

*Original Article***Islamic Law and Alternative Dispute Resolution
Mechanism with Special Reference to Matrimonial Disputes****Faizanur Rahman¹, Mohammad Haroon²****How to cite this article:**

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Delhi 110025, India.E-mail: faizan.faizylaw@gmail.com**Abstract**

At present we are passing through a transitional period, our social values are changing and new challenges in all walks of life are emerging rapidly. It is frequently evident that in all the communities throughout the world matrimonial disputes are ever at the top. Although in all the legal systems several provisions have been made for preventing disputes and providing a way for the resolution of Matrimonial Disputes. But with emerging conflicts among family members, matrimonial disputes are rising day by day and becoming difficult to resolve. The Holy Quran, the final book of divine guidance for humanity, revealed by Allah (God) to His Prophet Muhammad (PBUH) provides a full range of laws for the resolution of all kind of disputes either public or private. Almost, its eighty verses deal with family matters and provide clear rules and guidelines for the peaceful resolution of matrimonial disputes. Islamic law derived from the Holy Quran and Hadiths leads to Alternative Dispute Resolution (ADR) System for the resolution of Matrimonial Disputes. Under Islamic law, civil and petty criminal disputes are strongly recommended to be settled through Negotiation, Mediation, Conciliation, Arbitration, which are the tools of Alternative Dispute Resolution. This paper finds, Alternative Dispute Resolution system may lead to a better, faster, and less expensive resolution of disputes than other traditional systems of resolution. The objective of this paper is to explore and analyse Islamic law on Alternative Dispute Resolution System, its implications on modern Alternative Dispute Resolution system and to find out the effective solution of matrimonial disputes with the help of Islamic law on Alternative Dispute Resolution techniques. It is a qualitative research based on secondary data; basically, The Quran and Hadith of the Prophet Muhammad are consulted.

Keywords: ADR; Matrimonial Disputes; Holy Quran; Hadith; Islamic Jurisprudence; Administration of Justice.

Introduction

Disputes among people are inevitable. It is difficult to imagine a human society without disputes and conflicts the Creator of the universe has stated, in the Holy Quran about the nature of man: *And man, in most cases, is contentious and quarrelsome.*¹ Disputes must be resolved for the sake of peace

and prosperity in society. Every society has a legal system to regulate human conduct and maintaining peace in society. All legal systems exist in the world dedicated to attaining solution of every dispute so that nobody shall have to take the law into his or her own hands. The conventional methods of resolution of disputes either in inquisitorial or adversarial types of adjudication system require to seek justice

victim have to fulfil a particular procedure before and during the pendency of a case. Courts have become overcrowded. According to National Judicial Data Grid (NJDG), 27676562 cases in various courts of India are pending now.² Interminable, time-consuming, complex and expensive court procedure impelled jurists and policymakers to evolve such an alternative system, less formal, less expensive, speedy and more effective for resolution of disputes. This new-discovered system was given the name Alternative Dispute Resolution (ADR); it is an attempt to devise machinery which should be capable of providing an alternative to the conventional method of resolution of disputes.

Alternative Dispute Resolution (ADR) & Its Scope

ADR as a distinct system of disputes resolution is recognized worldwide. It can be defined as a technique of dispute resolution through the intervention of a third party whose decision is not legally binding on the parties. It can also be described as mediation, though mediation is only one of the modes of ADR. The method is neither that of litigation nor that of arbitration. ADR flourishes because it avoids rigidity and inflexibility which is inevitable in the litigation process apart from a high lawyer and court fee and long delays. ADR aims to provide the parties with a cheap, speedy and less formalistic remedy to the aggrieved parties. It aims at providing a remedy which is most appropriate in the circumstances of the case. This makes ADR a viable substitution for arbitration or litigation.³

ADR is the system for settling disputes outside the courts without adversarial litigation. In the process of ADR, with the help of an impartial mediator, conciliator or arbitrator parties come together to achieve a more acceptable solution of the dispute with the common efforts of both the parties. Arbitration, Conciliation, Mediation are the most frequently adopted techniques for the resolution of disputes outside the court. ADR procedures are usually less costly and more expeditious. They are increasingly being utilized in disputes that would otherwise result in litigation. ADR processes have been proved very effective to settle commercial disputes particularly in the context of international commercial transactions, consumer disputes, employment matters, matrimonial disputes, and personal injury claims etc. One of the primary reasons parties may prefer ADR proceedings is that, unlike the adversarial system of justice, the ADR system is often collaborative and allow the parties to understand each other's positions. ADR system also allows the parties to come up with

more creative solutions that a court may not be legally allowed to impose.

Modalities of ADR

Instead of going through the elaborate process in the conventional courts, now a litigant is free to seek settlement of his dispute outside the courts by resorting to any of the following methods:

- (a) Arbitration
- (b) Conciliation
- (c) Mediation
- (d) Judicial Settlement including settlement through *Lok Adalator* other Alternative Disputes Resolution fora.

(a) *Arbitration*: Arbitration a mode of ADR is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. In case of Arbitration, Arbitral Board delivers the Arbitral Award of Judgment after hearing parties after consideration of facts and evidence concerning statutory provisions.

In India, the law relating to Arbitration is contained in the Arbitration and Conciliation Act, 1996. This Act proceeds based on the United Nations model law to make this law accord with the law adopted by the United Nations Commission on International Trade Law (UNCITRAL). In terms of Section 2(1) (a) of the Arbitration and Conciliation Act, 1996 "Arbitration" means *any arbitration whether or not administered by permanent arbitral institution*. International Centre for Alternative Dispute Resolution (ICADR) is the unique centre in India which makes a provision for promoting, teaching and research in the field of ADR and also for offering ADR services to parties not only in India but also to parties all over the world. Under the initiatives of the Government of India, Indian Council of Arbitration (ICA) was established in 1965. The main objective of ICA is to promote amicable, quick and inexpensive settlement of commercial disputes using arbitration, conciliation, regardless of location.

Arbitration and Conciliation Act, 1996 encourages parties, as far as possible, to settle their differences privately either by mutual consensus or by the mediation of a third person. If the parties agree to have their disputes decided with the mediation of a third person, but with all the formalities of judicial adjudication, that may be speaking broadly Arbitration.

All disputes of civil nature involving Civil Rights fall within the jurisdiction of Arbitration. Almost all disputes-commercial, civil, labour and family disputes in respect of which the parties are entitled to conclude a settlement can be settled by ADR procedures. Disputes involving joint ventures, construction projects, partnership differences, intellectual property rights, personal injury, product liabilities, professional liability, real estate securities, contract interpretation and performance, insurance claim and Banking and non-Banking transaction disputes fall within the jurisdiction of Arbitration. It is expanding to the areas or construction health care, telecommunication, entertainment and technology-based industries etc.

Dispute involving criminal offences are fully beyond the jurisdiction of Arbitration. Even in the case of civil rights following matter cannot be referred to arbitration:

- (a) Matrimonial matters and matters connected with conjugal rights.
- (b) Industrial Disputes and Revenue matters (Income Tax and other Tax matters).
- (c) Testamentary matters under the Succession Act.
- (d) Motor Vehicle Accident cases.
- (e) Matters under the Indian Trust Act, Trusteeship of Charitable Institutions, Public charity matters falling within the purview of Monopolies and Restrictive Trade Practices Act.
- (f) Determination of guardianship or wards.
- (g) As per Section 24 of the Indian Contract Act matters relating to unlawful consideration are void, hence these matters can not be referred for arbitration.⁴

(b) *Conciliation*: The law relating to the Conciliation process is contained in the Arbitration and Conciliation Act, 1996. Conciliation is an alternative dispute resolution process whereby the parties to a dispute use a conciliator, who meets with the parties separately and together in an attempt to resolve their differences. They do this by lowering tension, improving communication, encouraging parties to explore the potential solution and assisting parties in finding a mutually acceptable solution. In Conciliation, Conciliator does not pass any Award.

(c) *Mediation*: Mediation is a process by which disputing parties reach on a settlement with the efforts of a neutral third party who is known as Mediator. He bridges the gap between parties, facilitates dialogue and successfully brings the

parties to the negotiation table. Mediation is the most frequently adopted technique of ADR. It is a non-binding process in which Mediator assists the disputing parties in reaching a mutually satisfactory and agreed settlement of the dispute. Mediator only assists the parties; he has no authority to make any binding decisions. He uses various procedures, techniques and skills to resolve the dispute by negotiated agreement without adjudication. He has no power of adjudicating or impose an award like Arbitration award. The process may have to pass through several stages like preparation, joint sessions, private meetings and final result.

Settlement of Disputes through Lok Adalat and other Fora

The other unconventional mode to resolve disputes are as follows:

- (i) *Lok Adalats*: Article 39-A of the Constitution of India⁵ dedicated to provide free legal aid. To accomplish this objective the Government of India appointed a committee headed by Justice PN Bhagwati. The committee prepared a draft on legal aid programme which could be applicable throughout India, and the Legal Service Authority Act, 1987 was passed. Along with provisions of free legal aid, it also contained provisions relating to *Lok Adalats*. Although before the enactment of this Act, *Lok Adalats* were functioning as an institution of Alternative Dispute Resolution voluntarily. Their decisions were lacked legal recognition but they gained popularity because of their informal procedure and speedy disposal of cases. Later through the Legal Service Authority Act, 1987, *Lok Adalats* has got legal status and their decisions are recognized. Now parties can resolve their disputes by amicable settlement through *Lok Adalats*.

Section 19 of The Legal Service Authority Act, 1987 provides that every State Legal Service Authority, District Legal Service Authority, or the Supreme Court Legal Service Committee, High Court Legal Service Committee and Taluk Legal Service Committee may organize *Lok Adalats* at such intervals and places as it thinks fit.

Lok Adalats which are known as *People's Festival of Justice* can be defined as a forum where voluntary efforts are made to settle disputes between parties through conciliatory efforts. Every *Lok Adalat* organized for an area shall consist of such

number of Acting or retired judicial officers and other people of the area, as specified by the State Legal Service Authority or the District Legal Service Authority or the Supreme Court Legal Service Committee or the High Court Legal Service Committee as the case may be. The *Lok Adalats* are generally organized in court premises. The secretarial expenses are afforded by States by allocating grants to Legal Aid Authorities.

Lok Adalat is not a court of law in its truest meanings. They work as the substitute of courts in settling cases which are pending in superior courts. Now *Lok Adalats* have also been organized even for cases pending in the High Courts and Supreme Court⁶ Generally, *Lok Adalats* are dealing with cases—Mutation, Compoundable criminal cases, encroachment cases, Family disputes, Land acquisition disputes, Motor Accident claims and cases which are not sub-judice. An award of a *Lok Adalat* is deemed to a decree of a civil court or an order of any other court. It becomes final and binding on all parties to the dispute. No appeal lies against any such award in any court.⁷ *Lok Adalat* organized on 10 Feb. 2018 disposed 12,01,166 out of 48,56,472 cases nationwide.⁸

- (ii) *Village Courts*: Article 40 of the Constitution of India provides that the State shall take steps to organize village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. Village courts are like Village Panchayats, where locals can settle their disputes through mediation. Residents without legal qualification may act as a member. They follow the principle of Natural Justice.
- (iii) *Mediation Centres*: Under the Tamil Nadu Legal Aid and Advice Board, Mediation Centres are established in rural areas where there are no courts. These centres promote settlement of disputes before taken to the courts. They are run through the mediator-lawyer, local worker and social workers. Their functioning is one a week on holiday. If settlement fails they provide legal aid to go to law courts.
- (iv) *Centre for Women*: In Tamil Nadu, such a centre is running to give thrust and expansion to women's mediation centre. Their role is to deal with matrimonial disputes. Family matters get special attention. In Tamil Nadu

men and women mediation centres are institutionalized, they focus on conciliation in family matters.

Matrimonial Disputes and ADR

An unprecedented rise in matrimonial disputes in India is noticed nowadays. According to the Ministry of Law, over seven lakh divorce cases were awaiting adjudication in courts at the end of December 2017. Of the 713511 pending divorce cases, 264409 are in Uttar Pradesh, Kerala with 61970 divorce cases pending in family courts is on the second number in this list.⁹ Some social and cultural reasons may be behind this situation. It could be like the husband complaining about wife talking endlessly her parents and friends; the wife is over suspicious about her husband, adultery, ego on each of the side, the difference in the social and economic status of wife or husband etc. it begins from intolerance from any side which leads to domestic violence, demand of dowry or even misbehave from the side of wife. Such disputes can be settled with the assistance of parents and other relatives, but when from wife's side such steps like lodging of police complaint under Section 498A IPC, Protection of Women from Domestic Violence Act (PWDVA), 2005 and Dowry Prohibition Act, 1961 it becomes difficult to ease the matter and adversarial litigations start, which raise the burden on civil courts. Despite heavy litigations, family courts with the help of mediation and conciliation centres are settling matrimonial cases amicably by exercising ADR techniques such as mediation and conciliation.

Family Courts and ADR

Until 1984, family matters like divorce, separation, maintenance, custody of children, etc. fell within the jurisdiction of the ordinary civil courts of the country. It is generally accepted that litigation in family matters needs to be less formal, less inquisitorial and less adversarial in comparison of other civil suits. The alarming rise in matrimonial and other family disputes paved a way to enact the Family Courts Act, 1984 to save the institution of marriage, and to provide the establishment of family courts, to promote conciliation and speedy settlement in matrimonial and family cases.

The jurisdiction of Family Courts has precedence over matrimonial and family law statutes enforced in India.¹⁰ On the successful working of various mediation centres enjoined in settling matrimonial disputes the Apex Court in *K.Srinivas Rao v. DA Deepa*¹¹ has observed as follows:

Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10 to 15% of matrimonial disputes get settled in this Court through various mediation centres. When the dispute is taken up by the Family Court or by the court of the first instance for hearing, it must be referred to mediation centres. Matrimonial disputes particularly those relating to custody of the child, maintenance, etc. are pre-eminently fit for mediation. Section 9 of the Family Courts Act enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts, Family Courts are assisted by Counselors. Even if the Counselors fail in their efforts, the Family Courts should direct the parties to mediation centres, where trained mediators are appointed to mediate between the parties. Being trained in the skill of mediation, they produce good results.

Concept of ADR in Islamic Law and Resolution of Matrimonial Disputes

Disputes arise mostly with the people we interact with regularly, such as husband and wife, family members, friends and colleagues etc. It is very important for the others around the two disputing people or groups, especially those in positions of authority like elders in the family, to wisely play the role of conciliator, mediator, to prevent the situation from being blown out of proportion and causing a permanent straining of relations.

Islamic law one of the most popular religion-based legal system in the world has its system of resolution of disputes, it has recognized methods of resolution of disputes similar to those which are known as ADR in the present time.

In cases of marital discords arise between husband and wife; it does not enable them to break up their marital bond instantly. Dissolution of marriage by way of *Talaq*, *Khula* and *Fasq* are not at all viewed favourably in Islam; rather it has been condemned and discouraged unless warranted by valid reasons. The Prophet (PBUH) cautioned against the senseless exercise of *Talaq* (divorce) when he said

*Among lawful things,
divorce is most hated by Allah¹²*

The Holy Quran commands both husband and wife to follow a procedure before the dissolution of marriage if it becomes inevitable. This prerequisite procedure contains techniques of ADR in the

form negotiation, conciliation and arbitration. Unfortunately, most of the Muslims do not follow this procedure which is dedicated to save the pious bond of marriage and raise the number of litigations in courts. *Sharia Courts*¹³ which are just like arbitration are dedicated to resolving the matrimonial disputes between Muslims outside the court of law. On the petition filed by one Vishwa Lochan Madan to seek a ban on *Sharia Courts* working in India on 7 July 2014 the Supreme Court of India has rejected his demand and observed that *Sharia Courts* have no legal sanctity, but if people still want to approach these courts, it's their will.¹⁴

Pre-Divorce Procedure set by the Holy Quran

.....the pious wives are obedient. They guard (their chastity) in the absence of their husbands with the protection of Allah. But those women whom you fear will disobey and defy, admonish them; and (if they do not amend) separate them (from yourselves) in beds; and (if they still do not improve) turn away from them, striking a temporary parting. Then if they become cooperative with you, do not seek any way against them. Surely, Allah is Most High, Most Great.¹⁵

The Holy Quran 4:34

And if you fear a breach between the two, then appoint one arbitrator from the husband's family and the other from the wife's family. If both (the arbitrators) resolve to bring about settlement, Allah will create harmony between them. Indeed, Allah is All-Knowing, All-Aware.¹⁶

The Holy Quran 4:35

These above mentioned two holy verse of the Quran set a four steps procedure, which must be followed before the dissolution of marriage if followed honestly, the possibility of dissolution of marriage and bitterness between husband and wife comes to end.

- (i) *Negotiation Between husband and Wife:* When there is marital discord, the Holy Quran advises the husband to reason out (*izuhunna*) with his wife through discussions. If differences persist, then as a next step,
- (ii) *Temporary Physical Separation:* The parties are asked to sexually distance themselves (*wahjuruhunna*) from each other in the hope that this temporary physical separation may encourage them to unite. And if even this fails, the husband is instructed, as a third step,
- (iii) *Further Negotiation:* Husband once again explain (*wazribuhunna*) to his wife the

seriousness of the situation and try to bring about a reconciliation. In pursuance of *wazribuhunna*, the husband shall explain to his wife that if they do not resolve their differences soon enough, their dispute may go beyond the confines of their house which may not be in the interest of both parties. If the dispute remains unresolved, the fourth step must be followed.

(iv) *Arbitration and Conciliation*: The Holy Quran requires the matter to be placed before two arbitrators, one from the family of each spouse, for resolving the dispute. If they both the arbitrators desire reconciliation, Allah will cause it between them.

There is a great reward for those who facilitate reconciliation between disputing parties. It is narrated by *Abu Darda* (R.A) that the Prophet (PBUH) said:

Shall I not inform you of something more excellent in degree than (voluntary) fasting, prayer and almsgiving (sadaqah)? The people replied, Yes, Prophet of Allah! He said, It is putting things right between people. Spoiling relations is the shaver.¹⁷ [Abu Dawud]

The above mentioned Hadith inspires people for playing the role of arbitrator, conciliator and mediator.

Conclusion

Alternative Disputes Resolution (ADR) techniques are usually less costly and more expeditious. ADR system is not new for Islam. The Islamic system of adjudication focuses on the resolution of disputes through amicable efforts of the parties guided by the honest and scholarly elders like *Qazis and Muftis*, which gives an idea about ADR. Although, Family courts, mediation centres, Sharia courts and local Panchayats are not parallel they are performing a very remarkable role in reducing the burden of the courts and satisfying people who are in want of justice. Forums adopted non-conventional or alternative techniques in settling disputes have been proved very effective and are inevitable need of the time.

Indian courts still, are overburdened. To make them effective our policymakers should prepare much more effective legal framework, through which the people could be motivated for settling

their disputes outside the courts. People should be promoted for acting as Arbitrators, Conciliators and mediators. More forums like mediation centres, local Panchayats, Sharia Courts etc. should be authorized under a legal framework to resolve the disputes in a recognized way. Eligible personalities from various fields, like social activists, a spiritual person like *Qazis, Muftis, Pandits* etc. may be fit for conciliation and mediation, they should be appointed as conciliator and mediator and their decisions should be reviewed and sanctioned by the courts. In cases of matrimonial disputes the Quranic mandate on pre-divorce stage must be made mandatory for all, if it will be followed, would end possibilities of marital discord.

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