The Evolution and Concept of Alternate Dispute Resolution (ADR) in the Legal Spectrum of the World and *Sharī'ah* (A Realistic Approach)

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Abstract

The human beings, being living together on this earth since time immemorial; have unavoidable interactions for the actualizing of their interests and, thus, face differences and conflicts in day-to-day life. Being social creatures, they have developed a variety of mechanisms for resolution of such differences and conflicts. Amongst it, the Alternative Dispute Resolution (ADR) is the most significant and effective one which is adopted by almost all nations- despite difference of beliefs, cultures and civilizations. History shows the effective use of ADR by the ancient Greece, Roman Empire, Chinese and Indian civilizations, Monotheistic (Abrahamic) Religions, the Islam and many more. However, the mechanism and structure approved by each nation, remained different from the others- to some or large extent. The present work aims to find out the historical back ground of ADR in various cultures and civilizations in terms of its origin and stages, it passed through. The study divulge with solid evidence that the intended objectives of all nations from the concept of ADR have the same and conjoint features. Its basic structure is, nevertheless, found utterly different owing to many reasons i.e. variance in geography, culture, social values, religious backgrounds, mindset of the concerned people and many others. Historical study illustrates that Shariah has put up all these factors, by one way or another, in the basic structure of ADR.

Keywords: ADR, Society, History, Disputes, Cases, Resolution, Settlement

Introduction:

Owing to its generic name and being a continuum, ADR (Alternative Dispute Resolution) has a distinct history from that of its modes. ADR is hardly a half century old phraseology, whereas its modes are centuries old. Its modes are rather as old as the history of man itself. Mediation, for instance, traces back to 1800BC, when Mari Kingdom (Syria) used arbitration and mediation in resolving disputes with other kingdoms. In the United States, no one was using the phrase ADR even in 1970s. During this whole decade, libraries and other book-shelves were dominated by books titling like "Labor-management Mediation" while the term ADR was yet to appear in common usage.[1] It, nevertheless, seems that the concept of "drawing lots" by flipping a coin or throwing a stone to the air or some other way remained the most ancient mode of ADR. In fact, the tendency towards peace and inclination of avoiding violence had given birth to the precursors of Alternative Dispute Resolution.[2]

The above facts lead to the presumption that primarily ADR was an alternative to actual fighting and not an alternative to formal litigation. Some writers are, even, of the view that formal litigation is an alternative to ADR for the reason that techniques of ADR are quite prior in time as compared to proper state imposed litigation. Again, in the

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[1]Jerome T. Barrett & Joseph T. Barrett, *A History of Alternative Dispute Resolution,* 188-189.
[2]Ibid,1.

various modes of ADR, negotiation seems to be the first ever. The mediation might have emerged at the time when the intervention of third party would have become expedient. If the intervener had to give decision, he was called 'arbiter', and if he was asked to work out an acceptable solution, he was named 'mediator'. If the intervener, on the other hand, undertook an investigation that brought the matter to an end, was termed as 'fact finding'.

The utilization of different modes of ADR is as ancient as the history of mankind. We would explain it further in this work while discussing the topic from *Sharī'ah*'s perspective. The western authors, nevertheless, trace back the history of amicable mechanisms to the ancient traditional societies; the societies governed by customs and traditions, the times where regular enactments were not heard of. In such societies, disputes were resolved without any recourse to the use of clubs, fists and poison arrows. This practice is still in force in contemporary traditional societies. In this connection, the role of the 'Bushmen of Kalahari', 'Hawaiian Islanders', 'The Kpelle of Central Liberia', 'The Abkhazian of the Caucasus Mountains', 'The Yoruba of Nigeria', 'Chinese Mediation', 'Jargah of Pakhtoon', 'Panchayath of Indians',and 'Tahkīm of Arabs' are worth mentioning. The ancient Greek also played significant role in the recognition and application of amicable mechanisms, particularly the arbitration.

The present work has specific objectives. First, to find out the origin of the concept of amicable mechanisms with various nations, cultures, civilizations, religions and the like. To realize this, the historical background of the mechanisms is studied in various cultures and civilizations with minute details. For instance, the modes of ADR are traced back in the history of ancient Greece and Roman Empire- the richest cultures and civilizations on this earth. The Islamic law, on the other hand, is also studied, comprehensively, for the same purpose. Secondly, the study targets to find out the basic structure and mechanism of ADR, approved by various nations at various stages of the history. This is done for the purpose to know about various facets of the issue under investigation i.e. what were the various ways of the resolution of disputes? who were supposed to resolve the disputes between or among the disputants?, how a resolver was appointed? What was the nature of the decision? Was it binding or non-binding on the concerned parties? What was the sanction behind the decision?, and much more in this regard. All these questions are dealt, though sometime indirectly, in this work.

The Role of China's Legal System in the Development of ADR:

A Chinese proverb says, "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit". Chinese leader Mau Tse-Tung once advised, "Disputes among the people ought to be resolved by democratic methods, methods of discussion, of criticism, of persuasion and education, not by coercive, oppressive methods.[3]

Historians trace back the history of ADR, particularly of mediation, to the ethics of Confucian[4] (the era from 551 to 479 B.C.). According to this theory, no entropy should

[3]Jerome Alan Choen,*; Chinese Mediation On The Eve of Modernization,* in California Law Review, volume 54, August 1966, pp 1201-1226, available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2913&context=californialawreview (last accessed on April 29, 2015).

[4]Confucianism **is** an ethical and philosophical system developed from the teachings of Chinese philosopher Confucius in the 6th–5th century BC. Sometimes viewed as a philosophy, sometimes as a religion, however Confucius never intended to invent a religion. Confucianism is perhaps best

be made to the natural order of things. There is natural harmony in the whole universe and that should not be disrupted. It considers the regular litigation as antithesis of this harmony and, therefore, gives emphasis on non-adversarial proceedings. Owing to this fact, in all state's administrations, mediators are appointed. Interestingly, the post of mediator has been created in all state departments some two thousand years ago, probably from the era of Western Zhou Dynasty. Even today, in the modern China, there are six million mediators working in 950,000 mediation committees. It means that there are more mediators per 100 people in china than lawyers per 100 citizens in the United States.[5]

Unlike other systems, the function of Chinese mediation is twofold; to prevent a dispute from arising and to settle a dispute after it has arisen. This corresponds with the concept of "*daf ul muddharah and raf ul muddharah"* of Islamic Jurisprudence.[6] For the reason that Chinese mediation always remains cautious against any potential threats to natural harmony, it encompasses the preventive norms of *Sharī'ah* as embodied in the subject of *"sad ul zaria".*[7] The Chinese mediators have, therefore, played a more effective and everlasting role in resolving disputes as compared to the role of practitioners of ADR in other communities.

ADR's Progress in the Ancient Greece and its Legal System:

Admittedly, western society was deeply influenced by Greek philosophy, almost in all walks of life. The roots of western ADR could, therefore, be found in the ancient Greece. The ancient Greeks practiced arbitration for the amicable resolution of disputes. In order to reduce the cumbersome pendency of Athenian courts, the government of city state created the post of arbitrator round about 400 B.C. According to Aristotle, every person of sixty years was bound to perform as an arbiter and to hear all civil cases in which the parties preferred informal proceedings. The consent of the parties was a pre-requisite for referring a case to the arbitrator, nonetheless, no choice was available to the arbiter and he had to arbitrate compulsorily. Any refusal in this regard would disentitle him to civil rights.[8]

Arbitration in the Greek society was not informal in nature and arbitrator was bond to follow the prescribed procedure. His appointment was to be made by throwing a lot. He was supposed to work out, in primary hearings, conciliation between the parties. In case of failure, he would hear the parties and examine their witnesses. This procedure is called mid-arb proceedings in the modern ADR. An appellate forum was also

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understood as an all-encompassing humanism that neither denies nor slights Heaven. Chinese have been following this philosophy since two thousand years. It has also deep effects on spiritual and political lives of the people of Japan, Korea and Vietnam. (http://www.religionfacts.com/a-z-religion-index/confucianism.htm , on Feb 11,2015)

[5]William Jia, *Chinese Conflict Management and Resolution* (Norwood, N.J: Ablex Publishing, 2002), 289. See also Jerome T. Barrett with Joseph T. Barrett, *A history of Alternative Dispute Resolution,* 6.

[6] Muḥammad Khalid Atashi, *Sharh Al-Mujallah,* Urdu translation by Amjad Al-ali (Islamabad: IRI Press 1986), 69,95, wherein rule 20 states "Harm is to be prevented" and rule 31 says "Harm is to be abolished".

[7]*Sadd al-Dhriah* means blocking the lawful means to an unlawful end. *Fath al –Dhriah* means a situation where, for the achievement of a legal and beneficial purpose, , lawful means are opened and facilitation is provided. See Hussain Hamid Hassan, *An Introduction To The Study Of Islamic Law (Islamabad: Leaf Publications,1997),186.*

[8]Harrell H. C., *Public Arbitration in Athenian Law* (US: University of Missouri Studies, 1936), 11: 1-42.

available, known as 'College of Arbitrators' which could also refer the case to regular state courts. In a defamation case, for instance, the arbitrator Straton ruled against Midias; the defendant. Midias challenged the decision before the College of Arbitrators. Appeal was allowed and, consequently, Straton was removed from the penal of arbitrators. Later on, a traditional judge maintained the verdict of the College.[9] There is another case of arbitration, on the same way, revealed by Greek mythology. Once the goddesses Juno, Athena and Aphrodite, at the wedding ceremony of Peleus and Thetis, indulged in a noisy quarrel over who was the most beautiful amongst them. Paris; the shepherd prince was appointed as arbitrator. He gave award in favor of Aphrodite, for the later had promised to bestow upon him Helene; the fairest lady. Juno; the female counterpart of Jupiter, became so furious at Paris that she unleashed a host of plagues on Aenaes; the son of Aphrodite. Later on the abduction Helene led to the blood-spattered war of Trojan. This was actually the result of injudicious arbitration.[10]

Aristotle (384-322 B.C.) preferred arbitration over regular litigation. According to him, arbitrators and mediators do not apply the law in its strict sense as the judges do. They rely on the principles of equity, deviating from the coercive application of legal rules. He maintained that what was equitable was superior to what was simply just. By this way, he distinguishes, very accurately, legal justice from equitable justice. To him, fairness overrides justness.[11]

Amicable Settlements in Roman law

Roman law recognized the mediation. The mediators were called by different names, such as proxenetas, medium, intercessor, philantropus, intropolator, conciliator and interlocutor. Cicero (106-43 B.C.)[12], on the other hand, also advocated the significance of arbitration and said that 'regular trial was explicit and clear-cut whereas arbitration was mild and moderate'. Besides, as a result of regular litigation, the party would either win or lose, for a judge would never try to find out a just middle point. On the other hand, a party to arbitration though does not expect full success; nonetheless, he is not afraid of losing at all.[13]

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[9] Jerome T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute resolution,* 7.

[10] George M. Taber, Judgment of Paris available at http://www.amazon.com/Judgment-Paris-George-M-Taber/dp/0743297326 (last accessed on April29, 2015). See also Jerome T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution, 7.*

[11] Horacio A, Grigera Naon, *Choice-of-Law Problems in Commercial Arbitration* (Tubingen: Mohr, 1992)22. See also Aristotle, *Rhetoric*, translated by W. Rhys Roberts (Cosimo, Inc., 2010), 50.

available at

http://books.google.com.pk/books/about/Rhetoric.html?id=t8Rl2z8XYywC&redir_esc=y (last accessed on April 27, 2015) . Robert S. Clemente and Karen Kupersmith, *Pillars of Civilization: Attorneys and Arbitration,* in Fordham Journal of Corporate & Financial Law, Volume 4, Issue 1 1999, pp 78,79, available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1150&context=jcfl (last accessed on April 27, 2015). See also Jerome T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution,* 7- 8.

[12] *Marcus Tullius Cicero* was Rome's greatest orator and verse writer. He was also an influential statesman, successful lawyer and philosopher. Cicero is said to have been a talented student which enabled him to study law under Quintus Mucius Scaevola, one of the greatest authorities on Roman law. His views on amicable settlements and on informal resolution of disputes support the claim of his being deeply influenced by Greek philosophers.

[13]Jerome T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution,* 8.

ADR after the fall of Roman Empire (476 AD):

The instances of ADR could be found in the middle ages; when Europe was passing through an age of darkness. The king of Aquitaine Pippin-I (819-838) entertained numerous property disputes. In 861, Charles the Bald arbitrated in a case between a monk and a group of sixty-one peasants. They complained against the monk Deodadus that he had bent them down into an inferior service by force and had so afflicted them.[14] In the year 1037, in the court of Barcelona, a land dispute between a nobleman Bernat Orger and the Abby of Saint Cugat, after refusal of Bernat to be sworn in, was decided by a unique way of ADR. According to the procedure, a child from each side is plunged in cold water. The winner was the one whose child survives the ordeal. In case of tie, an equal division of the land would take place. In the above case, the land was equally divided after adopting the procedure. In another stunning procedure of ADR, a hot piece of iron was to be placed in the hands of a disputant. If the wound healed within three days, his case gets established and if the wound caused further infections, he lost. The pulling out of a tiny ring from a boiling cauldron was another barbaric procedure of ADR in the medieval practice.[15] From 900 to 1100, business and trade remained the main subject of ADR. The European merchants used to resolve their mercantile issues through ADR techniques, on the basis of justness, fairness, mutual benefits and possible accommodation of reciprocal demands. Gradually, a set of commercial customs, having the force of law, was developed. In this connection, a famous case was decided in 1278.William Dunstable, by sample, bought 103 sacks of good quality wool from Robert Le Balancer. Later on, on selling the wool sacks to a third party, 68 sacks were found inferior not resembling to the sample. The case was decided in William's favor. Consequently, Robert was held liable to make amends. [16]

The first ever enactment is the Irish arbitration law of 1698. It worked for two hundred & fifty years. No amendment was introduced to it. Later on, It was replaced by Arbitration Act of 1954. From 1600 onwards, the need and use of ADR techniques obtained universal acceptance due to the involvement of coastal nations of Eastern Europe in commerce and trade, when trade by sea was progressing day by day. The maritime enterprises and expeditions began to march speedily towards its boom. Maritime and Admiralty courts were established. In this century, under the pretext of commerce and trade, British Empire started to expand its wings to the subcontinent of India. The establishment of East India Company was the primary shape of British Imperialism.

World War I (1914-1918) and World War II (1939-1945) further necessitated the use of ADR techniques in resolution of disputes. Both wars adversely affected the whole world. The entry of United States into World War 1 amounted to a stunning shortage of labor. Most of countrymen, particularly the labor class, were drawn into the war. Significant reduction in immigration, too, was another crisis. These two factors placed question mark on nation's productivity. The situation became worsened due to the strikes, lockouts and ban on workers to join unions. A state of damaging antipathy

[14]Wendy Davies and Paul Fouracre *The Settlement of disputes in early medieval Europe* (UK: Cambridge University Press, 1986), 51.
[15]Robert Bartlett, *Trial by water and Fire* (Michigan: Clarendon Press, 1986) 4,5,8,44. See also T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution,* 15-16.
[16]T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution,* 17.

between labor class and industrialists dominated the situation. To overcome this chaos, President Wilson succeeded in constituting the first War Labor Board. The board played effective role in resolving disputes through mediation and arbitration. United State Conciliation Service (USCS) also played important role in ending, shortening and preventing the strikes. In the first two decades of the 20th century (1900-1920), the National Civic Federation (NFC) resolved numerous labor disputes through mediation and arbitration. World War 11 caused a very high-level decrease in production. The situation became more intensified as compared to that of World War 1.In order to resolve the cases left unresolved by USCS, in March 1941, President Roosevelt constituted National Defence Mediation Board (NDMB). The board, however, could not succeed. Later on, in January 1942, NDMB was replaced by War Labor Board (WLB). WLB promoted mediation and arbitration and applied it to labor-management - disputes. By the end of war, thus, non-judicial dispute resolution {the phrase ADR was not in use by then} gained high acceptability. The era of 1920 to 1945 remained the time of bust and boom for Labor-Management ADR. The formation of League of Nations and creation of United Nations Organization (1945) were the outcomes of negotiations on regional and international levels.[17]

Indian Panchayat:

Panchayat is a compound name. In Sansacrat, *Yat* means assembly and *panch* means five which corresponds to *panch* of Urdu, *Punj* of Persian, *Penzah of* Pashto, *and Penta* of Latin. According to some writers, *panch* means arbitrator. *Panchayat* gave birth to the idea of village self-governing system based on grassroots governance. In modern days, it is known as devolution of powers to grassroots level. *Panchayat* is a village council for settling civil as well as criminal disputes. The evidence suggests that in the era of Rig-Veda (1700 B.C.) village committees "sabhas" existed. These bodies, in belated stages, turned to panchayats. Some writers hold that panchayat of India is twenty five hundred years old. This system was so effective that it remained in force, ironically, during eight hundred years of Muslim Rule in the United India. The reason was perhaps the non-repugnancy of panchayat to the transmitted sources of Islamic Law. The British rulers, however, marginalized it by establishing regular courts and by introducing "controlled local bodies" that safeguarded their revenue interests. In 1765, the *Panchyat* institution was completely abolished by East India Company and it was substituted by the office of *Patwari*; the record keeper of the village. Since then, he has been holding this office and there is no change in his position up till now. Worthy to mention is that both criminal and civil cases could be referred to *Panchayat* and that its decisions were final and irreversible.[18]

Panchayat Raj means self-governance at the village level. Though it is a relatively new idea, nevertheless, its roots go to *panchayat.* It is a decentralized form of government where affairs of village are run by village itself. Mahathma Gandi advocated this idea under the nomenclature of "*Gram Swaraj*". The idea was enacted by the state

[17]T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution*, 106,111,121, 122.
[18]Jerome T. Barrett & Joseph T. Barrett, *A History of Alternative Dispute Resolution*, 8. See also Jawaharlal Nehru, (1964), *The Discovery of India*,(Calcutta: *Signet Press, n.d .).288. See also* George Mathew, Ed, *Status of Panchayati Raj in the States and Union Territories of India* 2000/,edited by George Mathew(Delhi: Concept for Institute of Social Sciences, 2000) 3448, also available at http://www.jstor.org/discover/10.2307/4411085?sid=21105320800861&uid=3&uid=16954968&uid=2&uid=67&uid=3738832&uid=16821864&uid=363776971&uid=62 (last accessed on Feb.11, 2015).

governments in the decades of 1950's and 60's. Keeping in view the significance of the idea, the constitution of India recognized and protected it by 73rd amendment in 1992.[19]

Brehon Law and other Early Legal Systems:

After Celtic settlement before Christ, Old Irish Brehon Law System introduced arbitration. Arbitrator was known as "*Brithem*". A *brithem* could be a person well-versed in law though not the regular appointee of the king as a judge. His remuneration was one twelfth of the disputed sum.[20] In Spain, the arbitration was binding. The arbitrators used to decide the cases with the help of cultural norms that usually led to conciliation. The Spanish king Alfonso the Wise gave legal status to arbitration and allowed the lawyers to practice with the publication of *Siete Partides*, in 1263.[21] In Korea, during Yi Dynasty (1392-1910), arbitration played a significant role and it was widely practiced in resolving commercial and civil disputes. Since Korea remained in isolation from international community, therefore, it could not utilize the arbitration in international disputes.[22]

History of ADR in Monotheistic (Abrahamic) Religions and Legal System (*Qur'ānic* Perspective):

Judaism, Christianity and Islam are the divine religions. The reason is the Holy Books; the Torah, the Gospel and the *Qur'ān*. Evidence suggests that all three religions accommodated ADR with all its modes such as mediation, conciliation, arbitration and negotiation. All these religions, at the same time, encouraged their followers to prioritize the peaceful settlements and to go for regular litigation as a last resort. Abraham (AS), the prophet on whom all the three religions become unified conducted negotiations with King Nimrod, with his father, and with his nation as well.[23] Moses (AS), to whom Torah was revealed, was the prophet of *Allāh* (SWT) in 1619 (B.C.). According to some historians, his era is 1391-1271(B.C.). Jerome tells it 1295(B.C.). His negotiations with Egyptian King, probably Ramsees 2nd, are now part of the history. A sort of distant negotiations also took place between Solomon (AS) and Queen Bilqees.[24] The Holy *Qur'ān*, in its various chapters, has also referred to these negotiations. Jesus Christ (AS) also negotiated the proof of his prophet-hood with his nation.[25] Commands regarding amicable settlements could also be found in the Holy *Qur'ān* in numerous places. Famous Pacts of *Madina* and *Hudaibia* were also the outcomes of negotiations. Arbitration was one of the salient features of ancient pre-Islamic Arab civilization. Some experts of the Islamic jurisprudence are of the view that, referring of the parties to

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[19] The Constitution (Seventy Third Amendment) Act, 1992, Part 1X, Articles 40, 243, 243a-243n, The Gazette of India, Ministry of Law, Justice and Company Affairs, New Delhi, 1993, also available at http://www.orissa.gov.in/panchayat/73rd%20Amendment.pdf (last visited on Feb.11, 2015).

[20] Jerome T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution, 8.*

[21] Ibid

[22] T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution, 8*-9.

[23] Muḥammad Marmaduke Pickthall, *The Glorious Quran, Text and Eexplanatory Translation,* Chapter II (The Cow), verse 258. See also Chapter XVI (Mary) verses 42-48. See also Chapter XIX (The Poets) verses 70-79.

[24] Wahbah Al-zuhaili, *Al-tafsir Al-munir* (Beirut: Dar Al-fikr, 1998), 20:291-298.

[25] Muḥammad Marmaduke Pickthall, *The Glorious Quran, Text and Eexplanatory Translation,* Chapter III (The Family of Imran) verse 49.

amicable settlement, at the first date of hearing, is the duty of *Qāzi*, particularly when disputants hail from the same family.[26]
The details of the above brief are given below.

David (AS) as arbitrator (*Qur'ānic* Perspective):

David (1040-970 B.C) was the prophet of *Allāh* (SWT) and king of Israel. He was father of Prophet Solomon. One day, he ordered his guards not to let anyone enter to his prayer- room, for he would be busy in worship that requires complete retirement. Despite this, two disputants hopped in and asked him for award. He heard the first party and, without giving any opportunity of hearing to the other party, announced his judgment. *Allāh* (SWT) warned him for condemning the second party unheard. The episode appears in the Holy *Qur'ān* as below.

> *"And hath the story of litigants come unto thee? How they climbed the wall into the royal chamber. How they burst in upon David and he was afraid of them. They said; Be not afraid (WE are) two litigants, one of whom hath wronged the other, therefore judge aright between us; Be not unjust and show us the fair way. …."*.[27]

David and Solomon (AS) as Arbitrators (*Qur'ānic* Perspective):

Solomon was the son of David. Once a Shepherd left his sheep unfastened and unattended at night. Resultantly, they trespassed to grapes garden of certain persons and spoiled the plants. The case was presented to David (AS). After hearing the case, he awarded the sheep to the owner of plants. At that time, Solomon was eleven years old. He dissented with his father and advised him for review. Solomon said that the Shepherd would take care of the garden until it grows back as it was. Meanwhile, the owner of the garden would retain the sheep, benefitting therefrom.[28] The Holy *Qur'ān* refers to the story in the following manner.

> *"And David and Solomon, when they give judgment concerning the field, when people's sheep had strayed and browsed therein by night; …"*.[29]

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[26]Muḥammad b. Ahmad Al-Sarakhsi, *Al-mabsut* (Egypt: al-Saadah Press n.d), 16:61. See also Ábdullah b. Ahmad Ibn-i-Qudamah, *Al-Mughni* (Egypt: Dar-ul-Mannar Press 1367), 9:53. See also Muḥammad b. Abi Bakr, Ibni Qayyem Al-Jawziyyah, *Ialam-ul Muaqqiaeen An Rabb-il-Aalamin* (Egypt: Shirkah Attabbah Al-Fanniyyah Al-muttahidah, 1968), 1:107, 108. See also Yusuf Aasaf, *Miraat-ul-Mujallah* (Egypt: Al-matbaat-ul umumiah, n.d.), 2:523.

[27]Muḥammad Marmaduke Pickthall, *The Glorious Quran, Text and Explanatory Translation, Chapter* XXXVIII, Verses 21-24 (Islamabad: IRI Press 1988), 317.

[There are several Israelite stories about the background of these verses. Following the stance of famous commentators of the Holy Quran, I have deliberately ignored it and have remained confined to what Qur'ān itself contains. See also Muḥammad b. Ismail Ibni Kathir, *Qisas Al-Ambia*, (Beirut: Al-maktabah Al-islamia, 1982), 2:255.

[28]Muḥammad b. Ismail Ibni Kathir, *Tafsir-ul-Qur'ān Al-azim*, chapter XXI (The Prophets), Verses 78-79, (Beirut: Aalam al-kutub, 1985) 186..Also Available at http://www.qtafsir.com. See also Al-fakhr Al-razi, *Al-tafsir Al-kabir* (Tehran: Maktab Al-ialam Al-islamia Press, 1313 A.H) 22:195. Muḥammad b. Ismail Ibni Kathir, *Qisas Al-Ambia* (Beirut: Al-maktabah Al-islamia, 1982), 2: 284-285.

[29]Muḥammad Marmaduke Pickthall, *The Glorious Quran, Text and Explanatory Translation*, Chapter XXI, Verses 78-79.

There is another story narrated by Abū Hurayrah (RA). He has quoted the Prophet Muḥammad (SAW), saying that

> *"There were two ladies who each had an infant. The wolf came and took one of them, so they referred their case to David and he awarded the (remaining) child to the older lady…".*[30]

In Jewish tradition, Beth Din is the name of a setting where disputants present their case before three rabbinical judges. Prior to such presentation, they are supposed to settle their dispute informally in *Bitzua* or *p'sharah* i.e mediation or arbitration. Compromise was highly valued in the teachings of Torah and Talmud. After Romans occupation (63 B.C. to 66 A.D.), Hebrews established a sort of arbitration courts which enabled them to avoid Christian courts where they were supposed to be examined under an oath recognizing Jesus Christ.[31]

Amicability and Bible:

In so many places, the Bible encouraged its followers to make peaceful solutions and to avoid regular litigation and violence. Matthew 18 also emphasized on amicable settlements. One can found numerous biblical references, suggesting that ADR techniques were used as an alternative to war. In this regard, arbitration in 1 Corinthians is very particular. Some of the biblical references are given below.[32]

Methew16,17,18

"If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you…".

James 1:19

"Know this, my beloved brothers: let every person be quick to hear, slow to speak, slow to anger".

Romans 12:17-21

"Repay no one evil for evil, but give thought to do what is honorable in the sight of all. If possible, so far as it depends on you, live peaceably with all. Beloved, never avenge yourselves, but leave it to the wrath of God, for it is written, "Vengeance is mine, I will repay, says the Lord." To the contrary, "if your enemy is hungry, feed him; if he is thirsty, give him something to drink; for by so doing you will heap burning coals on his head." Do not be overcome by evil, but overcome evil with good".

Proverbs 15:1

"A soft answer turns away wrath, but a harsh word stirs up anger".

Matthew 5:24

"Leave your gift there before the altar and go. First be reconciled to your brother, and then come and offer your gift".

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[30]Muslim bin al-hajjaj Al-Qushairi, *Sahih Muslim* (Karachi: Qadimi Kutubkhana, 1956), 2:77. Ahmad b. Shuaib Al-Nisaee, *Sunan Al-Nisaee, Kitab Adab Al-qudhat* 49, Chapter 2387, Adjudication on the basis of qazi's own knowledge, hadith no. 5408, (Kabul: Nuamani Kutubkhana, n.d.), 306.

[31]T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution,10.*

[32]Bible verses about conflict resolution, available at http://www.openbible.info/topics/resolving_conflict, on Feb.11, 2015.

Matthew 18:17

"If he refuses to listen to them, tell it to the church. And if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector".

1 Kings 3:25-28

"And the king said, "Divide the living child in two, and give half to the one and half to the other." Then the woman whose son was alive said to the king, because her heart yearned for her son, ...

The parish (village priest) played the role of mediator and arbitrator in various issues involving his parishioners. There were councils of regional bishops under Catholic Church, whose job was to resolve differences on doctrine and practices. The councils mainly concentrated on negotiation and mediation. Even the popes, sometimes, stepped to negotiations".[33]

***Taḥkīm*: The History and Concept of ADR in *Sharī'ah*:**

Tahkīm means arbitration and *sulh* means conciliation. The phrase "*islāh"* literally means reforming but technically refers to efforts for restoration of peace, by removing differences through an amicable settlement,[34] nevertheless its interchangeable use with conciliation (*sulh)* is allowed. To be more specific, *sulh* is one of the products of *islāh.*

Islam, since its emergence, encouraged arbitration. Actually the customs prevailing in the pre-Islamic Arab society were recognized by Islam provided they were not found inconsistent with the express provisions of *Sharī'ah* . These customs included *Qisās* (retaliation), *Qasāmah* , *Mudārabah* , *Salam, Rahan* (mortgage) and much more. *Tahkīm was* also one of such customs. It should be noted here that Arab civilization is older than any other ancient civilization of Europe. The state of Yemen existed long before Athens and Rome.[35] The famous battle *al-basus*, began with the death of a camel and continued for forty (494-534 CE) years.[36] It claimed hundreds of lives. The dispute was eventually settled by the process of *Tahkīm.* Similarly, another famous war "*Dahis* and *Ghabra"* come to an end as a result of *Tahkīm .*[37] In the north of *Kaaba*, a town hall was built and named as *Dar al-Nadwah.* The grand-grandfather of *Quraish, Qussai* has been reported to be its founder[38]. It was a community center where the decision-makers used to hold consultations, dialogues and to conduct meditation.[39] Only matters of serious

[33] T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution*, 11, 12.
[34] Muḥammad Rawas Qalaji and Hamid Sadiq Qunaibi, *Muajam Lughat al-Fuqaha*, (Karachi: Idarat-ul-Qur'ān Publications n.d.), 71.
[35] Muḥammad Hamidullah ,*The Emergence of Islam* (Islamabad: IRI Press, 2004), 187.
[36] Kamal Sulieman Salibi, *A History of Arabia* (New York & Michigan: Caravan Books, 1980), 68.
[37] T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution*, 13
[38]The members of this community centre were mostly from the family of Qusai. Only few members belonged to other clans. A person less than 40 years, while not possessing special aptitudes of leadership, could not be selected as a member. See Dr. Muḥammad Buyumi Mehran, *Dirasat fi Tarikh Al-arab Al-qadim* (Riadh: Jamiah Al-imam Muḥammad b. Saud Al-islamiah, 1982), 406.
[39] Muḥammad Hamidullah,*The Emergence of Islam,* 193.

concern could find a place on agenda of the meeting.[40] The unsacred unsuccessful plan of assassination of Muḥammad (SAW) was also approved in this city parliament.[41]

In the Charter of Medina: the first ever written constitution of the world, the Prophet Muḥammad (SWA) was unanimously admitted as final authority in arbitration cases.[42] Besides, during the reconstruction of *Kaaba,* dispute arose between the leaders of local tribes of Makkah on the point that who would have the honor to reinstall the sacred black stone (*al-Hajr al-Aswad)*. Just before a battle was likely to happen, Muḥammad (SAW) was requested to arbitrate. The Prophet explored a wonderful phenomenon by keeping the stone in a small piece of cloth. He, then, directed the chief of every clan to hold the cloth from specified area and to left it to him. When they did so, the Prophet (SAW) himself placed the Stone.[43]

As for as amicable settlement (*sulh*) is concerned, numerous verses of the *Qur'ān* and a large number of the *Sunnah* speak for it. *Sulh*, its cognates and collocations can be found in more than 175 verses of the Holy *Qur'ān*. [44] Some of the examples are given below.

وَكَانَ فِي الْمَدِينَةِ تِسْعَةُ رَهْطٍ يُفْسِدُونَ فِي الْأَرْضِ وَلَا يُصْلِحُونَ

"And there were in the city nine persons who made mischief in the land and reformed not".[45]

الَّذِينَ يُفْسِدُونَ فِي الْأَرْضِ وَلَا يُصْلِحُونَ– وَلَا تُطِيعُوا أَمْرَ الْمُسْرِفِينَ

"And obey not the command of the prodigal, Who spread corruption in earth, and reform not".[46]

أَوْفُوا الْكَيْلَ وَالْمِيزَانَ وَلَا تَبْخَسُوا النَّاسَ أَشْيَاءَهُمْ وَلَا تُفْسِدُوا فِي الْأَرْضِ بَعْدَ إِصْلَاحِهَا

"So give full measure and full weight and wrong not mankind in their goods, and work not confusion in the earth after the fair ordering thereof".[47]

> ***"****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*…….[48]

Most of the jurists of Islamic Law have allocated independent chapters to *sulh* in their voluminous books. These jurists include Imām al-Shawkānī[49], Imām al-Kāsānī[50],

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[40] Ábdullah b. Muḥammad Al-shaikh, *Seerat-ur-Rasul (saw), Urdu translation* (Jehlum Pakistan: Javid Riaz Printers Lahore, 1990), 44.

[41]Abul Aala Maududi , *Seerat Sarwar-e- Aalam,* (Lahore: H. Faruq Associate Limited Press, 1980), 2: 720-721.

[42] Muḥammad Hamidullah, *The Emergence of Islam, 198, 198.*

[43]Abdur Rahman b.Muḥammad b. Khuldun, *Tarikh Ibn Khuldun* (Karachi: Nafis Academy Printers, Urdu Translation, 1981) 36. See also T. Barrett with Joseph T. Barrett, *A History of Alternative Dispute Resolution*, 13.

[44] Muḥammad Abd Al-baqi Fuad, *Al-muajam Al-mufahras Li Alfaz Al-Qur'ān Al-karim,* (Istanbul: Dar Al-daawah, 1987) 410,411,412.

[45] Al-Qur'ān, An-Naml:48

[46] Al-Qur'ān, Ash-Shu'araa:151-152

[47] Al-Qur'ān, Al-A'raf:85

[48] Al-Qur'ān, An-Nisa:128

[49]Shawkānī, *Nayl al-Awtār*, (Dār Ehiā al-Tourath al-ʿArabī, 1st Edition.2001).

Ibn Qudāmah al-Maqdisī[51], Abū al-Walīd Muḥammad ibn Ahmad ibn Rushd[52], Imām Muḥammad ibn Ahmad ibn Abī Sahal al-Sarkhasī[53], and Ibn ʿĀbidīn[54]. Among these jurists, the work of Imām Muḥammad ibn Ahmad ibn Abī Sahal al-Sarkhasī[55] is very noteworthy in nature.

Hudabia Pact was the outcome of peaceful settlement. Actually, a great deal of conversations, negotiations, information sharing, exchanging of promises and other diplomatic efforts preceded the Pact. Similarly composite dialogues, comprehensive deliberations and a package of binding promises regarding liabilities of each side contributed towards framing of Charter of Madina.[56]

The point that needs to be noted here is the use of word "*islāh"* in so many provisions of primary transmitted sources of Islamic Law. It denotes and includes all human efforts towards an amicable settlement and reforming of strain situations whereas *sulh* is the name of a justice-restored situation. A *muslih* means reformer.[57] So *islāh* is a generic name like ADR; covering negotiations, mediations, conciliations and, above all, consent-oriented arbitration. Besides, *sulh* is a contract under Islamic Law whereas *islāh* is a procedural phenomenon. Hence, the phrase *islāh* of Quran and Sunnah corresponds to ADR of the contemporary systems.

As a mode of ADR, the history of negotiation is older than that of mediation. The first ever negotiation had taken place between the Prophet Noah (AS) and his nation. His genealogical tree is Noah Ibn Lamik, Ibn Mitoshilkh, Ibn Enoch, Ibn yard, Ibn Mahlabeel, Ibn Qinan, Ibn Anoush, Ibn Seth, Ibn Adam the Father of Mankind (PBUH). According to the history of the People of the Book, (except Muslims) Noah (AS) was born 146 years after the death of Prophet Aadam (AS). ábdullah bin Abbas narrated that the Prophet Muḥammad (SAW) said: "The period between Adam and Noah was ten centuries".[58] According to an acceptable opinion, approximately 5764 years have passed

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[50]Abū Bakr ibn Masʻūd al-Kāsānī, *Bādā'iʻal-Sanā'iʻ*,1st Edition, (Beirut: Dār al-Fikr Labnan, 1996), Kitāb-al Sharikah.

[51]Ibn Qudāmah al-Maqdisī, *Al-Kafī*, 5th Edition, (Beirut: Al-Maktab al-Islāmī, 1988).

[52] Abū al-Walīd Muḥammad ibn Ahmad ibn Rushd, *Bidāyt al-Mujtahid wa Nihāyat al-Muqtasid*, Vol. 2, 1st Edition. (Beirut: Dār al-Fikr Labnan, 2003).

[53]Abū Bakar Muḥammad ibn Abī Sahal Sarakhsī, *Al-Mabsūt*, (Beriut: Dar-Ehyā al-Turāth al-Arabi, Edition.2002).

[54]Ibn ʿĀbidīn, *Radd al-Muhtār*, vol. 6, (Beirut: Dār al-Fikr, 2005).

[55]Imām Abū Bakar Muḥammad ibn Abī Sahal Sarakhsī was a prominent jurist of the Hanafī School in the 11th century .He was also known as "*Shams ul al-A'imma* ("the sun of the leaders").He was in prison for more than 15 years due to his juristic opinion against the ruler of the time. The mentioned book is a collection of his lectures delivered by him to his disciples while he was in prison. It is a very comprehensive book, spread over 30 volumes, contains detailed discussion of *ibādah* and *muʻamalah*. He discusses all their related issues in very details and tries to elaborate each and every single issue with practical examples from daily life. His work can be affectively used for introducing new methodology in the field of research related Islamic jurisprudence. He also has a book on the principle of Islamic jurisprudence which is an evidence of his intellectual capacity both in Islamic Law and its jurisprudence. He is considered an authority by the classical and contemporary jurists and weightage is always given to his jurisprudential verdicts.

[56] Muḥammad Hamidullah, *The Emergence of Islam*, 233-236.

[57] Munir Al-Ba'alabacci, *Al-Mawrid English to Arabic (Beirut: Dar-ul-ilm, 1989).*

[58]Muḥammad b. Habban Al-basiti, *Al-musnad Al-sahih ala Al-taqasim wa Al-anwa'a*, Hadith no. 3092 (Beirut: Dar Al-kutub Al-ilmiah, 2010), 3:67. Details are also available at http://www.onislam.net/english/ask-about-islam/islam-and-the-world/worldview/459298-hadith.html, on Feb.

since the creation of Adam (AS). The discovery of 25 million years old human fossil is evidence suggesting that the history of mankind is much older than the above figures.[59] The text of the above-referred negotiations has been narrated by the Holy *Qurān*. It flows as below.

> *"Noah's folk denied the messengers (of Allāh)," "When their brother Noah said unto them: Will ye not ward off (evil) ?" "Lo! I am a faithful messenger unto you," "So keep your duty to Allāh, and obey me." "……."*.[60]

Woolf Report and Reforms:

Since long, the people of England and Wales were complaining against the civil justice system. To them, the system was adversely contributing due to its complex adversarial nature. They, therefore, shouted that the system was outdated, complicated, unable to answer, snail-paced, unwelcoming and above all deadly expensive. In 1995, the National Consumer Council conducted a survey which explored that every three out of four (75%) litigants were extremely unhappy with the civil justice system. In order to defuse the situation, so many attempts were made but the government utterly ignored all reports and recommendations. Commonwealth Law Report (CLR), report of Civil Justice Review in 1988 and the Heilbron Hodge Report 1993, went in vain. Consequently, during 1990's, the situation became so tense that it could not be left unnoticed any further. In March 1994, Lord Chancellor Lord Mackay had to appoint Lord Woolf; Master of the Rolls, to work out the ways for overhauling the civil justice system. In 1995, he submitted an interim report under the caption of "Access to justice" containing 124 recommendations. 1n July 1996, he gave his final report with 303 recommendations. Complexity of procedure, uncertainty of expenses and time and the role of the parties were found to be the main causes of no confidence upon the system. He, inter alia, emphasized on encouragement of out-of-court settlement (ADR) to such extent that exposed the report to the drastic criticism of lawyers. In response, the Labor Government asked Sir Peter Middleton to review the Woolf's reforms. In September 1997, Sir Peter submitted his report and endorsed Woolf's reforms. In April 1999, Woolf reforms were officially introduced that resulted in overhauling the Civil Procedure Rules (CPR) and bringing about radical changes to the Civil Justice System. Evidence suggests that, in the post-reform era, the number of civil actions launched in the High Court has fallen massively. During 1990 and 1991, more than 350,000 cases were instituted in the Queen's Bench Division. By 2002 this had fallen to below 20,000 - and this descending trend has continued growing. "Judicial Statistics reveal average waiting time from issue of claim to trial has reduced form 85 weeks in 1998 to 52 weeks in 2005 in the county courts".[61]

11, 2015. Also see Sayyed Muḥammad Amjad Altaf, *Urdu Dairah Ma'arif Islamiah* (Lahore: Danishgah Punjab Lahore, 2010) 22:473, 474, 475. See also , Ismail b. Muḥammad, Ibni Kathir, *Tarikh Ibni Kasir,* Urdu Translation by Muḥammad Asghar (Karachi: Dar Al-isha'at, 2008), 1:126.

[59]Details are available at http://islamquest.net/en/archive/question/fa3297 (last accessed on Feb.11, 2015).

[60],Muḥammad Marmaduke Pickthall, *The Glorious Quran, Text and Explanatory Translation, Chapter* XXVI (The Poets, verses 105-119), 256.

[61] Anthony Glaister,Woolf reforms: lawyers continue to wrangle over merits a decade on, available at http://www.thelawyer.com/analysis/opinion/practice-areas/city-analysis/woolf-reforms-lawyers-continue-to-wrangle-over-merits-a-decade-on/1000991 (last accessed on Feb.12, 2015). Also see Michael Zander,

Conclusion:

Man by nature is self-centered. He, therefore, always remains ready for quarreling and disagreement with others, in order to achieve his interests at the cost of others. So, a continuous birth of disputes, in a human society, is natural. Try to eliminate the very existence of dispute would be fighting the nature which is not hard but impossible. We may, however, reduce and control the disputes by uprooting them at the early stages. The disputes should, therefore, not be left unnoticed, severing day by day, challenging the peace and tranquility of the society. It is, therefore, the duty of every civilized society to have an appropriate mechanism for the resolution of such disputes in order to overcome their adverse effects to the possible extent. The need for such mechanism is almost realized by each and every developed society, exists or existed in the past, and from here, the need and significance the concept of Alternate Dispute Resolution (ADR) emerge. For instance, the Chinese leader Mau Tse-Tung has the view that disputes among the people ought to be resolved by democratic methods, methods of discussion, of criticism, of persuasion and education, not by coercive, oppressive methods. History shows that, in China, there were two objectives of ADR i.e. to prevent a dispute from arising and to resolve it when it arises. On similar way, in ancient Greece, the mediator has been given various names such as proxenetas, medium, intercessor, philantropus, interpolator, conciliator and interlocutor. This fact shows that the ancient Greece society had a very established structure of ADR alongwith its various modes like mediation and arbitration. *Indian Panchayat* (a typical type of ADR) has been existing in India since long. This concept has paved a way to the idea of village self-governing system based on grassroots governance. This is now known as devolution of powers to grassroots level. The concept of ADR is too much deep-rooted in the history of human. For example, Old Irish Brehon Law System introduced arbitration after Celtic settlement and before Christ. The name of arbitrator in such system was "*Brithem*". This is the oldest system which can be cited, as a solid evidence, for the primordial inception of the concept of ADR. On similar way, the mechanism of ADR is precisely available in almost all divine religions i.e. Judaism, Christianity and Islam. The Holy Books; the Torah, the Gospel and the Qur'ān, accommodate the concept of ADR by one way or the other, with different approaches but with the same objective (to prioritize the peaceful settlements and to go for regular litigation as a last resort). The prophets David, Solomon and Muḥammad (AS) have acted as arbitrators on many occasions. The Holy Qur'ān has elaborated some of their awards given in a variety of disputes. Among these divine religions, Islam has given too much importance to the concept of *Tahkīm* and *sulh* for peaceful settlement of disputes. *Tahkīm* means arbitration and *sulh* means conciliation; both are the distinctive types of ADR. Islam, being a complete code of life, envisages rules and regulations for these thoughts - both at theoretical and practical levels.

Cases and material on the English Legal System 10th edition (UK: Cambridge University Press,2007)54, 138. Also see National Consumer Council.Seeking Civil Justice: A survey of people's needs and experiences, 1995, NCC. See also Gary Slapper and David Kelly, *The English Legal System,* (UK: Taylor & Francis, 2009) 334, also available at http://www.amazon.com/Seeking-Civil-Justice-Peoples-Experiences/dp/1899581057 (last accessed on Feb.12, 2015).