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Research Article

## An Appraisal of the Practice and Procedure of Sulh (Settlement Out of Court) An Islamic Law Perspective

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**Abstract.** Sulh Meaning Amicable Settlement or Conciliation is a Fundamental Mechanism in Islamic Jurisprudence for Resolving disputes outside formal Court Proceedings rooted in the Principle of Justice and Social Harmony. This Appraisal Examines the Legal framework, historical eviction and contemporary application of Sulh in Islamic Law, it explore how Sulh is Structured in the context of different legal schools and compares it with more than Alternatives Dispute Resolution (ADR) Mechanisms highlighting both the Similarities and the features of Islamic Settlement Processes. In Islamic legal Introduction, Sulh is Permissible in matters of Personals disputes, Property Rights, and even some Criminal cases, provided it does not contravene divine injunctions or Public welfare. The appraisal concluded by evaluating the Potential of Sulh in contemporary legal context, advocating for it integration within modern ADR Practices and Proposing reforms to enhance its applicability Particularly in multi-cultural and Pluralistic societies. This Study also highlights the benefit of Sulh in Preventing relationship and promoting Peace making. It is an Enduring Modern Dispute Resolution in both Muslim and Non-Muslims Communities.

**Keyword:** Appraisal, Practice, Procedure, Settlement, Islamic law

## INTRODUCTION

From the beginning of recorded history and nature of human being, dispute and disagreements have been as old as man himself right from his creation by the Lord of the universe (Allah). This is due to the complexity of the nature of how man was created. It is often said that no man is an island; instinctively, man must interact, interrelate, stay and reason together with other people in his daily life though in different ways, manners and approaches. The imperative intermingling of men and their interaction among themselves makes dispute and disagreement inevitably inseparable of life because of this disagreement and dispute man cannot live in isolation. Disagreement may occur between individuals of the same family, tribe, societies, communities of the same country, corporate bodies, political parties, sovereign state, institutions, religious organizations, and so on and so forth. It is a common phenomenon in sovereign nations like ours with cultural, lingual and religious diversities. Dispute, if not quickly managed by settlement often result into bloody clashes and war of which consequences are bitterly painful, regrettable and adverse results with irreparable damage and hardships. In order to checkmate disagreements in whatever form; individual, societal, communal, tribal, religious, political, environmental, commercial, local or international, when these negative attitudes arose.

There exists a general guide in the present and the past *Shariah* courts of resort to the practice and procedure of *sulh* (settlement out of court) from the Maliki's school of jurisprudence in the process of adjudication. But while the interpretation given to Islamic law by the Maliki school of jurisprudence applies almost throughout *Shariah* court in Northern Nigeria. These laws are not in codified forms but only found in various books of Fiqh such as *Mudawwanat-al-kubrah*, *Askari*, *Tuhfatulhukkam*, *Muktasar-al-Khalil* etc. And in view of the fact that today, lawyers both Muslim and non-Muslim have the right to audience before *Shariah* court in Nigeria and these lawyers may not be knowledgeable in the original language of the sources of the literature on the subject of *sulh* which are mostly in Arabic and that the official language of the courts also English supplemented with indigenous popular language in a particular society i.e. Hausa.

### Historical overview on the concept of Sulh

The Islamic legal system has a different approach for Alternative Dispute Resolution method from the Western Countries (ADR) *sulhis* a popular aspect of Islamic legal system which derives its origin like other Islamic principles of law from the Holy *Qur'an* and supplemented by the *Ahadith*; traditions of the holy Prophet Muhammad (SAW) and *Ijma* of the Islamic jurist.

After the advent of Islam in the sixth century, the Arabian peninsula become the geographical base of the Islamic state, which by the prophet Muhammad (SAW)

and his four rightly guided *caliphs*,<sup>1</sup> during this period, *sulh* was practiced and resorted to whenever disputes arose. An example of this is the incident that took place between the people of Makkah and Madinah called treaty of Hudaibiyah as it is summarized below;

Towards the sixth year of the hijrah, the Prophet decided to perform, accompanied by his followers (1400-1500), the lesser pilgrimage or pious visit (*umrah*) to Makkah. Although for nearly six years there had been a more or less permanent state of war between the Muslim community at Madinah and pagan oligarchy of Makkah, the Prophet did not anticipate any hostilities on that occasion, since the of Dhul-qaadah, in which he intended to reach Makkah, was one of the four sacred month during which, in accordance with time-honoured Arabian custom, all warfare was outlawed, and particularly so in and around the city. A call was issued to some of the allied Bedouin tribe in the vicinity of Madinah to join the holy prophet on this pilgrimage but most of them excused themselves on some pre-text. Thus, the prophet's parties set out for Makkah, all of them dressed in the pilgrims' *ihram* (*garb*) and, apart from their sheathed swords, unarmed.

On learning of the prophet approach, the makkans decided against all Arabian traditions to oppose the entry of the pilgrims by force of arms. A detachment of two hundred horsemen under the command of Khalid ibn Walid (who was destined to embrace Islam less than two years later) was sent out to intercept the prophet's party, while several thousand heavily armed men took up positions around Makkah. Since the prophet was neither inclined nor in a position to give battle, he turned westwards from Birr Usfan (a place about one-day journey from Makkah) and alighted on the plain of Hudaibiyah, where he and his followers remained for the next few days. There and then negotiations were opened between the Muslim and the Makkah oligarchy, after some preliminary discussion conducted by various emissaries of both parties, the prophet Muhammad (SAW) sent Uthman Ibn Affan as his envoy. Shortly after Uthman's arrival in Makkah, a rumour that he had been murdered reached the Muslim camp at Hudaibiyah. Thereupon the Prophet Muhammad (SAW, expecting a treacherous attack by the Makkans, assembled his followers and, sitting under a wild alacia tree, took amid scenes of the greatest enthusiasm, a pledge from each one of his followers that they would remain steadfast and fight unto death; and after the recitation of verse of this Surah, this "pledge of the free" become known to history as "the pledge of God's) Goodly acceptance".

When a few days later the rumor of Uthman's death proved false and he himself returned to Hudaibiyah it became clear that the Makkans were prepared to conclude a truce. A treaty was drawn up, stipulating, among other provisions, that all warfare between Makkah and Madina should be suspended for ten years, and that the Prophet and his followers should refrain from entering Makkah that year, but would be free to do so the following year. The prophet also agreed that if a Makkah minor or any other person under the guardianship should go over to the Muslims without the permission of his guardian, he would be returned to the latter; but should any follower of the Holy Prophet whether minor of age go over to the Quraish of his own

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<sup>1</sup> The rightly guided caliphs are; Abubakar, Umar, Usman and Aliyu.

free will, he or she would not be returned. Although this last stipulation appeared at first glance to be disadvantageous to the Muslim, it is obvious that the Holy Prophet agreed to it in pursuance of the principle that “there shall be no compulsion in matters of Religion” (2:256).

The truce of Hudaibiyyah was prove of the greatest importance to the future of Islam. For the first time in six years, peaceful contacts were established between Makka and Madina and thus the way was opened to the penetration of Islamic ideas into the citadel of Arabian paganism. The Makkans who had to visit the Muslim camp at Hudaibiyyah returned deeply impressed by the spirit and the unity of Muhammad’s followers, and many of them began to waver in their hostility towards the faith preached by him. As soon as the perennial warfare came to an end and people of both sides could meet freely, new converts relied around the Holy Prophet, first in tens, then in hundreds, then in thousands so much so that when the pagan Quraish broke the trace two years after its conclusion, the holy Prophet could and did occupy Makkah almost without resistance. Thus in fact if not in appearance, the trace of Hudaibiyyah ushered in the moral and political victory of Islam over all Arabia.<sup>2</sup>

From the above quoted incidents the following were the objectives that was achieved as result of the treaty, viz;

- i. That all warfare between Makkah and Madinah should be suspended for the period of ten years.
- ii. That No entrance to *Makkah* by any disciples of the holy prophet for that years.
- iii. That any *Makkan* citizen who come over to the prophet in *Madinah* must be sent back to *Makkah*, but if the person is from the side of the holy prophet, such a person will not be sent back to *Madinah*. Thought this last stipulation was very disadvantageous to the Muslims, Thus the prophet still agreed to it in the pursuance of the principle enjoyed by Allah (SWT).<sup>3</sup>

This trace of treaty of *Hudaybiyya* became a great event of history in the life of Islam peace and stability flourished for the first time between the *Makkah* and *Madinah*; Islamic ideas perpetrated the Arabian Peninsula bringing up unity between the communities which later prepared for the victory of Islam and the entrance of the prophet to the city of Makkah the following year on pilgrimage with his companions without any hostility. It is concluded that *sulhin* Islamic legal system was practiced and implemented toward the sixth years of the *Hijrah* calendar which is now 1439 years; whereas, it was only in the 1945 that the United Nations established and implemented what is now been celebrated as Alternative Dispute Resolution (A.D.R).

### Sources of Sulhu

The institution of *Sulhi* is not something new in the Islamic legal system. The basis of *Sulhin* Islamic Law is sourced from the primary, and secondary sources of Sharia. It has been established by various verses of the holy *Qur’an*, the Sunnah of the

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<sup>2</sup> U.D. Keffi op. cit. p. 192

<sup>3</sup> Qur’an, chapter 2:256.

Holy Prophet Muhammad (SAW) and the consensus of the Muslim Jurists.<sup>4</sup> However, the authorities of *Sulh* can be found from the following Qur'anic provisions:-

*“There is no goodness in much from their (people) confidential talk save (in) him who commanded with charity or kindness or reconciliation between the people, and who does that asking Allah's satisfactions, so we will give him a great reward”*<sup>5</sup>.

*“..... If they effect a reconciliation between them, and reconciliation is better, and avarice has been made to be present in the (peoples) minds; and if you do good (to others) and guard (against evil), then surely Allah is aware of what you do”*.<sup>6</sup>

*“And if you fear a breach between the two, then appoint Arbiter from his family and an Arbiter from her family; if they both desire agreement, Allah will effect harmony between them, surely Allah is knowing, Aware”*.<sup>7</sup>

*“..... So be careful of (your duty to) Allah and set aright matters of your difference, and obey Allah and his prophet if you are believers”*.<sup>8</sup>

*“And if two parties of the believers quarrel, make peace between them; but if one of them acts wrongfully towards the other, fight that which acts wrongfully until it returns to Allah's command; then if it returns, make peace between them with justice and act equitable; surely Allah loves those who act equitably”*.<sup>9</sup>

*“The believers are but brethren, therefore make peace between your brethren and be careful of (your duty to) Allah that mercy may be had on you”*.<sup>10</sup>

*“And help one another in righteousness and piety and help not one another in sine and aggression and keep your duty to Allah, surely Allah is severe in requiting”*.<sup>11</sup>

*“Surely Allah commands you to makeover trust to those worthy of them, and when you judge between people, judge equitably, surely Allah Admonishes you with what is excellent”*.<sup>12</sup>

*“And obey Allah, His messenger and dispute not with another; lest you get weak-hearted*

*and your power depart and be steadfast, surely, Allah is with the steadfast, surely, Allah is with the steadfast”*.<sup>13</sup>

*“Give full measure when you measure out, and weight with a true balance”*.<sup>14</sup>

The above quoted verses strongly advocate amicable settlement of dispute on equitable and fair manner and Allah promise a divine reward for those who do so. Likewise, from the *Sunnah* there are many *Ahadith* of the Holy Prophet which are in support of the institution of *Sulh* in Islamic Law as follows: -

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<sup>4</sup> Sayyid Sabid, *Fiqh-Sunnah*, Dar-al-Fath, al-Qahira (2009 21<sup>st</sup> ed) Vol. 3, 210

<sup>5</sup> Qur'an 4 v 118

<sup>6</sup> Qur'an 4 v 128

<sup>7</sup> Qur'an 4 v 35

<sup>8</sup> Qur'an 8 v 1

<sup>9</sup> Qur'an 49 v 9

<sup>10</sup> Qur'an 49 v 10

<sup>11</sup> Qur'an 5 v 2.

<sup>12</sup> Qur'an 4 v 57.

<sup>13</sup> Qur'an 8 v 45.

<sup>14</sup> Qur'an 17 v 34

*From the authority of Sa'ad Ibn Abi Maryam, from Abu Ghassan from Abu Hazim, from Sahal Ibn Sa'ad, may Allah be pleased with them, that a misunderstanding had ensured between the family of Amr Ibn 'Arf, so the Prophet (SAW) went in a contingent of some companions to reconcile them, prayer approached before his return. Bilal did the proclamation of prayer (Azaan) but the Prophet (SAW) was yet to return. He met Abu-Bakr and told him that time was due for salat (prayer), but the Prophet (SAW) still being waited. Can you lead the prayer? He acquired. Abu-Bakr responded positively saying to Bilal; "if you so wish. Bilal said the Iqaama" and Abu-Bakr came forward and commenced leading the prayers. Then the Prophet (SAW) came back and walked through the row until he reached the first....<sup>15</sup>*

*"Sulh is permissible among the Muslim except the one which makes the lawful unlawful and which makes unlawful as lawful. Muslim are bound by their promises except promise that permit the unlawful as lawful and the lawful as unlawful."<sup>16</sup>*

*"He who makes peace (Sulh) between the people by inventing good information or saying good things (in attempt to please the disputants) is not a liar."<sup>17</sup>*

*"Shall I inform you of a deed more rewarding than fasting, prayer and charity? It is the Act of settlement between people, for bad relationship and disputes are like a razor (which can eliminate a community).*

*"There is a Sadaqa to be given forever joint of the human body, and for every day on which the sunrise, there is reward of Sabaqa for the one who established Sulh and justice among people."<sup>18</sup>*

Ibn Qudama an eminent Muslim jurist has also stated that all Muslim jurist have agreed in the appointment of two Arbitrators when a dispute and dissension occurs between two spouses and it is not known of the two spouses is in fault.<sup>19</sup> It has also reported by Imam Al-Shafii from Ubayda-al-Salmani; who said: A man and woman come to Khalif Ali ibn Abi Talib and each of them have a group of people with them. Ali ordered them to appoint a male Arbiter from his family and one from her family. Then he said to the Arbitrators, do you know what your responsibilities are? If you find that you can bring them back together, then do so. If you find that they should be separated, then do so. The woman said "I am pleased with the book of Allah concerning what is up on me and what is for me; the man said as for separation, I will not accept that; Khalif Ali (R.A) told him, you are lying, by Allah until you accept the same thing she has accepted."<sup>20</sup>

## Meaning and Nature of Sulh in Islamic Law

*Sulh* as a concept has various definition given by different authors and Islamic jurists within the context of Islamic law. Literally, *Sulh* is an Arabic word which means perfection especially if things become good; it also means terminating a dispute.<sup>21</sup>

<sup>15</sup> Sahih al-Bukhari; sulh chapter, Hadith No. 2690.

<sup>16</sup> Muhammad Muhsin Khan; Sahih al-Bukhari, Vol. 4, Hadith No 2795

<sup>17</sup> Muhammad Muhsin Khan; Sahih al-Bukhari, Vol. 3 (Eng. Trans) p.533, Beirut.

<sup>18</sup> Ibn Qudama, al-Mugni, Op. Cit Vol. 7, p.5

<sup>19</sup> Al-shafii, Al-Umm, Op. Cit Vol. 4, p. 463

<sup>20</sup> Abdullahi, M.M. Op Cit p. 22

<sup>21</sup> Sahil al-Bukhari Vol. III Book 57 p. 4.

*Sulh* is used as a term in many places in the Holy Qur'an signifying an agreement or settlement over a property dispute and retains the sense in later Islamic legal usage. It applied to treaties such as sulh Versailles.<sup>22</sup>

It also reflects a sense of resolution of conflict through negotiation where the two parties appoint respected individuals to mediate the dispute; a truce, is declared, a settlement is reached that maintains the honour and status of both parties and a public ritual takes place. Particular importance is the fact that practice affirms bond between groups and not just individuals.<sup>23</sup> It averts a cycle of revenge.<sup>24</sup>

Technically, Ibn Arafah consider *sulh* to mean abandonment or relinquishing of one's right or claim with a consideration for the purpose of terminating dispute or its avoidance altogether.

To Imam Raghib al-Asfahani, *sulh* stands for all means and method of reconciling disputing parties.<sup>25</sup> *Sulh* is a termination of a quarrel or hostility or it is an agreement that terminates hostilities or misunderstanding between disputants.<sup>26</sup>

From the definitions seen above *sulh* does not come in a vacuum. It is always preceded by a conflict, dispute misunderstanding of various nature – contractual, economic, political, military, etc. also *Sulh* has been used to refer both the process of restorative justice and peacemaking, a method of resolving dispute amicably<sup>27</sup>. *Sulh* is a settlement ground upon compromise negotiated by the disputants themselves or with the help of a third party. It is an actual outcome of the reconciliatory processes undertaken to resolve a dispute, that is contract entered into by the disputants containing agreed private settlement out of court.

### Nature of *Sulh*

*Sulh* as an institution under the Islamic legal system it takes different forms *sulh* take. The form of settlement between Muslims in their civil transaction such as sale contract, lease, gift etc; and their social dispositions.

#### 1. Legality of *Sulh* in Islamic Law

The legality of the practice of *Sulh* was evidence from its proof from the provision of the holy Quran which commending assistance Allah says: "Help ye one another in righteousness and piety, but help ye not one another in sin and rancor"<sup>28</sup>

The messenger of Allah (SAW) said the best of you in Allah's eyes are those who are more beneficial to others and amongst the best deeds in Allah's eyes are: creating happiness in the heart of a Muslim praying his debt, or satisfying his hunger" He added attending my brothers need is dearer to me than retract "*Ikhaq*" in

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<sup>22</sup> Lewis (1991), p. 78-80

<sup>23</sup> Irani, G.E. (2006) Apologies and Reconciliation: Middle Eastern Rituals" Taking Wrong Seriously: Apologies and Reconciliation. Standard, University Press.

<sup>24</sup> Gopin, Mare (2003) Holy War, Holy Peace; How Religion can Bring Peace to the Middle East. Oxford University Press.

<sup>25</sup> Bukhari; <http://www.islamaljaryash.net/albukhary.html> Book 57 p. 4

<sup>26</sup> Op. Cit p. 275

<sup>27</sup> Keffi, S.U.D. (2010) Op. Cit, pp 192

<sup>28</sup> Muhammad Muhsin Khan & Muhammad, Taqi-ud-Din-al-Hilali, Op. Cit Q 5 v 3

this Masjid (of *Rasul*) for one month.<sup>29</sup> Also prophet says: "Intercede so you will be rewarded".

The second Caliph Umar Ibn Khattab (R.A) says return the disputants for out of court till the reconciliation is achieved, verily, litigation causes rancor between disputants.<sup>30</sup> So, Also in his lengthy letter to Abu Musa Al-Ash'ari(R.A) on the occasion of his appointment as a judge in Kufa as follows... *Sulh* (compromise) is permissible among Muslims, but not any agreement though which something forbidden would be permitted, or something permitted forbidden.

Therefore, in view of the foregoing Quranic provisions, Ahadith of the holy prophet Muhammad (SAW) and jurist postulation like Umar the second caliph's letter served as the legality of *Sulh* and its practice between the contending Muslim parties, is considered an act virtuously recommended, thus it is not wrong for a judge (*Qadi*) to make a recommendation to the disputing parties to resort to settlement out of court. The judge (*Qadi*) may also encourage them to settle their conflict or dispute out of court by way of *Sulh*.

## 2. Circumstances under which Sulh is recommended

Islam being a complete way of life touches all aspect of human endeavors, likewise in *Sulh* institution it is not all aspect of life that *Sulh* will be applied to in setting conflict or dispute or disagreement. Accordingly, the Islamic law has a practical and procedural laid down instances that are amenable to *Sulh*. It is not lawful for a *Qadi* (Judge) to pass a judgment on a case without fully having it inside, *Sulh* could be resorted to in an instance where a judge could not ascertain the nature of the case or unable to determine clearly who is right or wrong the contending litigants despite the evidence before him due to the complexity of the case.

During the life time of the holy prophet Muhammad (SAW) who practicalized *Sulh* and made it plain that he was questioning of judicial proceedings; which were revised by man and therefore wrong. Thus the trial is not considered as an ultimate truth-finding mechanism that will lead to substantive justice. It can be tainted and subverted by the imperfect nature of human kind; therefore, it should be avoided when possible.

Al-Shafi'i stated that he prefers that if a judge command disputant to attempt *Sulh* and extricate himself from his judicial duties (offer and adjournment of the case for one or two days to facilitate their *Sulh*). However, if they disagree, he cannot turn them away and should instead proceed to adjudicate between them. Imam Shafii warns the judges against judging of the decision is not plain to him, for it amount to oppression. The judges have the burden of ascertaining exactly where judgment should lie, no matter how long it takes.<sup>31</sup> The judges before whom a case is presented, they may advise the parties to incline to *Sulh* in any of the following situations or related matters.

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<sup>29</sup> Al-Tabari, al-Mujam-al-Kabir

<sup>30</sup> M.T. El-Imairi (ND) Murafa'at Monograph, Op. Cit, pp. 17

<sup>31</sup> Al-Shafi'i al-Umm, Op. Cit Vol 6, p 312

- i. Where the parties to litigation happen to be influential, *Sulh* is advised to avoid breach of peace. As a result of delivering judgment, if the other parties lose, the judge may advise peacemaking between them.
- ii. Where the case is complicated due to legal issues or intrigues involved therein.
- iii. Where each parties to litigation is able to present his evidence but the evidence so presented are on equal weight or strength when put on a scale of justice, both appear to be same in terms of proving claim and denial, then the judge may result to such settlement out of court. Where, however, evidence of one of the parties becomes convincing in terms of strength, in establishing the claim or disproving it, then the judge is mandated to proceed with the case. The need to advice the litigants to resort to *sulh*, will not arise.
- iv. He may also advise the parties on *Sulh* where the litigants happen to be learned and respected men in the locality with large followers
- v. Where the litigation is such that May likely strain blood relationship among disputants tied by relationship. Caliph Umar bn khattab was reported to have said that: avoid litigation among people tied by kindship. Litigation among them causes animosity”. If one or both of the litigants accept his advice to incline to making peace, then, fine and good where, however, both litigant or one of them reject the settlement of their dispute through making peace, then, he has no alternative than to continue with the litigation up to the point of delivering judgment. This goes with the Yoruba adage that says “No friendship after litigation”.<sup>32</sup>
- vi. Where the litigants who appear before the court consist of an influential and a weak litigant who may not be able to derive the fruit of the judgment due to the influence of the other party, the judge may advise on peace-making but on the condition that the judge does not appreciate the nature of litigation or that the two parties consent to making peace.

It must be pointed out that even though Shariah recommends and encourages parties to resort to *Sulh*, it is however prohibited for a judge to force one or both of the parties to submit to *Sulh* against their will or the will of anyone of them. He should not persist on it unless with the agreement from both sides.<sup>33</sup>

### 3. Basic Condition Governing Sulh

*Sulh* contract has certain conditions that must be present to the party concluding the contract. For instance, the person making *Sulh* must be sane, both insane and minors base on their condition has been deprived of making *Sulh*.<sup>34</sup> Likewise, the subject matter of *Sulh* must be something lawful in the eyes of *Shariah* and it must be treasury or something similar such as real estate owned by the dependent and known to the parties. Jurist list important type of dispute that could occur between people now a days, and up on which *Sulh* may be applied even though

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<sup>32</sup> Keffi, S.U.D. (2010) Op. Cit, pp 192

<sup>33</sup> A.S. Shanjity, A. (2004) Mawahib-al-Jahil min Adillatak-Khalil, Vol. 4 pp 54-55, Al-Maktab, al-Ilmiyyah, Bei

<sup>34</sup> Doi, I.A. Op. Cit pp 553

not purely permitted by the *Shariah* as a subject matter of *Sulh*, at least in the opinions of some jurists. The following areas are importance up on which *Sulh* applied.

Firstly, if debt is deferred and the creditor and debtor are reconciled that part of the money is to be paid in advance while the other part considered waived. Some jurist allowed the exercise of this *Sulh* while others considered it as *Riba*, like Ibn Qiyim al-Jawziy and Ahmad bn Abdulhalim (At-Tayimiyyah).<sup>35</sup>

Secondly where the debt is immediate and the plaintiff reconcile with the defendant to pay part of the debt within a stipulated time. That is he fixes a time for the payment to be made in exact day, if he fails, then he is liable to pay the previous figures that has been waived. Abu Hanifa and one of his disciples Muhammad bn Hassan As-Shaybani opined that if the payment is not made on the stipulated time, the debt will return to its original status, and the *Sulh* will be nullified base on the Defendant's failure to comply with the plaintiff's stipulation.<sup>36</sup>

Abu Yusuf of the Hannafi School opined on contrary, that the failure of the defendant to comply with the plaintiff's stipulation will not invalidate the terms of the *Sulh*; he is only liable to pay the agreed amount. The preponderance view is that of Imam Abu Hanifa and Muhammad bn Hassan Ash- shay bani.

Thirdly, if the disputing parties agree to reconcile and the price offered is a benefit rather than a tangible thing or money. In other words, the defendant, who owes the plaintiff ₦20,000 agrees to give the Plaintiff use of his house for 1 year in lieu of paying the amount owed in funds. In this instance the Muslim jurist opined that the *Sulh* contract is permissible, in that, it resemble a rental contract.<sup>37</sup>

### Essential Elements of *Sulh*

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

- a. Al-MusalihLahu (one who makes a declaration of claim)
- b. Al-MusalihuAlayhi (one against whom the claim is declared)
- c. Al-MusalihAnhu (subject matter in respect of which the claim is lodged)
- d. Al-MusalihBihi/badl al-Sulh (the object offered for the Sulh/consideration)
- e. Al-Ijab (offer) and
- f. Al-Qabul (acceptance)

### 4. Classification of Sulhu

Thus, *Sulhis* governed by both substantive rules as well as procedural rules. the scope of this concept regarding the types and classifications of *Sulh*to be perceived differently by the Islamic jurists; some referring to the procedural aspect in their discussions while others referring to the substantive rules on the subject. Be it as it may, this chapter identifies and highlights the various types and classifications of *Sulh*under Islamic law.

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<sup>35</sup> Abdullahi, M.M. (2014) Op. Cit. p. 39

<sup>36</sup> Op. Cit. p. 40

<sup>37</sup> Al-Kasani, Bada'i-al-Sana'i fi Tabrib, al-Shari'ih Vol. 6, p. 47

It is generally said that *Sulhis* largely divided into two, transactional and confrontational. Transactional refers to relationship engendered by mutual consent, be it contractual, marital, etc., as well as that engendered through any of the well-known and established processes of acquiring and disposing property under the Sharia. Confrontational on the other hand refers to a situation of misunderstanding or conflict arising out of war or armed conflict<sup>38</sup>. The transactional category of *Sulhis* more common than the former which is occasional but devastating<sup>39</sup>. Procedurally, Sulh in the context of this research is classified into three namely;

- a) *SulhalalIqrar*(i.e., *Sulh* upon the admission of liability by the defendant);
- b) *SulhalalInkar*(i.e., *Sulh* upon the denial of liability by the defendant);
- c) *Sulh an Sukutin*(i.e., *Sulh* upon neither the admission nor denial of liability by the defendant).<sup>40</sup>

**a) *SulhalalIqrar* (Upon Admission of Liability by the Defendant):** When *Sulhis* contemplated upon the admission of liability by the defendant (*sulhualaliqrar*), the jurists see such a *Sulh* as a contractual or tortuous matter such as debt, sale, cases of indemnity that is reached between the disputing parties as they come to term so they can agree on a certain condition with the aim of settling their dispute. That is to say, all such rules that relates to a sale agreement under Islamic law should be duly observed and complied with in the process of the *Sulh*. This applies only where the defendant has readily admitted liability or acknowledges his indebtedness to the Plaintiff (the claimant)<sup>41</sup>. Here, the defendant admits the plaintiff's claim, while agreeing to pay a certain amount of money or offering something in return for settling the debt and ending the conflict.

**b) *Sulh-alal-Inkar* (Upon Denial of Liability by the Defendant):** As to *Sulh* upon the denial (of liability) by the defendant (i.e., *al-Sulhualalinkar*), is a form of *Sulh* that is permissible in the opinion of Hanafī, Mālikī, and Hanbalī, but excluding the Shāfi'ī, jurists. This is a kind of *Sulh* where the defendant may deny the claim launch against him by the plaintiff, be it a property, debt or *manfa'a* (usufruct). It also involves an instance where the defendant denies the debt or immovable property that the plaintiff claims while admitting that the plaintiff has a right to less than what he is claiming. Accordingly, admission and denial occur simultaneously. Under such circumstances, the majority of Muslim jurists are of the view that there is nothing to prevent the conflicting parties from drawing up a *Sulh* contract to end the conflict.<sup>42</sup>

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<sup>38</sup> Abubakar, M. S. (2010) The Role of the Sharia in Resolving Armed Conflicts Between Muslims or Between Muslims and Non-Muslims, in Aliyu, I. A. Alternative Dispute Resolution and Some Contemporary Issues, M. O. Press and Publishers, Kaduna, p. 172.

<sup>39</sup> Muhammad, A.M. (2014). *The Concept of Sulh In Islamic Law: A Case Study of the Practice and Procedure of the Katsina State Sharia Courts*, being a LLM thesis (unpublished) submitted to the School of Post graduate Studies, Ahmadu Bello University, Zaria. p.64.

<sup>40</sup> Sayyid Sabiq, op cit, p. 212.

<sup>41</sup> Abubakar, M. S. (2010) The Role of the Sharia. Op. cit, p.66.

<sup>42</sup> Sayyid Sabiq, op cit, p. 213.

However, on the other hand, Shāfi‘ī and Ibn Hazm opined that, in such cases of denial (i.e., *al-Sulhualinkar*), *Sulh* is not permissible stating that *Sulh* is only permissible upon the defendant’s admission of liability and no more because in their view, *Sulh* justifies an established legal right which cannot be based upon denial by the defendant. These jurists further held the view that, a defendant’s act of paying money solely for the sake of ending a conflict is similar to the act of giving a bribe, which is not permissible by the *Shariah*<sup>43</sup>. But it may be observed that, in circumstances of this nature, this form of *Sulh* contract has a compensatory nature. The plaintiff perceives reception of money as compensation of his right while the defendant perceives the contract as a tool to avoid taking an oath before the judge. Therefore, the principle of the *Shari‘ah* that evidence is required of a claimant and an oath is required of someone who denies [the claim] may thereby become relaxed.

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

## APPLICATION OF SULHU

### **Sulh in contractual Cases.**

*Muamalat* is one of the famous fields of human endeavor under the *Sharia* that the relevance and application of the concept of *sulh* is contemplated. Its application relates to cases of contracts of sale, debts, mortgage, partnership, leases, hire, etc.

This aspect of the law of *Sulh* in Islamic law contemplates resolution of disputes initiated formally before a constituted and competent judicial authority within the framework of Islamic legal setting wherein disputants submit their case before Islamic courts for adjudication. In this respect, *Sulh* can be seen and regarded under Islamic law as a court-connected dispute resolution mechanism, i.e., *al-Qada‘u bi al-Sulh*.<sup>44</sup> It presents a scenario whereby a dispute is already commenced before a court of law but is somewhat sought to be resolved amicably either upon the request of one or both parties or upon a recommendation by the court for resorting to and exploring *Sulh* as an avenue meant for out-of-court settlement.

<sup>43</sup> Muhammad, A.M. (2014). Op. cit. p.67.

<sup>44</sup> Muhammad, A.M. (2014). Op. cit. p. 65.

### ***Sulh in Criminal Cases***

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

Offences under the Islamic criminal law consist of *hudud*, *qisas* and *ta'zir*. Literally, *hudud* means 'limit'. *Hudud* is a punishment which is fixed by Allah SWT to fulfill His rights. The punishment cannot be increased, decreased, or waived if the matter has been brought to the ruler because it is imposed for the sake of public interest. *Hudud* consist of adultery, false accusations, theft, robbery, drinking wine and apostasy. *Hudud* is considered as a crime against Allah SWT as it involves His rights. However, some offences such as robbery, theft, and false accusations involve both the rights of Allah SWT and the rights of individuals.<sup>45</sup>

*Qisas* means to punish the offender in the same manner as he causes hurt to the victim. *Qisas* is an offence related to murder and causing bodily injury which affects the victim personally. This offence that infringes the rights of the individual as well as the rights of Allah SWT but the rights of the individual dominates in this respect. Punishment of *qisas* is fixed by the law of retaliation or *diyat* (blood money), but can be remitted by the victim and the victim's heirs.<sup>46</sup>

*Ta'zir* offences are those which do not fall under the category of *hudud* or *qisas*. It is at the discretion of the authority to punish the offender of a *ta'zir* offence. *Ta'zir* offences consist of those which violate the rights of Allah and the rights of individuals. Violating the rights of Allah, such as taking *riba*, breach of trust, and false testimony also includes the violation of the rights of an individual such as defamation and cheating. Punishment of *ta'zir* offences consists of admonition, fine, the death penalty, imprisonment, and caning.<sup>47</sup>

In Islam, rights can be categorized into the rights of Allah and the rights of individuals. The rights of Allah SWT (*haqq al-Allah*) are an obligation to Allah SWT that corresponds to public interest. The violation of rights will cause liabilities in this world and the hereafter. The rights of Allah SWT are enforced by the state and do not require complaint from the victim which may include rituals and worship.

The rights of individuals (*haqq al-'ibad*) are for his interest or for the benefit of others. For instance, commercial rights, contractual rights, political rights, and social rights. Nevertheless, there can be a combination between the rights of Allah SWT and the rights of the individual, but the former prevails or the right of individual prevails. For example, in case of suicide and wasting of property, since both involve rights of

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<sup>45</sup>Norjihana A.Z. et al (2016) The Application of Mediation (Sulh) in Islamic Criminal Law. *Shariah Journal*, Vol. 24, No. 1- 115-136. p. 120.

<sup>46</sup>Shabbir, M. (2013). *Outlines of Criminal Law and Justice in Islam*, Edward Elgar Publishing, United Kingdom, p. 27.

<sup>47</sup>Norjihana A.Z. et al (2016), op. cit. p. 121.

Allah and individuals, the rights of Allah is dominant. The right of individuals can be dominant if they (the victim or the heirs) suffer more detriment.

In short, if the offence has infringed the rights of Allah SWT the state has to punish the offender, but if the rights of individuals have been violated, the offender shall be liable for restitution or must compensate the victim. The punishment for violating of the rights of Allah SWT is specified in the Quran and Ahadith and the state shall punish accordingly.

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

### ***Sulh in Hudud***

There are different views of Muslim scholars on the application of *ṣulḥin hudud*. Imam Abu Hanifa restricts the application of *ṣulḥin hudud*. He opined that *ṣulḥin hudud* is *batil* (falsehood) since *hudud* is the rights of Allah. It cannot be reconciled, compromised and released without *hudud* if the matter has been brought to the authority. However, Imam Abu Hanifa and other Muslim scholars agree that the victim and the offender may resolve offences of false accusation, theft and robbery through *ṣulḥ* if the cases are not brought to the court.<sup>48</sup>

It is no doubt that *Sulh* is among the very objectives of the *Shari'ah*. There are various legal authorities that specifically serve as a proof for the resort to *Sulh* in criminal cases under the *Shariah*. The legal proofs are from the Holy Qur'an, *Sunnah*, *Ijma'aas* well as reason (*dala'ilaqliyyah*). These proofs includes those that relate to the subject of *Sulh* generally (i.e., those that are all-encompassing on the subject of *Sulh* which have been earlier discussed in chapter two of this work) and those that are specific to *Sulhin* criminal cases alone<sup>49</sup>. Our concern here is on such proofs as relates to criminal cases. From the Holy Qur'an, Allah (swt) states:

*O you who believe, Qisas (law of equity and punishment) is prescribed for you in case of murder, the free for free and the slave for the slave and the female for the female. But if the killer is forgiven by the brother (or the relative, etc) of killed against blood money then adhering to it with fairness and payment of the blood money to the heir should be made in fairness, that is an alleviation and a mercy from the Lord...<sup>50</sup>*

The Islamic jurists say that what is meant by the phrase "*famanufiyalahu*" in this verse is to collect *Diyyah* instead of *Qisas* in intentional killing and the person

<sup>48</sup>Norjihhan A.Z. et al(2016), op. cit. p. 121.

<sup>49</sup> Muhammad, A.M. (2014). Op. cit. p. 70.

<sup>50</sup> Qur'an 2:178.

collecting (accepting) the *Diyyah* to do so without having oppressing the killer in settling its amount and for the killer to also settle it without any harm on either side.<sup>51</sup>

From the *Sunnah*, it was reported from A'isha (RA) that the messenger of Allah (saw) has sent Abu Jahm ibn Huzaifah to collect Zakat and a particular person refused to offer his own. Then, Abu Jahm beats the person and his people came to the Prophet (saw) demanding *Qisas* (retaliation). The Prophet (saw) said you would be given such things and they refused. Thereafter, the Prophet (saw) further increased the amount and they also refused. The Prophet (saw) then further increased such an amount and they finally agreed to it<sup>52</sup>. Therefore, this hadith establishes the legality of concluding *Sulhin* criminal cases under Islamic law, more so in such heinous crimes that attracts *Qisas*(retaliation). Thus, the practice of *Sulhin* criminal cases under the *Shari'ah* is a well-founded phenomenon.<sup>53</sup>

Furthermore, the legality of *Sulh* in criminal cases is also derived from *Ijma'*. Muslim jurists are unanimous in accepting a *Sulh* over intentional crimes.

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

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

- a) ***Sulhin* False Accusation (*Qadhaf*):** False accusation (*qadhaf*) is an offence when any person accused someone falsely of committing fornication and challenging the legitimacy of a child<sup>54</sup>. A person will be liable and punished for false accusations if he has accused someone of committing adultery, but fails to produce four witnesses to support the allegation. The punishment for false accusations is stated in the Quran<sup>55</sup> and comprises of flogging with eighty stripes, and forever rejecting that the person's testimony in court unless such person repents.

Imam Shafi'i and Imam Ahmad agreed that the offence of false accusation is considered as a violation of the rights of Allah as well as rights of the individual. Imam Shafi'i, Imam Malik and Imam Hanbali agreed that if the victim intends to lodge a complaint against the accused and bring the case before the court, if the accused is found guilty, they may be punished with *hadd* punishment. Otherwise, if the victim does not wish to lodge a complaint against the accused and has forgiven them, the *hadd* punishment will not be imposed.<sup>56</sup>

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<sup>51</sup> Muhammad, A.M. (2014). Op. cit. p. 71.

<sup>52</sup> Reported in Sunan Abu Dawud, Kitaab ad-Diyyaat, Hadith No. 4534; Ibn Majah in Kitaab ad-Diyyaat, Hadith No. 2638.

<sup>53</sup> Muhammad, A.M. (2014). Op. cit. p. 71.

<sup>54</sup> Shabbir, M. (2013), op. cit. p. 155.

<sup>55</sup> Qur'an 24:4-5.

<sup>56</sup> Shabbir, M. (2013). Op. cit. p. 172-173.

*Sulhis* equally not amenable in cases of defamation (*Qazaf*) because the punishment for defamation under the *Shariah* is sanctioned as a deterrence for people to desist from impugning upon other peoples' integrity even though there is in it, embodiment of individual's rights and that of Allah (SWT) but the rights of Allah therein is more stronger than that of the individual.<sup>57</sup>

**b) Sulh in Theft (*Sariqa*):** *Şulhis* encouraged in theft as the offence also involves the rights of individuals. Literally, theft (*sariqa*) is 'intentionally taking away another's movable property in secret. Technically, it means taking away the property from others custody in secret for which the amount is not less than ten *dirhms*<sup>58</sup>. The punishment for theft is amputation of the hands of the offender.<sup>59</sup>

There is a hadith where Safwan ibn Umayya's cloak was stolen from at the time he slept at a mosque. The Prophet SAW ordered the thief's hand be cut off, but Safwan said that he did not intend to punish the thief and he wanted to donate the cloak to the thief. Then, the Prophet SAW asked why Safwan did not do this before the matter was brought to him<sup>60</sup>. This hadith indicates that theft is allowed to be resolved through *şulh* before the matter is brought to the judge. *Hudud* can also be waived if the victim is willing to give the stolen item to the offender as a gift. If the stolen property is returned to the owner before the victim takes legal action, the allegation is withdrawn and the accused will not be punished. However, if the stolen property is returned after the criminal proceeding begins, regardless of whether the property was returned before or after trial, *hudud* will be imposed upon the offender.

**c) Sulh in Robbery (*hirabah*):** *Şulhis* also applicable in robbery. Robbery (*hirabah*) is to take away property from the custody of another person by threatening or using force. *Hirabahis* considered as an offence against an individual and an offence of waging war against Allah and the Prophet SAW through the use of arms.<sup>61</sup>

The punishment of robbery as mentioned in the Quran<sup>62</sup> is (1) death if homicide is caused by the act of robbery, (2) amputation for the first offence and if the act does not cause death to the victim, (3) crucifixion if the offender commits homicide and robbery, and (4) banishment if the offender did not rob nor kill the victim. The offender can be exempted from *hudud* of robbery if he or she repents before arrest. This is based on the Quran:

"Except those who repent before you overpower them..."<sup>63</sup>

Though the repentance before arrest withdraws *hudud*, the offender still carries liability. If the act caused death to the victim, the offender is responsible to the heirs as an act of *qisas*. The heirs of the victim have the option to either demand *qisas* or forgive the offender and claim compensation. If the offender

<sup>57</sup> Muhammad, A.M. (2014). Op. cit. p. 70.

<sup>58</sup> Norjihana A.Z. et al (2016), op. cit. p. 122.

<sup>59</sup> Qur'an 5:38.

<sup>60</sup> Norjihana A.Z. et al (2016), op. cit. p. 122.

<sup>61</sup> Shabbir, M. (2013). Op. cit. p. 184-191.

<sup>62</sup> Qur'an 5:33.

<sup>63</sup> Qur'an 5:34.

has taken property, the property must be returned to the owner if the offender knows the owner. If the owner is not known, the property must be given to *Bayt al-Mal*. However, if the property is no longer with the offender, the offender must pay the value of the stolen item to the owner.<sup>64</sup>

According to Qadi Iyadh, if an armed robber kills a person and the perpetrator is apprehended before he repents, members of the deceased family (*wali ad-Dam*) cannot grant waiver of *Qisas*(retaliation) to the criminal nor can they contemplate *Sulh*. This means that, if the victim's family embarks on *Sulh*with the armed robber ahead of his apprehension, the *Sulh*is void in view of the fact that punishment for robbery is the right of Allah (SWT) alone to which no one can validly wade into it.<sup>65</sup>

### ***Sulh in Qisas and Diyat:***

*Qisas* means to punish the offender in like-manner as he has caused to the victim. *Qisas*is an offence related to murder and causing bodily injury. The punishment of *qisas*is fixed by law which is retaliation or *diyat* (compensation or blood money), but can be remitted by the victim and the victim's heirs.<sup>66</sup>

The victim's heirs have the right of *qisas* since *qisas* involves the rights of individuals. The victim's heirs have three options in resolving murder cases and cases related to bodily injury, i.e. to take *qisas* from the convict, to pardon the offender, or to take *diyat*(compensation).<sup>67</sup>

*Sulh*is also applicable in *qisas*and *diyat* which involve offences of murder and bodily injury. Imam Malik classified murder cases into two categories, i.e. willful murder and murder by mistake. Imam Abu Hanifa, Imam Ahmad and Imam al-Shafi'i added another category of murder; that is quasi-willful murder.<sup>68</sup>

**a) *Sulhin* Murder:** Punishment for willful murder is *qisas* or retaliation as mentioned in the Quran<sup>69</sup>, however, Islam allows the heirs of the victim to remit the punishment of *qisas* by pardoning the offender with or without compensation as stated in the Quran<sup>70</sup>.

Imam Malik agreed that though the heirs of the victim may forgive the offender, whether with *diyat* or without *diyat*, the offender is still subject to penal punishment. Penal punishment is punishment determined by the ruler ranging from the lightest to the most severe. Imam Ahmad, Imam Abu Hanifa and Imam al-Shafi'i differ with Imam Malik and opine that since the heirs of the victim have forgiven the offender, penal punishment is not necessary<sup>71</sup>. The Shafi'i hold that liability to pay *diyat*for willful murder is on the offender by using the offender's property himself.

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<sup>64</sup>Norjihhan A.Z. et al(2016), op. cit. p.23.

<sup>65</sup> Muhammad, A.M. (2014). Op. cit. p. 69-70.

<sup>66</sup> Shabbir, M. (2013). Op. cit. p. 192.

<sup>67</sup> Abu Dawud, Sunan Abu Dawud, Kitab al-Diyat, vol. 5, hadith no. 4578.

<sup>68</sup>Norjihhan A.Z. et al(2016), op. cit. p.124.

<sup>69</sup> Qur'an 2:178.

<sup>70</sup> Qur'an 2:178.

<sup>71</sup>Norjihhan A.Z. et al(2016), op. cit. p. 124.

There is no conflicting view on *sulhin qisas* involving willful murder. Islamic law gives privilege to the victim's heirs to decide for punishment to the offender, either by continuing with the original punishment of murder (retaliation) or to resolve the case by way of *sulh*. According to Imam al-Shafi'i the victim's heirs also have the right to withdraw the whole amount of *diyator* a partial amount of *diyator*.

Quasi-wilful murder is a situation where the offender injures a victim resulting in the latter's death unintentionally. In other words, the offender has the intention to cause injury to the victim with no intention to kill him. For instance, the offender beats the victim with a light stick, or small stone, causing the victim to die. The punishment for quasi-wilful murder is *diyator* as reported by al-Mughira b. Shu'ba that a woman killed her fellow-wife with a tent-pole.

The Prophet SAW ordered the relative of the offender on the father's side to pay *diyator* for the victim (the wife and the unborn child)<sup>72</sup>. Imam Abu Hanifa, Imam Ahmad and Imam al-Shafi'i agree that the punishment for quasi-wilful murder is *diyator* only or a combination of *diyator* and *ta'zir*<sup>73</sup>. The offender is not subjected to *qisas*. The al-Shafi'i opines that *diyator* for quasi-wilful murder is paid using the property of the *'aqilah*.

Murder by mistake is a situation where the offender unintentionally kills the victim by accident. As stated in the Quran<sup>74</sup>, the punishment for murder by mistake is to free a Muslim slave and to pay *diyator* to the victim's heirs. If the offender is unable to find a slave to free, he has to fast two consecutive months. Imam Abu Hanifa, Imam Ahmad, Imam Malik and Imam al-Shafi'i agree that the punishment for murder by mistake can be a combination of *diyator* and *ta'zir*<sup>75</sup>. The al-Shafi'i also agrees that *diyator* for unintentional murder is paid using the property of the *'aqilah*. According to Imam Malik, Imam al-Shafi'i and Imam Ahmad *'aqilah* means the agnatic male relatives on paternal side such as brothers, nephews, uncles and cousins. If the *'aqilah* is unable to pay the *diyator*, the government will pay the *diyator*. Nevertheless, if the victims' legal heirs have forgiven the offender and agree to remit freely without accepting *diyator*, it amounts to *shulh*.

If the offender of unintentional murder or murder by mistake has been forgiven by the heirs, the offender will not be liable for *diyator*, but can be subjected to *ta'zir*. *Ta'zir* aims to prevent the criminal from repeating offences in the future. *Ta'zir* can be imposed for crimes against Allah or individuals. There are certain offences that have been mentioned in the Quran without specific punishment and therefore left to the authority to decide.

**b) Sulh in Bodily Injury:** *Qisas* for bodily injury means imposing a punishment which is like the offence imposed on the victim. The victim of bodily injury has two options in this respect, either to punish the offender with retaliation (*qisas*) or forgive the offender and receive compensation through the process of *sulh*.

<sup>72</sup> Imam Muslim, Sahih Muslim, Oaths Muharibin, Retaliation and Blood Money, Book 16, Hadith no. 4171.

<sup>73</sup> Norjihani A.Z. et al (2016), op. cit. p. 125.

<sup>74</sup> Qur'an 4:92.

<sup>75</sup> Norjihani A.Z. et al (2016), op. cit. p. 125

Al-Shafi'i emphasize that the victim's heirs have the right to withdraw the whole amount of *diyator* a certain amount of *diyat*. *Sulhin diyatis* not allowed if the heirs demand the amount of *diyat* more than specified in Islamic law. This amounts to *riba* or interest. All Muslim jurists agree that the implementation of *sulhin qisas* is allowed either with the full amount of *diyat* or part of the *diyat*. *Diyat* is a punishment for unintentional murder or murder by mistake. However, it does not deny the right of the ruler to impose a suitable *ta'zir* punishment if public interests necessitates it.

### Sulh in Matrimonial Disputes

Disputes are inevitable and Human crisis knows no bound as even spouses are caught up with misunderstanding and conflicts. Because of the sensitive nature of matrimonial relationship, couples are not expected to storm the court initially for the settlement of their dispute. Instead, the Sharia enjoins spouses to exhaust all reconciliatory avenues before resorting to litigation.<sup>76</sup> *Sulhin* the matrimonial context can be slightly different from other negotiations. However, in such circumstance, members of the family often serve as facilitators in the dispute. This practice is expressly sanctioned in Qur'an as Allah (SWT) has said: "If you fear breach between them twain, appoint two arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation..."<sup>77</sup>

In fact, *Sulh* generally serves as the primary vehicle for resolving matrimonial disputes, especially given the unfavorable standing of divorce in Islamic law. In a family dispute, *Sulh* can be exercised in a matter relating to either property rights, for example, arrears of maintenance, settlement of deferred dowry, etc. It may also involve non-property rights such as consummation (of the marriage), cruelty and ill-treatment, etc. so also, it may pertain to rights that arise either during the marriage or after divorce, such as *muta'ah* (consolatory gift), *hadanah* (custody), maintenance during *iddah*, etc.<sup>78</sup>

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

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

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

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<sup>76</sup> Abubakar, M. S. (2010) The Role of the Sharia in Resolving Armed Conflicts Between Muslims or Between Muslims and Non-Muslims, in Aliyu, I. A. Alternative Dispute Resolution and Some Contemporary Issues, M. O. Press and Publishers, Kaduna, p. 22

<sup>77</sup> Qur'an 4:35.

<sup>78</sup> Muhammad, A.M. (2014). Op. cit. p. 88.

on the part of the wife or from them both. Sometimes, a wife may prove recalcitrant as Allah (swt) has said in the Qur'anic verse "... as to those women on whose part you see ill conduct, admonish them (first) next refuse to share their bed and last beat them lightly ... but if they obey you, seek not against them means of (annoyance) ..." <sup>79</sup> Ibn Abbas said regarding this verse that it is that woman who refuses to obey her husband and neglect his rights but if she mends her attitudes that is alright otherwise the husband may beat her lightly in such a manner that would not break her born or injure her. If she obeys her husband, he is not allowed to maltreat her. <sup>80</sup>

There exists a consensus among the Islamic jurists regarding the permissibility (*Ijaazah*) for the appointment of *al-Hakamain* (two arbiters) when a conflict occurs between husband and wife in a circumstance where it became uncertain as to whom among the spouses is at fault. It has been stated by Ibn Rushd that there exist a consensus among the jurists to the effect that *al-Hakamain* should not be appointed except from the family members of the spouses concerned. When where there is an absence of a qualified (competent) person among the members of two families, then someone else could be appointed.

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

The Maliki School as stated in *Mudawwanah* accepts so if the spouses agree to the appointment of one person, then it would be in order because it is their own affairs, thus they have the right to do so. And if they co-opted another person with such a condition that may not be a non-Muslim, slave, minor, woman or lunatic as all these persons cannot qualify to be appointed as matrimonial arbitrators. <sup>81</sup>

## CONCLUSION

The *Shari'a* does not leave such a disgruntle state of conflict unchecked but provided a means for it resolution. In most African societies, the procedures employed in settling dispute vary considerable in the way the dispute is addressed and settled and often result in different outcomes. In Nigeria customs vary from one area to another except in the northern part where Islam is predominantly practiced and has shaped the local customs to conform to Islamic tenets. The mechanism for the resolution of dispute envisaged under the *Shari'a* may take the form of litigation before a court of law (*al-Qada'u*) or it amicable settlement out of court (*sulh*). Each of these two mechanism has its own peculiarities. *Shari'a* had recognized and institutionalized *sulh* (settlement out of court) as a dispute resolution mechanism in

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<sup>79</sup> Qur'an 4: 34.

<sup>80</sup> Muhammad, A.M. (2014). Op. cit. p. 88.

<sup>81</sup> Al-Mudawwanah, Vol. 5, p. 368.

addition to litigation so as to restore peace and stability among the Muslims ummah and to averted severance of relationship, *sulh* (settlement out of court) is recommended where the parties to the dispute consent to it.

### Recommendations

1. It is recommended that *Sulh* should be formally recognized as one of the best modes of dispute resolution in the Sharia Courts. This connotes that its practice should be strengthened in states where it is in vogue and be introduced to areas wherein it is not in practice.
2. Workshops, seminars and other educating Programmes should be organized for judges, lawyers and other stakeholders that can facilitate the application on *Sulh* so as to acquaint and give them reorientation about the essentials and essence of *Sulh*.
3. Judges and lawyers must bring it to the notice of the litigants that they have the option to settle their disputes amicably outside court without any the parties recording a loss.
4. It is recommended that the government at both state and federal level should make provisions more facilities that will aid the practice of *Sulh*. Such facilities can be the putting in place of an avenue with competent persons where disputants can go to resolve their disputes amicably. These facilities should be available both at the rural and urban parts of the states.

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