*, verse 45 and *Suratul Israa'*, verse 33 where Allah mentions:

*O you who believe! Al-Qisas (the Law of Equality in punishment) is prescribed for you in the case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives) of the killed against blood money, then adhering to it with fairness and payment of the blood money to the heir should be made in fairness. This is an alleviation and a mercy from your Lord. So after this, whoever transgresses the limits (i.e. kills the killer after taking the blood money), he shall have a painful torment.*⁶⁴

*And We ordained therein for them: Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal. But if anyone remits the retaliation by way of charity, it shall be for him an expiation. And whosoever does not judge by that which Allah has revealed, such are the Zalimoon (polytheists and wrongdoers - of a lesser degree).*⁶⁵ *And do not kill anyone whose killing Allah has forbidden, except for a just cause. And whoever is killed wrongfully (Mazluman intentionally with hostility and oppression and not by mistake), We have given his heir the authority [to demand Qisaas, Law of Equality in punishment or to forgive, or to take Diyah (blood money)]. But let him not exceed limits in the*

62 Uthman, M.B., Op. Cit. p.165.

63 Bambale, Y.Y., *Crimes and Punishments under Islamic Law*, Malthouse Press Limited (Lagos), 2003, p.87.

64 Khan, M.M. and Al-Hilali, M.T., Op. Cit. p.46..

65 Ibid, p.159.

*matter of taking life (i.e. he should not kill except the killer).
Verily, he is helped (by the Islamic law).⁶⁶*

It can be deduced from the above verses that *Qisaas* applies to crimes against life and body. Therefore, where the crime is intentional and proved, a *Qaadi* must enforce the decreed punishment except where the aggrieved party or his legal guardian decides to either pardon the convict or reach an amicable settlement for *Diyah* (blood money). This view supports the views of Imam Malik, Imam Shafi'i and Imam Ahmad b. Hanbal that reconciliation in *Qisaas* is permitted.⁶⁷ They based their opinion on *Suratul Baqarah*, verse 178 and upon the words of the Messenger of Allah (peace be upon him) that: "The one who kills another deliberately will be handed over to the heirs of the deceased; they may kill him if they please, or they could receive blood money... And whatever they settle between them is permitted."⁶⁸ However, Maliki jurists are of the view that *Sulh* will not be allowed in *Qisaas* cases if the homicide involves *Geelah* (treachery) or *Hirabah* (robbery).⁶⁹

Ta'azeer: *Ta'azeer*⁷⁰ is defined as "discretionary punishment to be delivered for transgression against Allah, or against an individual for which there is neither fixed punishment nor penance (*Kaffara*)."⁷¹ Offences attracting *Ta'azeer* have a wider scope than offences attracting *Hudood* and *Qisaas*; a *Qaadi* has discretionary powers to award punishments in accordance with certain prescribed laws and in the light of general principles and rules from the words of Allah (the most glorified, the most high) such as "The recompense for an evil is an evil like thereof..."⁷² and the principle of *la darara wa dirar* (no harming and no reciprocation of harm).⁷³

It is submitted that giving a *Qaadi* discretionary powers to award punishments in situations not expressly provided for in the *Qur'an* and the *Sunnah* is an imperative safeguard against any situation that may threaten the peaceful

66 Ibid, p.371.

67 Wali, A.B., Op. cit. p.123.

68 Audah, A., *Al-Tashri al-Jina'iy al-Islamiy*, (1969), Vol. II, p.167.

69 Uthman, M.B., Op. cit. p.162.

70 *Ta'azeer* is derived from the Arabic word "Azr" which means to censure or repel.

71 Bambale, Y.Y., Op. Cit. p.96.

72 Khan, M.M. and Al-Hilali, M.T., p.637.

73 Abdel Haleem, M., Sheriff, A.O., Daniels, K., Op. cit., p.20.

coexistence of the Islamic community. However, a *Qaadi* must take into account aspects such as the seriousness of the wrongdoing, the prevalence of crime in the community and whether the suspect is a first time offender or not before awarding punishment. He may recommend forgiveness, restitution, reprimand, community service but he should always take into cognisance the wish (es) of the wronged.

Civil Proceedings

Sulh can be invoked in civil matters such as marriage, divorce, maintenance, guardianship, cruelty/ill-treatment, consummation, inheritance, transactions/disputes between Muslims and Non-Muslims etc.

In Islam, marriage is a sacred contract entered into between a man and a woman in the presence of Allaah (the Most Glorified, the Most High) and it is through that institution that families are brought into existence. Therefore, the success of every society depends to a large extent on the stability of families. Conversely, disputes are an inevitable part of human nature which even marriages are not insulated from and because marriage is generally regarded as a union between two families instead of two people, marital disputes which (may emanate from a wife or husband) symbolise a shared problem that affect both families. It is as a result of the tremendous importance that Islaam accords to the marriage institution that Allah (the Most Glorified, the Most High) makes specific reference to *Sulh* as the primary means of resolving matrimonial disputes. This is pursuant to *Qur'an* 4, verse 128 where Allah (the Most Glorified, the Most High) legislates concerning desertion on the part of the husband. On this, 'Ali bin Abi Talhah (may Allah be pleased with him) narrated that Ibn 'Abbas (may Allah be pleased with him) said that the verse 128 refers to, "When the husband gives his wife the choice between staying with him or leaving him, as this is better than the husband preferring other wives to her."⁷⁴ It is however stated that the plain wording of the verse refers to the settlement where the wife relinquishes some of the rights she has over her husband, with the husband agreeing to this concession, and that this settlement is better than divorce. For example, the Messenger of Allah (peace be upon him) kept Sawdah bint Zam'ah as his wife after she offered to relinquish her day for 'A'ishah (may

⁷⁴ *Tafsir Ibn Kathir (Abridged) Volume 2*, Darussalam Publishers & Distributors (2000), p.601.

Allah be pleased with her). By keeping her among his wives, his *Ummah* may follow this type of settlement and peace are better with Allah than parting, Allah said: “and making peace is better.”⁷⁵

In relation to the possibility of estrangement between husband and wife (which in some cases leads to divorce), which is the most detestable of all things permitted by Allaah (the Most Glorified, the Most High), Qur’aan 4, verse 35 provides for the appointment of two arbitrators (preferably from the members of the affected family(ies)). This is with a view to brokering reconciliation. On verse 35, Allaah (the Most Glorified, the Most High) first mentioned the case of rebellion on the part of the wife. He further mentioned the case of estrangement and alienation between spouses. The scholars of *Fiqh (Fuqaha’)* are of the view that when estrangement between the husband and wife happens, the judge refers them to a trusted person who examines their case with a view to stopping any wrongs committed between them. If the matter progresses, the judge refers the matter to two trustworthy persons (one from the woman’s family and the other from the husband’s family) to meet with the couple, examine their case and decide whether it is best for them to stay together or part ways. Even though Allah (the Most Glorified, the Most High) gives preference to staying together, and this is why Allaah said: “If they both wish for peace, Allah will cause their reconciliation”.

‘Ali bin Abi Talhah (may Allah be pleased with him) further reported that Ibn ‘Abbas (may Allah be pleased with him) said concerning the appointment of arbitrators that if the man is in the wrong, they prevent him from his wife, and he pays some restitution. However, if the wife is in the wrong, she remains with the husband and does not pay any restitution. If the arbitrators decide that the marriage should remain intact or be dissolved, then their decision is upheld. However, if one of the spouses disagrees with the decision of the arbitrators that the marriage remains intact while the other agrees, and one of them dies, the spouse who did not agree will not inherit from the spouse who agreed while the one who agreed will inherit from the spouse who did not agree. This was collected by Ibn Abi Hatim and Ibn Jarir.⁷⁶

75 Ibid.

76 Ibid, p.448.

On the other hand, where the two arbitrators disagree, Shaykh Abu ‘Umar bin ‘Abdul-Barr is of the view that the scholars agree that the opinion to dissolve the marriage will not be upheld. They are also of the view that the decision of the arbitrators is binding regardless of whether the spouses appointed them as agents. This is the situation where it is decided that they should stay together but they disagree whether it is binding or not when they decide for separation. He then stated that the majority holds the view that the decision is still binding even if they did not appoint them to make any decision.⁷⁷

It is instructive to note that there are instances where a disputing couple are unable to reach an amicable settlement and the only option left is to institute an action in the *Shari’ah* Courts. In issues of divorce, Islamic law courts reserve the application of *Qur’an* 4, verse 35 for divorce suits in which a wife repeatedly files for divorce but repeatedly fails to satisfy the courts that she deserves the release.⁷⁸ To tackle the predicament of recurring suits without success for lack of evidence, the jurists devised a procedure based on *Qur’an* 4:35 as follows:⁷⁹

If she repeatedly puts up complaints before the court against her husband and seeks separation and she fails to satisfy the court because she fails to establish the genuineness of her allegation before the court, the judge appoints a panel of two arbitrators on condition that (a) they are both upright and guided (b) they have experience about the spouse’s problems with the capacity to solve them. It is preferable that they are of the spouse’s blood relation, otherwise, non-relation will be accepted. They should be familiar with the causes of their (couple’s) rift and work hard, as much as possible to settle them.

If they do not succeed and (found that) the fault(s) are/is attributable to both or they found that the fault(s) are/is with the husband or the true position is not clear, the panel

77 Ibid.

78 Ambali, A.A., *Stimulation and Sustenance of Economic Development Through the Use of Alternative Dispute Resolution (ADR) Systems in the Judicial Process: Sharia Court of Appeal Perspective*, p.12. Being a paper presented at the 2015 All Nigeria Judges’ Conference held on Wednesday, 25th November 2015 at the Andrews Otutu Obaseki Auditorium of the National Judicial Institute, Abuja.

79 Ambali, A.A., Op. cit. pp..13-14.

recommends separation – release of the wife. It should be regarded and treated as irrevocable separation (divorce).

*If the faults are from the wife, they should not be separated by **Talaq**, releasing the wife, they should be separated through the process of **Khul'** – the women opting out of the marriage and compensating the husband.*

If the panel does not agree on a consensus, the court orders them to go back and carry out the investigation. If they still do not agree, the court dissolves them and sets up another panel of two arbitrators.

*The panel must place their findings before the court. The court shall enforce their recommendation. All these are based on His words the Most Glorified in *Qur'an* 4:35.*

Islam also permits the use of *Sulh* in internal and international conflicts between Muslims and non Muslims provided it is not on purely religious matters and the resolution must be in line with the *Shari'ah*.

Conclusion

The role of *Sulh* and *Tahkeem* in any society cannot be overemphasised. This is in view of the fact that they are a fundamental part of the Islamic justice system which have been sanctioned by the *Qur'aan*, *Sunnah* and *Ijma'* and *Qiyaas*. More importantly these mechanisms are the most efficient and effective ways of dispute resolution because they decongest courts, restore peaceful coexistence, lead to forgiveness and brotherhood by addressing issues that may lead to hostilities, conflicts, destruction of relationships and a breakdown of law and order.