

Dispute Management: An Islamic Perspective

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INTRODUCTION

*"The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from God: For God loveth not those who do wrong."*²

This paper is about dispute management from an Islamic perspective. This is an area of scholarship about which much has been written in Muslim literature. However, from the view of the West,³ this is largely an unknown entity,⁴ with very little academic writing in English.⁵ It may surprise many Western Dispute Management theorists and practitioners that Islam has had a system of dispute management in combination with formal adjudication that is nearly two thousand years old.

This paper will look at Islam and Dispute Management from both an historical and geographical overview. Although the religion of Islam is uniform across the Muslim world, there are differences due to culture in the manner in which dispute management systems are applied.⁶ For example, this paper will highlight dispute management as used in Malaysia, the use of 'sulh'⁷ in Saudi Arabia and systems in place in Lebanon to deal with conflict. All have the same distinct similarities, such as the Kadi⁸, however this role is utilized differently, and has different dispute management powers in the different countries.

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 - 2 Sura XLII Shura or Consultation, Verse 40, *The Holy Quran*, translated and commentary by A. Yusuf Ali, 1993, Islamic Propagation Centre International, Singapore.
 - 3 The term the 'West' is used as a shorthand to describe the mainly Anglo Saxon nations, including Australia, Canada, New Zealand, the United Kingdom and the United States of America. It is recognised that these nations have their own distinct dispute management systems, however in comparison to Islamic Dispute Management systems, the 'Western' systems have much more in common.
 - 4 See for instance the comments by Justice Frankfurter of the United States Supreme Court, who stated the United States Supreme Court 'is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency', *Terminiello v Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter J., dissenting) as cited in Iqbal, Walid 2001, 'Dialogue and the practice of Law and Spiritual Values: Courts, Lawyering and ADR: Glimpses into the Islamic Tradition', *Fordham Urban Law Journal*, April, p.1035.
 - 5 Ozcelik, Sezai 2000, 'Nonviolent Action and Third Party Role in Islamic World', available at <http://www.geocities.com/tartarkirim/island4.html> accessed 28 April 2003.
 - 6 Boule (2001, p.6) argues that good mediation is problem solving with an awareness of cultural differences. Boule defines 'cultural' in a broad sense to refer to differences based on class, gender, ethnicity, national origin, profession background, geography and the like. Boule, Laurence 2001, *Mediation – Skills and Techniques*, Butterworths Australia.
 - 7 Compromise, settlement or agreement between parties to a dispute.
 - 8 Islamic judicial figure.
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Modern developments and usage of Islamic Dispute Management will also be highlighted in this paper. Just as the West can learn a lot about Islam, Muslim countries can also derive a great deal from the recent development of dispute management, its practices and processes, from the West. This is very similar to the ideas about Asian (Chinese) Dispute Management systems, which are evolving from their Confucian roots due to their contact with the West.⁹ This paper will also attempt to posit a view on the future developments of dispute management in the Islamic system.

Buckley (1995) provides sound advice about negotiating with people from another culture: "it is advisable, indeed imperative to learn as much as possible about the mores and attitudes of that culture"¹⁰. By extension, this statement can be applied to different religions, such as Islam, where an understanding of the different legal tenets can provide a distinct advantage in negotiations, be they commercial or political.

Co-opting the arguments used by culturalists such as Professor Yuan (1996), religion is similar to culture in that it is of significance to the understanding of dispute management. Culturalists often maintain that ignoring culture is a principal cause of breakdown of negotiations.¹¹ Islam has a number of similarities with oriental cultures, which differ from Western cultures. Some of these similarities include the structuring of relationships, managing disputes, and the prominence of social consensus, moral persuasion, and attaining balance in human relations.¹² In contrast, there is an emphasis in Western culture upon precision in documentation and the application of principles of legality that govern the structuring of relationships.¹³ In addition, there is a tendency to emphasise a more adversarial approach to resolving disputes, and to define personal problems and social troubles in terms of legal rights and obligations. These contrast with non-Western values, where there is a preference for 'friendly negotiations or consultation' as opposed to litigation.¹⁴

While outside the scope of this paper, it is recognized that what are considered Western values may have little in common with the dominant Western religion, Christianity. Behrens (2003) in his paper on 'Church dispute mediation' states that dispute management techniques such as mediation are not a modern phenomena, but instead a concept which permeates the Bible. Mediation has been used throughout the 2,000 years of church history. As Behrens illustrates, mediators spoke directly to the parties in dispute, as opposed to intermediaries such as lawyers. This according to Behrens, reflected the direct relationship Christians had with their Lord.¹⁵ Essentially, the proposition is that modern-day Western values, especially legal methodology, are far removed from religious values.¹⁶ Thus, the different religious based

9 Thirgood, Russell, 1999, 'Dispute Resolution Chinese Style – The Influences', *Australasian Dispute Resolution Journal*, November, pp.272.

10 Buckley, Ross P. 1995, 'Cross-Cultural Commercial Negotiations', *Australian Dispute Resolution Journal*, August, p.181.

11 Yuan, Lim Lan P. 1996, 'Impact of Cultural Differences on Dispute Resolution', *Australasian Dispute Resolution Journal*, August, p.197.

12 Ibid.

13 Ibid.

14 Ibid.

15 Behrens, James 2003, 'Church Dispute Mediation', *Australasian Dispute Resolution Journal*, Vol.14, p.29.

16 This is due to the separation of the Church and State, as a result of the dispute in the Middle Ages between the Monarchs of England and the Church. See BBC: 'History – Church and State' at http://www.bbc.co.uk/history/state/monarchs_leaders/henryII_law01.shtml.

dispute management systems may have much in common due to their emphasis on morality, divine justice and spirituality.¹⁷

Dispute Management & Religion – More than Cross-Cultural Negotiations:

“One of the most important findings of cross-cultural conflict resolution research is that religion is a perennial and perhaps inevitable factor in both conflict and conflict resolution. Religion, after all, is a powerful constituent of cultural norms and values, and because it addresses the most profound existential issues of human life (e.g., freedom and inevitability, fear and faith, security and insecurity, right and wrong, sacred and profane), religion is deeply implicated in individual and social conceptions of peace.”¹⁸

The above comments by Said and Funk highlight the integral importance of religion in dispute/conflict management in many non-Western cultures. Western dispute management is exclusive, and implies that “approaches based on non-Western sources, or even religious precepts, for that matter, are dangerous or somehow invalid”.¹⁹ According to Said and Funk, the increasing importance of protracted ethnic and religious conflicts has influenced a number of theorists that the religious and cultural aspects of conflict and its resolution are paramount.²⁰

Said and Funk define religion “as a path of ultimate transformation, comprised of interconnected systems of symbols and guidelines”²¹. These profile both individual and group subconscious via which social practices and interactions are instilled with significance and meaning. This framework forms the basis of individual and group identity, “providing the shared normative foundation that makes harmonious social interaction possible as well as meaningful”.²²

Dispute management and conflict resolution do more than deal with material clashes of interest; Said and Funk state that it articulates “social reintegration, restoration and redemption, existential security, personal transcendence and transformation”.²³ Dispute management perspectives and techniques that do not incorporate appropriate and relevant paths of ‘redemptive transformation’ are less likely to yield enduring or effective resolution.

17 In essence, ‘treating others as one would want to be treated suggests both substantive and process values informed by both “spiritual respect” and “secular justice” concerns’. Menkel-Meadows (2001) argues that reciprocity works most effectively when it encourages a position of mutual respect and real, as well as “active, listening” to the other – as per Menkel-Meadows, C. 2001, ‘Commentary: And now a word about secular humanism, spirituality, and the practice of justice and conflict resolution’, *Fordham Urban Law Journal*, April, p.1073.

18 Said, Abdul Aziz and Funk, Nathan C., ‘The Role of Faith in Cross-Cultural Conflict Resolution’, available at <http://www.gmu.edu/academic/pcs/ASNC83PCS.htm> accessed 07 May 2003 at p.1

19 Ibid.

20 Ibid.

21 Ibid. at p.2.

22 Ibid. at p.2.

23 Ibid. at p.3.

The following is a brief example of dispute management from both the Christian and the Jewish perspective.

Waddell and Keegan describe Christian conciliation, a dispute resolution option which is superior not only to litigation, but also to any of the other ADR methods.²⁴ The primary reason for the effectiveness of Christian conciliation is its focus on reconciling relationships and encouraging parties to deal with the causes of their conflict. 'Christian conciliation' is defined as "a process for reconciling people and resolving disputes out of court in a biblical manner."²⁵ Parties to the conciliation are expected to be honest, keep their word, do what is merciful and just, admit their wrongs, and make restitution for any damage they have caused. Waddell and Keegan state that the most important distinction between 'ordinary' ADR and Christian conciliation is the pre-eminence of the Bible as a standard of conduct for both the participants and the conciliators. It is this focus on both the personal and substantive issues which often results in dramatic solutions of 'impossible' disputes.²⁶

Bush in his paper on Jewish dispute management techniques based on religious values, discovered that the preference for compromise is more than simply an ethical principle in Jewish tradition,²⁷ it is actually a legal obligation on a judge in a traditional rabbinical court. The rabbinical court judge must strive to achieve a compromise or settlement. According to Bush, if the judge cannot, then he should judge between the two litigants in a pleasant manner, but still aspiring to encourage the disputants to compromise. If one of the litigants will stop at nothing in order to prevail, then the judge can become more firm and decide the case according to the strict law.²⁸

In concluding this section of the paper, Menkel-Meadows (2001) states that the sacred, religious, and spiritual values that inform most of what is good about conflict resolution should not be "cabined to the church, synagogue, mosque, or zendo".²⁹ To achieve a just outcome with regards to dispute management and conflict resolution, it is vital that all the relevant aspects of what informs the disputants be taken into account. For those who adhere to the Muslim faith, this means taking into account what Islam has laid down as dispute management systems. The next section of this paper will address Islamic dispute management systems in order to provide the reader with a better appreciation of what may influence the Muslim party to a dispute.

24 Waddell, Glen G., and Keegan, Judith M., 'Christian Conciliation: An Alternative to "Ordinary" ADR', *Cumberland Law Review*, Vol.29, p.584.

25 Ibid, p.584.

26 Ibid, p.592.

27 Baruch Bush, Robert A. 2001, 'Dialogue and the practice of law and spiritual values: Mediation and ADR – Insight from the Jewish tradition', *Fordham Urban Law Journal*, Vol.28, April, p.1009.

28 Ibid p.1009

29 Menkel-Meadows, C. 2001, 'Commentary: And now a word about secular humanism, spirituality, and the practice of justice and conflict resolution', *Fordham Urban Law Journal*, April, p.1087.

Islam and Dispute Management – Overview and History:

In the reconstruction of the Ka'ba, a serious quarrel arose over the setting of the Hajar al-Aswad – the Black Stone. Each one of the four leaders of the Quraysh that was in dispute over this issue was eager to have this honour and ensure he was not outdone by the others. There was an impasse. They could not agree. One of the leaders suggested that the first person to arrive at the Haram the next morning could be the one to place the Hajar al-Aswad. As it transpired, the Prophet (peace be upon him) was the first to arrive at the Haram. Not wishing to have the privilege all to himself, he asked each of the contesting tribes to select one leader. He then spread a sheet of cloth and put the Hajar-al-Aswad on it, asked the leaders to hold it at four ends and together raise it. Thus a serious conflict was averted by the Prophet's (pbuh) prudent action in giving all four leaders an equal honour of placing the stone.³⁰

The main source of Islamic law (*Shariah*) is the Qu'ran, which, according to Muslims, is the embodiment of the Divine word that was revealed in stages to Prophet Muhammad (Peace Be Upon Him – pbuh) by the Angel Gabriel. The second source is the Sunna of the Prophet – a record of all of Prophet Muhammad's (pbuh) acts and sayings, as well as acts performed by others that were not opposed by him. The third source is the 'Ijma'. This term can be translated as 'consensus'. The fourth legal source is Qiyas – 'analogy'. In Islamic law, these primary sources are complemented by secondary sources, such as 'custom'.³¹

Islam defines and regulates the relationship between man and God. That relationship, together with man's duties to God, is clearly set out in the *Qur'an* and has been further elaborated and clarified in the *Sunna*. However, Islam also articulates and regulates man's relationship with his fellow men both individually and collectively. It must therefore also comprehend a legal and ethical system, as well as principles of social behaviour. Within the context of dispute resolution, Islam provides general principles and an authoritative set of rules and regulations. It both guides and defines, and provides the environment for dispute resolution.³²

Even though the ethical and moral foundations underlying the Western concept of law vary little from those of Islam, there are some differences. In Western law, for example, the relationship between "ethics and the law has been overlaid and obscured by secular ideas of

30 Keshavajee, M.M. 2002, 'Alternative Dispute Resolution: Its Resonance in Muslim Thought and Future Directions', available at http://www.iis.ac.uk/learning/life_long_learning/alternative_dispute_resolution/alternative_dispute_resolution.htm accessed 28 April 2003.

31 Ramadan, Moussa Abou 2003, 'The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992-2001)', *Fordham International Law Journal*, March, p.597.

32 Johnston, K., Camelino, G. and Rizzo, R. 2000, 'A Return to "Traditional" Dispute Resolution: An Examination of Religious Dispute Resolution Systems', available at <http://www.cfcj-fcjc.org/full-text/traditional.htm> accessed 28 April 2003, p.9.

right and wrong".³³ This can be observed in the meticulous Western legal codes which are understood to reveal the 'will of the people' and which promulgate human rights and obligations as reciprocal and relating essentially to the needs of society.³⁴ Transgressions are identified, and punished as crimes against social order.

In contrast, the traditional Muslim concept rests on the proposition that the *Shariah* is the law of God set down for all time in the divine revelation. Muslims, by virtue of being Muslims, have acknowledged a positive responsibility to seek to apply God's will and live in consonance with that law irrespective of the conduct of others, both at the individual and the collective level. The emphasis is upon obligations rather than upon rights, and upon the divine origin of the law. The *Shariah* is not, therefore, 'law' in the normally accepted sense of the term: "it contains an infallible guide to ethics. It is fundamentally a doctrine of duties, a code of obligations. Legal considerations and individual rights have a secondary place in it."³⁵

The Western approach to conflict resolution prioritizes problems to be abstracted and resolved; Islamic approaches bear a resemblance to other non-Western approaches insofar as they frame conflicts as matters of communal and not just individual concern, and highlight the importance of repairing and maintaining social relationships. Muslim approaches to conflict resolution draw on religious values, social networks, rituals of reconciliation³⁶ and historical practices of communal and inter-communal coexistence. Strong emphasis is placed on relationships between personal and group identity, between individual and collective responsibility for wrongdoings, and between attentiveness to 'face'-related issues (public status, shame, and reputation for generosity) and the achievement of restorative justice within a context of continuing relationship.³⁷

Under Islamic law, 'the purpose of *sulh* (*compromise, settlement or agreement between parties to a dispute*) is to end conflict and hostility among believers so that they may conduct their relationships in peace and amity... In Islamic law *sulh* is a form of contract, legally binding on both the individual and community levels'.³⁸ Although the concepts of compromise, settlement, reconciliation, and agreement – as encapsulated in *sulh* – are not unknown to the modern Western intellect, the process through which *sulh* is reached may differ in Western and Islamic systems. According to Iqbal (2001), in the West this process typically would involve the alternative dispute resolution (ADR) mechanism whereby regular courts are bypassed and a parallel set of institutions are called upon for assistance. In the Islamic

33 Ibid.

34 Ibid.

35 Ibid

36 Irani, George and Funk, Nathan C. 2000, 'Rituals of Reconciliation: Arab-Islamic Perspectives', *KROC Institute Occasional Paper*, August.

37 Said, Abdul Aziz and Funk, Nathan C., 'The Role of Faith in Cross-Cultural Conflict Resolution', available at <http://www.gmu.edu/academic/pcs/ASNC83PCS.htm> accessed 07 May 2003, p.7.

38 Iqbal, Walid 2001, 'Dialogue and the Practice of Law and Spiritual Values: Courts, Lawyering and ADR: Glimpses into the Islamic Tradition', *Fordham Urban Law Journal*, April, p.1035.

tradition, regular courts and ADR mechanisms are essentially intertwined and, historically, the legal systems that have relied on this traditional model have dispensed justice much more efficiently than those departing from the Islamic spirit.³⁹

Similar to other non-Western legal systems, the Islamic system of resolving disputes places an emphasis on duty to the community. The good of the community is far more important than that of the individual. The concept of self includes others. Relationships are governed by notions of mutual respect, interdependence, harmony, reciprocity and holism, as opposed to individualism, confrontation and competition.⁴⁰

Irani and Funk (2000) in their seminal work on Arab-Islamic rituals of reconciliation noted a number of very pertinent insights into differences between Western and Islamic dispute management techniques. While Western mediators were expected to be formally certified professionals who provided their services as neutral, unaffiliated outsiders, in the Islamic approach, the preferred 'third party' was an unbiased insider with ongoing connections to the disputants as well as a strong sense of the common good, and standing within the community, for example age, experience, status, and leadership.⁴¹

Other pertinent differences highlighted by Irani and Funk (2000) were in relation to the goals of the Western process. These were considered as pragmatic, and were directed toward the possibility of a 'win-win' scenario which could enable the parties to forget the past and move on. In contrast, the goals of the Arab-Islamic process manifest concern for preserving and cultivating the established 'wisdom' of the community. The focus was thus continuity-oriented; history was considered a source of stability and guidance that provided lessons for determining a common future. While the Western approach aimed to empower individuals to solve their own problem without subjecting themselves to the inconveniences and the adversarialism of the legal system, the Arab-Islamic approach was intended to empower families and the community to participate in matters of common concern.⁴²

Another key point of interest raised by Irani and Funk (2000) was that Western process encouraged a direct, step-by-step problem solving between disputants who ideally 'separate the person from the problem'.⁴³ In distinction, the Islamic process prioritizes relational issues, such as restoring harmony and solidarity and restoring the dignity and prestige of individuals and groups. Although "magnanimous gestures of absolution are encouraged, the outcome of the process must nonetheless reflect standards of 'rightness' and just compensation".⁴⁴ A great deal more was at stake than the interests of individuals; disputing

39 Ibid, pp.1035-6.

40 Thirgood, Russell 1999, 'Dispute Resolution Chinese Style – The Influences', *Australasian Dispute Resolution Journal*, November, p.273.

41 Irani, George and Funk, Nathan C. 2000. 'Rituals of Reconciliation – Arab-Islamic Perspectives', *KROC Institute Occasional Paper*, August, pp.19-21.

42 Ibid.

43 Ibid.

44 Ibid.

families and lineage groups importune the intervention of prominent individuals to prevent the intensification of the dispute and the disruption of 'communal symbiosis'. Irani and Funk (2000) point out that their study showed that the process was completed with a powerful ritual that sealed a settlement and reconciliation with handshakes and a collective meal.⁴⁵

Some other key points of interest apparent with the Western and Muslim/Arabic system of dispute management pertain to the concept of active listening. According to Irani (1999), in Lebanon, to remain silent is sometimes interpreted as meek acquiescence or agreement. In the "rural areas of Lebanon, if you do not talk, it means you are dull; the more you talk, the more it is assumed you know. People want to show that they know, especially those who go to town and come back to the village. They always talk."⁴⁶

Other differences include the role of third parties or mediators in disputes. In some Arab/Muslim cultures, the mediator is perceived as someone having all the answers and solutions. This is a position that holds a great deal of power and responsibility. As discussed in the paper by Irani (1999): "If [the third party] does not provide the answers, he or she is not really respected or considered to be legitimate."⁴⁷

Modern and Future Developments and Usage of Islamic Dispute Management:

Saudi Arabia

Modern-day Saudi Arabia is one of the few Muslim countries that has a legal system that largely adheres to the traditional Islamic model. Unlike many other Muslim countries around the world, it has never been colonized, or had an imported legal and governmental system imposed, such as Malaysia by the British, Morocco by the French, etc.⁴⁸ A great majority, about 99 percent,⁴⁹ of civil cases filed in Saudi Islamic courts end in reconciliation. Iqbal (2001) states the main reason for this is the influence of the religion, in particular the quote from the Qur'an:

*"It shall not be wrong for the two to set things peacefully to rights between them: for sulh is best".*⁵⁰

The Saudi Islamic courts have a strong emphasis on reconciliation. Because of this, the system is less formal than the Western systems. Lawyers are only permitted in the absence of an actual party, but not as counsel, or an officer of the court. The system relies on the *Kadi* (an Islamic judicial figure) as the proper person to protect the parties from any unfair practices

45 Ibid.

46 Ibid.

47 Ibid.

48 Frank E. Vogel, 'The Rule of Law in Saudi Arabia: Exploring contraindications and traditions' in Cotran, E. and Yamani, M. 2000, *The Rule of Law in the Middle East and the Islamic World: Human Rights and the Judicial Process*, L.B. Tauris Publishers London, p.135.

49 Iqbal, Walid 2001, 'Dialogue and the practice of Law and Spiritual Values: Courts, Lawyering and ADR: Glimpses into the Islamic Tradition', *Fordham Urban Law Journal*, April, p.1040.

50 Ibid.

and to guide them through the process of adjudication.⁵¹ In addition, the emphasis at a typical proceeding focuses on oral, rather than written proceedings.

Settlement lies at the heart of dispute resolution in Saudi Arabia, “not as mere convenience but as a basic norm”.⁵² Yet the agreement is limited in that it cannot override God’s law, and can only produce an outcome that is permissible under the law. According to Iqbal (2001), there are two main reasons for the emphasis on reconciliation. The first is that sulh conveys ‘religious blamelessness’ on the Kadi and the parties. The second is that formal adjudication may breed hatred between the parties while reconciliation brings them together.⁵³

The Kadi in the Saudi legal system is not a mere adjudicator; the Kadi possesses great skill as a mediator and conciliator. For example if a Kadi believes that a settlement or compromise would yield a just outcome, he will aim – sometimes even forcefully – to persuade the parties before him to come to an agreement and settle their disputes amicably.⁵⁴ Kadis do not rely upon religious exhortations alone, but also press practical considerations into service such as that sulh may have advantages beyond religious benefits for both parties in that it can avoid harsh outcomes.⁵⁵

Malaysia

Hassan states that Islamic conflict resolution systems are growing in popularity and awareness in Malaysia as in other Islamic societies, as part of the growing phenomena of the application of Shariah Law. In the Malaysian situation, this has occurred nowhere more so than in the family context.⁵⁶ While Malay society readily recognizes that disputes, particularly within the family context, are unavoidable, there are religious and cultural principles on how disputes should be managed.⁵⁷ Malay Muslims hold a negative view of people who do not avoid or prevent a conflict from reaching a destructive stage. The emphasis is on disputes being resolved promptly and as smoothly as possible. This attitude towards disputes stems from a core belief held by most Malays that hostility and destructive behaviour can undermine both the family and community solidarity and undermine the central values of togetherness and happiness that have been forged by custom (*adat*) and Islam.⁵⁸

The situation in Malaysia revolving around family disputes involves three distinct mechanisms: the marriage counselor, the district Kadi and the Shariah Court judge. Together these mechanisms constitute the formal apparatus of the Islamic dispute management

51 Ibid.

52 Ibid, p.1041.

53 Ibid

54 Ibid, pp.1041-1042.

55 Ibid, p.1042

56 Hassan, Sharifah Saleha Syed and Cederroth, Sven 1998, *Managing Marital Disputes in Malaysia: Islamic Mediators and Conflict Resolution in the Shariah Courts*, Curzon Publishing, London, p.1

57 Ibid, p.58.

58 Ibid, p.58.

system.⁵⁹ The counselor, usually a female, although officially assigned to expedite communication between dissenting individuals, often suggests solutions to the disputants on how best to resolve their differences in the light of Islamic law or legal principles.

The Kadi, who for all practical purposes is an arbitrator, at times forgoes his power to produce a decision single-handedly and instead assists the individuals involved to arrive at a consensus on the issues in the dispute. By doing so, the Kadi lends to arbitration the character of mediation.⁶⁰ As for the Shariah Court judge, despite the formality and procedural rigour that epitomize court proceedings, the judge occasionally encourages litigants to work out compromises in the courtroom or the privacy of their own office. In other words, even what appears as an adjudicative decision produced at the end of a court hearing, is in actual fact a negotiated settlement, arrived at in a formal court setting that has assumed the character of mediation sessions.⁶¹ Therefore, there is a range of conflict resolution techniques that the counselor, Kadi and judge can resort to when handling intra-familial disputes in Malaysia.

Brunei

The processes used for dispute resolution in Brunei are as much the legacy of events and influences from the past as they are of the contemporary ADR movement that the west has been exporting to Asia.⁶² The low rate of litigation in Brunei is not because of a lack of confidence in the common law courts as institutions of integrity, but as a result of the local cultural factors that bring about settlement in other ways.⁶³

Black (2001) argues that a possible reason for the limited role of arbitration may be inadequate knowledge of and familiarity with the process. In addition, there are only a small number of firms with experience in the field.⁶⁴ There is an added concern that similar to litigation, arbitrating a dispute may impact negatively on future commercial dealings. The tenacity of the traditional social hierarchy and its accompanying rules of behaviour, which “prioritize respect, loyalty and mutual co-operation, mitigates taking action against a person of royal or social standing”⁶⁵. Settling a dispute by direct or facilitated negotiation or an informal mediation where the intervener is connected by family, friendship or business ties to the disputants is preferred. This is clearly at odds with the Western model of an impartial mediator, having no connection or relationship with the parties.

As compared to other Muslim countries particularly in the Middle East, Islamic arbitration is used less widely in commercial, administrative and contractual disputes. Although it gives authority to the arbitrators to impose a decision, aspects of conciliation (*suhl*) are incorporated into the process, so that an amicable settlement is the preferred

59 Ibid, p.2.

60 Ibid, p.5.

61 Ibid, p.5.

62 Black, Ann 2001, 'ADR in Brunei Darussalam: the meeting of traditions', *The ADR Bulletin*, Vol.4(8), p.107.

63 Ibid, p.107

64 Ibid, p.108.

65 Ibid, p.108.

outcome. Given the increasing Islamisation of commercial and administrative practices throughout Brunei, it is likely that traditional dispute resolution may become an option for commercial and financial disputes, as well as for family matters.⁶⁶

According to Black, while Brunei is experiencing modern technological changes, it is attempting to selectively resist what are perceived as the counter-cultural forces of the West, prioritizing instead retention of the “inherent norms of Brunei internal lifestyle that is collectively practiced by its society”.⁶⁷ By rejecting the concept of individualism on the basis that in the West “it has been the prime cause of moral decadence, degradation of social values and cultural demoralization, disrespect of elders, family and authority”, Brunei is turning to Islam to enhance its Malay culture and illuminate its future direction. This means that as well as strengthening the role of the Shariah Courts, alternative means compatible with Islam will be readily accepted rather than models from the modern ADR movement from the West.⁶⁸

The Future?

Like the religion itself, dispute management in an Islamic context is going through an unprecedented period of change. Because Muslims are spread all over the globe, there are many facets to consider with the potential direction that dispute management will take with regards to Islam. Apart from the aforementioned examples of Malaysia and Brunei, there are other areas which may assist with seeing what the future holds vis-à-vis dispute management in Islam. For example, Buckley (1995) states that many lawyers in non-Western countries are familiar with, have studied, or undertaken a form of study in Western countries. Thus, there is a distinct preference by these lawyers for the Western method of negotiation and dispute management, “for then everyone can get down to the job at hand and not put so much time and energy into appearing appropriately humble, dining together and establishing linkages through people known in common”.⁶⁹ Thus, it is arguable that there may be a distinct shift from the Islamic model of dispute management to a hybrid model, combining aspects of the Western and Islamic model of dispute management.

In addition, Muslim countries such as Bangladesh are co-opting the Western methodology of dispute management to develop “beside the formal justice system in order to eliminate the endless sufferings of the poor litigants”.⁷⁰ According to a recent article in the *Daily Star News*, a popular Bangladesh broadsheet, the methodology and process of Western dispute management can be used to enhance and develop the dispensation of justice in traditional methods like mediation, conciliation and arbitration, and resolution for a long period of time.⁷¹

66 Ibid, p.108.

67 Ibid, p.109.

68 Ibid, p.109.

69 Buckley, Ross P. 1995, ‘Cross-Cultural Commercial Negotiations’, *Australian Dispute Resolution Journal*, August, p.183.

70 Islam, Nur Md 2003, ‘Alternative Dispute Resolution System: In quest of a new dimension in civil justice’, available at <http://www.dailystarnews.com/law/200302/02/reform.htm> accessed 28 April 2003.

71 Ibid.

In contrast to Bangladesh where Muslims form the overwhelming majority, dispute management is also active in countries where Muslims form a minority group. For example, Canadian Muslims are turning to Islamic dispute management principles to inform their intra-community conflicts. Muslims in Canada are setting up their own arbitration boards to allow them to govern themselves according to Islamic law on such issues as marriage and divorce.⁷²

In this system, disputes would first go to a secular court that would turn them over to the Islamic arbitration boards for a ruling, and the ruling would then be subject to the approval of a secular court. Permitting alternative methods of resolving disputes in matters of family–personal law could provide Muslims with a “way of doing things that reflects fundamental aspects of their sense of justice”.⁷³

Conclusion:

*ADR, in one form or another, has been known to human society since the beginning of conflict. A case in Africa, very succinctly attests to this. In 1893, two Indian Muslim businessmen in South Africa had a major commercial dispute. One of them wrote to their head office in Porbander in India and asked them to send a Vakil, knowledgeable in English, so that he could be a go-between themselves (the Indian merchants) and their European lawyers in South Africa. The Porbander office looked around and found a young, recently trained, Gujarati barrister by the name of Mohandas Karamchand Gandhi, who agreed to go to South Africa on contract for one year, but actually stayed for 21 years. He managed to settle the case out of court. No doubt, he drew from a tradition that goes back thousands of years - the Lok Adalat system in India, from which he, himself, hailed as did his two clients. His clients found resonance in their culture but also in the teachings of their faith, in the Holy Qur'an, which extols the virtues of forgiveness and negotiated settlement.*⁷⁴

Islam is not just a religion, and certainly not just a fundamentalist political movement. It is a civilization, and a way of life that is not only present in one Muslim country to another, but also in Muslim communities around the globe. Islam is animated by a common spirit far more humane than most Westerners realise.⁷⁵ This paper has attempted to show dispute management from an Islamic perspective. Dispute management is not a new phenomenon within Islam. The importance of understanding this system of dispute management cannot be underestimated from both a commercial, and also from a political perspective.

72 McAteer, M. 1991, 'Muslims seek jurisdiction over family law', *The Toronto Star*, 30 May 1991

73 Ibid.

74 Keshavajee, M.M 2002, 'Alternative Dispute Resolution: Its Resonance in Muslim Thought and Future Directions', available at http://www.iis.ac.uk/learning/life_long_learning/alternative_dispute_resolution/alternative_dispute_resolution.htm accessed 28 April 2003.

75 Mazrui, Ali A. 1997, Islamic and Western Values, *Foreign Affairs*, Vol.76, No.5, Sept/Oct, pp.118-132.

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