

ŞULĤ
FACTS AND EFFECTS IN ŞHARĪ'AH VIS-A-VIS
EFFICACY OF PAKISTANI STATUTES AND
EFFICIENCY OF THE JUDGES

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This work probes the notion of *şulĥ* with its minute details, in the context of ADR (Alternative Dispute Resolution). It discovers the generic term *Işlāĥ* as one of the corresponding *Şhari'ah*'s phenomenon to ADR of the conventional law. It argues that the mechanism and structure provided by the *Şhari'ah* for resolution of disputes through informal techniques is highly simple, easily understandable, vastly practicable, more expeditious in bringing finality to the issue, and above all, it is free of cost. It determines the criterion of fitness of a case for *şulĥ* and explores that *şulĥ* could be affected both in civil and criminal areas including major issues of the *Hudūd* offenses. The work also covers the details of the subject in Pakistani legal system, with special reference to the efficacy of Pakistani Statutes, and efficiency of the learned judges on the subject. Legal effects of *şulĥ*, both in the *Şhari'ah* and law, have been discussed comprehensively. Proposals and suggestions for improvement also form part of this work. Being the very common and efficient method in legal research so far, the qualitative research technique has been adopted in the present work, where the content analysis of the secondary data, available in the *Şhari'ah* and law on the subject under investigation, has been made with minute details.

Keywords: *Şulĥ*, Dispute, Judge, Law, Case, Resolution, Alternative, Settlement, *Şhari'ah*.

Introduction

Arising of disputes is the ever-connected and unpreventable

characteristic of human society. Its sole responsible factor is the hankering nature of man that often appears in the shape of conflict of interest. To stop the birth of dispute is, therefore, almost impossible and every effort in this regard would not be more than a futility. What is necessary and wise is that dispute should not be left unnoticed, keep on growing till it begins challenging the peace of the whole society. They should be timely attended to, properly assessed, wisely managed and peacefully resolved. As the resolution of dispute has a direct nexus with law and order, tranquility of the society and productivity of its members, it has been a center of concern for philosophers, academicians, researchers, social workers and politicians round the world and throughout history. Human history has witnessed two modes of peaceful dispute settlement i.e. (a) amicable resolution of dispute through informal techniques and (b) determination of dispute through formal adjudication. No doubt, the human history has also experienced the ending of disputes by might and use of force, nonetheless, it could not be considered as settlement of dispute, and it may rather be called 'Suppression of a dispute'.

Regular adjudication is, of course, a peaceful mode of settlement of dispute; nevertheless, it has some necessary irremovable features that do not suit the hasty and comfort-inclined nature of humans. These features have been the subject of criticism by scholars, researchers, judges, lawyers and other important stakeholders of the justice sector and are, as a result, frequently counted as "the defects of the formal adjudication". The defects mainly include complexity of procedure, towering expenditure, unwanted adjournments, extremely lengthy cross-examinations, hardships faced by the party in the production of witnesses, and most significantly the long-awaited finality of the verdict of the trial court. The situation goes further worsened when abuse of procedure becomes a common trait of the lawyers and the judges, for one reason or the other, could not save the proceedings from wanton, irrelevant and unwarranted performance of the counsels. Problems in the process of execution of decrees are more troublesome than those of a hearing of a suit. Juxtapose to it, the system of resolution of disputes through informal techniques is simple, cheap, expeditious, everlasting and, more importantly, easy in execution. It saves the time of the litigants, court and other related departments as it saves the wealth of the parties and expenditure of the government. These informal means are, now-a-days, known by a generic phrase of ADR in

conventional legal paradigm; standing for Alternative Dispute Resolution. Two of its modes the Mediation and Conciliation correspond to the concept of '*ṣulḥ*' under the Islamic Law (*Sharī'ah*).

The *Sharī'ah* has its own system of informal means of dispute resolution that is more simple, easy and practicable as compared to ADR of conventional law. According to the main stream of scholars (both classical and contemporary), this system is twofold and offers *taḥkīm* and *ṣulḥ* as informal means of dispute resolution. *Taḥkīm* corresponds to arbitration and *ṣulḥ* would cover both 'mediation' and 'conciliation' of the conventional law. The *Sharī'ah*, principally, does not recommend meaningless and impracticable classification of informal means to 'mediation', 'conciliation' and 'negotiation' as provided by law. To it, all these phenomena are the ways leading to *ṣulḥ*, by one way or another. Pragmatically speaking, even *taḥkīm* is not a mode of amicable settlement in the *Sharī'ah* and is considered by classical Muslim jurists (*fuqahā*) as a sub-branch (*far'*) of regular adjudication (*qaḍā*).¹ This work is, however, confined to *ṣulḥ* with a further confinement to *ṣulḥ* in dispute between ordinary litigants, not being spouses. The focus mainly remains on procedure and effect of *ṣulḥ* in cases pending in courts. *Sulḥ* between the States (nations), political warring factions and *ṣulḥ* in matrimonial issues have been kept out of its ambit and would be dealt within some other academic project. The work investigates the concept of *ṣulḥ* in the context of modern ADR mechanism with particular reference to the Pakistani legal system. For the purpose, analytical approach of quantitative research has been applied.

What has been discovered in this work could be ultimately assessed from the thorough study of its content, it is, however, briefly stated that the work has examined the reasons of inefficacy of Pakistani laws and inefficiency of the learned judges of the trial courts, on the subject. It has also explored the factors responsible for such defects, as it has offered suggestions for improvement in the shape of amendments, rectifications, and purpose-based fresh legislation. Most significantly, the work has examined the compatibility of relevant provisions of the Pakistani laws on the subject with *Sharī'ah* and has pointed out the areas which are not in consonance with the rulings of Islamic Law and Jurisprudence despite the fact that consistency of laws with the *Sharī'ah* is a constitutional obligation.²

Need of Ascertaining the Meaning and Limits of *Ṣulḥ* (Compromise)

Since long, various phrases like *Muṣāliḥat*, *Rāzināmah* (in Urdu), *Ṣulḥ*, *iṣlāḥ*, *Ṣalāḥ*, *Muṣāliḥat* and *Musālamah* (in Arabic), ‘compromise’, ‘mediation’, ‘conciliation’ and ‘reconciliation’ (in English) are not carefully used. This careless, or to be more lenient, interchangeable usage would have been acceptable if kept confined to common conversations, but, unfortunately, this practice is not being given up even during sharing of talks, delivering lectures and authoring research papers on the subject and then its reading out in national and international conferences, seminars and workshops, specially arranged for resolution of disputes through amicable settlements. A damaging confusion has, therefore, been created that has placed the academicians, researchers and predominantly the practitioners at nowhere. This confusion is quite similar to that which is being faced by cotemporary mediators due to the unstopped number of approaches towards the meaning and limits of mediation in conventional law.³ So, it is the right time for ascertaining the meaning of *Ṣulḥ* and defining its limits in the *Shari‘ah* – through a process of expurgation of all other relevant phrases including the meanings of its cognates.

Ṣulḥ, also known as *musālamah*, is an Arabic noun used for a ‘peace restored state’ arising out of a peaceful settlement that operates as a contract between the disputing parties. Its nearest synonym is *Ṣalāḥ*; the antonym of *fasād*/brawl. The second antonym of *Ṣulḥ*, could be *mukhāṣamah* (a state of disagreeing). The most appropriate translation of *ṣulḥ* and its nearest fellow in meaning would ‘compromise’ or reconciliation [not conciliation in its technical sense which is covered by *Iṣlāḥ*. *Iṣlāḥ* refers to efforts for reform and restoring of peace through peaceful process. It means every procedure that ensures good and prevents evil. In brief, *iṣlāḥ* refers to efforts for reforms and efforts to set aright the affairs of people; as opposed to *ifsād* which means efforts for chaos and turmoil. In the present legal scenario, the phrase *iṣlāḥ* would cover all modes of alternative dispute resolution; including arbitration,⁴ and, as such *iṣlāḥ*, would be the appropriate similitude of the present day ADR. *Ṣulḥ* is the name of a contract of peace and also refers to a state of peace as opposed to a state of turmoil. To be more specific, the antonym of *ṣulḥ* is *fasād* whereas the antonym of is *ifsād*.⁵ The relation of *iṣlāḥ*

and *ṣulḥ* is also that of a source and product. The termination of a dispute through the process of *iṣlāḥ* may either be in the shape of reconciliation (*ṣulḥ*) or other mutually accepted shape as an award.

In the following, the methodology of Qur’ān, using *iṣlāḥ* and *ifsād* as antonyms inter se could be observed. It shall also be comprehended that how Qur’ān condemns the later and how it appreciates the former. The fact shall also surface that what the modern World knows as mediators or conciliators, the Qur’ān calls them *muṣliḥūn*. What the contemporary writers know as miscreants, the Qur’ān lists them as *mufsidūn*.

وَإِذَا قِيلَ لَهُمْ لَا تُفْسِدُوا فِي الْأَرْضِ قَالُوا إِنَّمَا نَحْنُ مُصْلِحُونَ

When it is said to them: “Make not mischief on the earth,” they say: “Why, we only want to make peace!”⁶

وَقَالَ مُوسَى لِأَخِيهِ هَارُونَ اخْلُفْنِي فِي قَوْمِي وَأَصْلِحْ وَلَا تَتَّبِعْ سَبِيلَ الْمُفْسِدِينَ

And Moses had charged his brother Aaron (before he went up): “Act for me amongst my people: Do right, and follow not the way of those who do mischief.”⁷

أَوْفُوا الْكَيْلَ وَالْمِيزَانَ وَلَا تَبْخَسُوا النَّاسَ أَنْشَاءَهُمْ وَلَا تَفْسِدُوا فِي الْأَرْضِ بَعْدَ إِصْلَاحِهَا

Give just measure and weight, nor withhold from the people the things that are their due; and do no mischief on the earth after it has been set in order.⁸

وَلَا تُطِيعُوا أَمْرَ الْمُسْرِفِينَ ۝ الَّذِينَ يُفْسِدُونَ فِي الْأَرْضِ وَلَا يُصْلِحُونَ

“And follow not the bidding of those who are extravagant, – Who make mischief in the land, and mend not (their ways)”⁹

وَكَانَ فِي الْمَدِينَةِ تِسْعَةُ رَهْطٍ يُفْسِدُونَ فِي الْأَرْضِ وَلَا يُصْلِحُونَ

There were in the city nine men of a family, who made mischief in the land, and would not reform.¹⁰

All the above verses and many other like it use both phrases of

islāh and *ṣulh*; as opposite words. Similarly, the Holy Qur’ān has also used *ṣulh* and *fasād* as antonyms and referring to a ‘state of peace’ and a ‘state of disorder’ respectively. This could be seen in the following verses:

وَإِنْ أَمْرًا خَافَتْ مِنْ بَعْلِهَا نُشُوزًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا
صُلْحًا وَالصُّلْحُ خَيْرٌ

If a wife fears cruelty or desertion on her husband’s part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best;¹¹

ظَهَرَ الْفَسَادُ فِي الْبَرِّ وَالْبَحْرِ بِمَا كَسَبَتْ أَيْدِي النَّاسِ

Mischief has appeared on land and sea because of (the deed) that the hands of men have earned ...¹²

All the above verses clearly differentiate between *islāh* and *ṣulh*; and also mention their antonyms for further clarification. So, they should not be confused *inter se* and both should be clothed with their separate meanings, particularly in research works, more particularly, when such works specifically focus on amicable settlements.

The above distinction is also evident in the work of some famous commentators. For example Allamā Shabbir, while interpreting verses No. 9 and 10, of chapter No. 49 (*Al-Hujurat*) writes:

“make excessive efforts for the removal of differences. Do not be a spectator to confrontation of your brothers, try to the best of your strength and intervene between disputants. You must fear Allah while making such efforts”.¹³

Mufti Muḥammad Shafi has also taken *islāh* in its broader sense and has not confined it to *ṣulh*.¹⁴ The significance of this distinction has also attracted the attention of the legal scholarship and the cotemporary researchers have concluded that *ṣulh* is a descriptive noun whereas *islāh* (the use of its verb) refers to an act that brings *ṣulh* and removes its opponent i.e. *fasād*.¹⁵ It is probably because of the above distinction that the learned Imam Muslim, in his *Ṣāhiḥ*, has captioned the relevant chapter with *islāh*, not with *ṣulh*.¹⁶ Similarly, Imām Bukhāri has also captioned one of his chapters with *islāh*.¹⁷

From the above, it can be easily concluded that, technically speaking, *ṣulḥ* under the Islamic law competes with *rāḍināmah* (Urdu) ‘reconciliation’ and ‘compromise’ of conventional law. *Iṣlāḥ* competes with all modes of ADR: the ‘arbitration’, ‘mediation’, ‘conciliation’ and even the ‘negotiation’. This distinction has also discovered that what the modern world knows under the generic phrase of “ADR”.¹⁸ The *Sharī‘ah* has recognized it under the broad heading of *iṣlāḥ*. It is, nonetheless, highly expedient to explain at this place that unlike the conventional law, the *Sharī‘ah* does not recommend the complicated classification of informal modes of dispute resolution. The problems and confusions that has caused the division of these modes to arbitration, mediation, conciliation, negotiation and a dozen more could, therefore, not find in room here. The *Sharī‘ah* has a simple two fold division of informal techniques; (a) *Taḥkīm*; the adjudicatory process and (b) *Maṣālahat*; the non-adjudicatory process. The former terminates in a binding decision whereas the later, if succeeds, results in *Ṣulḥ*. The procedure for *taḥkīm* and *qaḍā* (formal adjudication) is the same. The modus operandi for *maṣālahat* may be mediation, conciliation, negotiation or any other.¹⁹

***Ṣulḥ*: The Technical Aspect**

What has been explained above about the meaning and limits of *ṣulḥ* could also be observed in the work of classical jurists (*fuqahā*). Almost all of their definitions reflect the contractual nature of ‘*ṣulḥ*’ and do describe it as a noun and not as an action or process of efforts for reconciliation. For instance, according to Ibn ‘Ābidīn, “It is a contract which uproots the dispute and terminates the litigation”.²⁰ Its essentials are offer and acceptance”.²¹ Here, the jurist has not only mentioned the ‘contract’, but has also stated its basic essentials, known as *ījāb* and *qubūl* or *sīghah* under Islamic law of contract. According to Imām Sarakhsī, “It is a contract permitted by the *Kitāb* and *Sunnah*”.²² Ibn Farhūn Mālikī has said, “*Sulḥ* on account of admission is a contract of a sale”.²³ Here, the learned jurist has further specified it and has counted it as a ‘sale’ if the defendant submits a cognovits. The compilers of *al-Mujallah* hold that “*Ṣulḥ* is a contract that terminates a dispute consensually and is concluded through offer and acceptance”.²⁴ This definition *inter alia* focuses on the objective of the contract of *ṣulḥ* and tells that how this contract could be concluded. The best definition is, however, that of

Ibn al-Hummām who says that, *ṣulḥ* literally means termination of a dispute and technically refers to a contract for resolution of dispute.²⁵ Being a contract, a *ṣulḥ* agreement must fulfill all requirements of a valid contract, such as, free consent of the parties, the parties being major, consistency with the objectives of the *Sharī‘ah*, determinacy of the subject matter, consideration being lawful and many more.

***Sharī‘ah* Places More Emphasis on Peaceful Resolution of Dispute. To It, Regular Determination of Issues Could be the Last Resort**

As compared to the other legal systems of the world, the *Sharī‘ah* places more emphasis on the peaceful resolution of dispute. Recourse to regular adjudication is the last option under it. There are numerous verses in the Holy Qur’ān that prohibit *ifsād* and call for efforts for reformation. As a rule, for instance, the change in the will of a testator and telling a lie for a witness are major sins. For the purpose of reform, change in the will is, nonetheless, allowed. Similarly, in making efforts for reform, telling a lie has been made permissible.²⁶ Besides, it is mandatory for a Muslim to honor his vow; otherwise he shall pay various kinds of expiations. But if someone makes a vow that he shall not make any efforts for reform (to make peace between people), he is under obligation to break his vow, to pay expiation and should make *iṣlāḥ* between the people. By doing this, he will commit no sin.²⁷ The relevant verse runs as:

وَلَا تَجْعَلُوا اللَّهَ عُرْضَةً لِأَيْمَانِكُمْ أَنْ تَبَرُّوا وَتَتَّقُوا وَتُصْلِحُوا بَيْنَ النَّاسِ صَلَّىٰ وَاللَّهُ
سَمِيعٌ عَلِيمٌ

“And make not Allah, by your oaths, a hindrance to your being righteous and observing your duty unto Him and making peace among mankind. Allah is Hearer, Knower.”²⁸

The sayings of the Holy Prophet Muḥammad (ﷺ) explain it further: “Whenever one made a vow (not to do), and the otherwise he thought better, then he must adopt what is better”.²⁹ Another *Tradition* offers the same concept as;

“Not the liar is he who makes peace between the people and speaks for welfare. I never heard the Prophet (ﷺ) permitting telling lies in any case except during war, in making reforms between people, and in talking to one’s wife or to one’s husband”.³⁰

Some other *Tradition* of the Holy Prophet Muḥammad (ﷺ), like the following, further strengthen the importance of *ṣulḥ*

“The Prophet (ﷺ) said to Abi Ayyūb (رضي الله عنه), Should I tell you about the best of charity? He said, Why not. The Prophet (ﷺ) said, Make efforts for restoration of peace between the people when they began to make affray, and bring them closer to when they have repelled each other (*Iṣlāḥ dhāt al-bain*)”.³¹

Khair is a phrase used by the Holy Qur’ān in a number of places. It means a good deed. For the purpose of this topic, focus should remain on its use in three different chapters of the Holy Qur’ān; the *Al-Nisā’*, the *Al-Mujādalah* and the *Al-Qalām*. Admittedly, a mediator, off and on, holds secret meetings with each disputant party. These meetings are essential part of efforts to set aright the affairs of the people. In the Qur’ānic parlance, these meetings are known as *Najwā*. It also denotes the concept of counseling or conferring. A *najwā* should be aimed for unification and betterment (*al-birr, al-ma’rūf and iṣlāḥ bain al-nāss*) of the people. There is a great reward for such counselors. If it is aimed at creating differences between the masses and deepening of already tense relations between them, it would be a satanic act (*najwā min al-shaitān*), and hence, prohibited for being aimed for injustice (*ithm* and *‘udwān*). Such counselors are hinderers of the good because they are detractors and spreaders abroad of slanders, transgressors, and malefactors and intrusive. Here, the phrases ‘detractor/*hammāz* and spreader abroad of slanders/*mashshāen be-namīm* particularly refer to the person who strives to create hatred and intensify enmities between people.³² The later phrase especially points to the go-between for creating misunderstandings. It is nothing else but *ifsād*; the opposite of *iṣlāḥ*. These are the characteristics of infidels and a Muslim must avoid it.³³

سَنَسِيْمُهُ عَلَى الْخُرْطُومِ

Soon shall We brand (the beast) on the snout!³⁴

What is being stated here may be found in the verse:

هَمَّازٍ مَشَاءٍ بِنَمِيمٍ ۝ مَنَّاعٍ لِلْخَيْرِ مُعْتَدٍ أَثِيمٍ ۝ عُتْلٍ بَعْدَ ذَلِكَ زَنِيمٍ ۝

A slanderer, going about with calumnies, (habitually) hindering (all) good, transgressing beyond bounds, deep in sin, violent (and cruel),- with all that, base-born,³⁵

The same idea can be inducted from the following verses:

لَا خَيْرَ فِي كَثِيرٍ مِّنْ نَّجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ بَيْنِ
النَّاسِ ۖ وَمَن يَفْعَلْ ذَلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا

Most of their secret conferrings are devoid of good, unless one secretly enjoins in charity, good deeds, and setting the affairs of men right. We shall grant who ever does that seeking to please Allah a great reward.³⁶

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَنَاجَيْتُمْ فَلَا تَنَاجَوْا بِالْإِثْمِ وَالْعُدْوَانِ وَمَعْصِيَتِ الرَّسُولِ
وَتَنَاجَوْا بِالْبِرِّ وَالتَّقْوَىٰ وَاتَّقُوا اللَّهَ الَّذِي إِلَيْهِ تُحْشَرُونَ ۖ إِنَّمَا النَّجْوَىٰ مِنَ
الشَّيْطَانِ لِيَحْزُنَ الَّذِينَ آمَنُوا وَلَيْسَ بِضَارِّهِمْ شَيْئًا إِلَّا بِإِذْنِ اللَّهِ ۗ وَعَلَى اللَّهِ
فَلْيَتَوَكَّلِ الْمُؤْمِنُونَ ۖ

O ye who believe! When ye hold secret counsel, do it not for iniquity and hostility, and disobedience to the Prophet (ﷺ); but do it for righteousness and self-restraint; and fear Allah, to Whom ye shall be brought back. (9) Secret counsels are only (inspired) by the Evil One, in order that he may cause grief to the Believers; but he cannot harm them in the least, except as Allah permits; and on Allah let the Believers put their trust.³⁷

In Islamic Judicial History, the judicial policy of Caliph ‘Umar b. Khattāb (رضي الله عنه) has got its own significance. Once he issued a directive and used the phrase *yaṣṭaliḥu*. It is an intransitive verb, tracing back to the family of *ifti’āl*. It denotes the performance of some act by one’s own self.³⁸ It requires no other person or thing as an object. On this analogy, the correct translation of his directives would be as: “Return the disputants [pointing to pre-trial proceedings] so that they may themselves work out a peaceful settlement”.³⁹ Sometimes, recourse to amicable settlement becomes highly expedient. The Māliki jurists are of the strong opinion that a judge should refer the litigants to affect compromise/*ṣulh*; if the case is deadly complicated or the litigants are relatives inter se.⁴⁰ Even a partial compromise (the partial adjustment of the suit) has been highly recommended. Narrated ‘Abdullāh bin Ka‘b bin Mālik: Ka‘b (رضي الله عنه) demanded his debt back from Ibn Abi Ḥadrad in the mosque and their voices grew louder till Allah’s Messenger (ﷺ) heard them while he was in his house. He came out to them raising the

curtain of his room and addressed Ka‘b (ﷺ) “O Ka‘b!” Ka‘b replied, “Labbaik, O Allah’s Messenger (ﷺ).” (He said to him), “Reduce your debt to half,” gesturing with his hand. Ka‘b said, “I have done so, O Allah’s Messenger (ﷺ)!” On that the Prophet (ﷺ) said to Ibn Abī Ḥadrad, “Get up and repay the (remaining) debt to him.”⁴¹ Amazing is the fact that elucidationists (scholars with expertise in interpreting dreams) interpret the conciliation-revealing dreams as indicating goodness, welfare, health and prosperity. So, the inviting of a debtor to conciliation with no payment would mean guiding an astray to the right path. Similarly, a compromise with the debtor on a part of the debt [partial adjustment] would mean the coming of good to the dreamer.⁴²

For the above significance of *ṣulḥ*, almost every jurist, to whatever School of thought he may belong, has allocated a considerable part of his book to *ṣulḥ*. For instance, Aalim b. al-Ala; the author of *al-Fatāwā al-Tātārkhāniyah* has stated nine thousand six hundred and fifty five (9655) cases of reconciliation/*ṣulḥ*. Imām al-Sarakhṣī had discussed *ṣulḥ* in six separate chapters.⁴³ Ibn Qudāmah al-Maqdasi has given ten pages to *ṣulḥ* despite his extreme inclination to brevity throughout in his book.⁴⁴ All other imminent jurists, such as Ibn Taimiyah, Ibn Qayyem, Muḥammad al-Sharḥini, Muḥammad b. ‘Alī al-Shawkāni, Shamsuddīn Muḥammad al-Ramali, Mansoor b. Yūsuf al-Bahooti, Shamsuddīn Muḥammad al-Dasūqi, Ibrāhīm b. ‘Alī al-Sherāzī, Ibn al-Hummām and al-Kāsānī have rich and valuable contributions to the subject. The contemporary contributors include ‘Abdullah al-Ḥāmid, Alī al-Hammādi, Hasan al-Nidāni, Maḥmūd al-Sayyed, and Kāmīl Aḥmad.⁴⁵ Wahbah Al-Zuhaili has specified near about three dozen of pages to *ṣulḥ*.⁴⁶

In *Shari‘ah*, there is the concept of compromise between the plaintiff/claimant and a third stranger, not being a party to the dispute even. The stranger includes an uncalled mediator and self-appointed conciliator. If a third person, without permission of the defendant negotiates the dispute with the plaintiff, and they both arrive to an amicable agreement, the contract of a valid *ṣulḥ* is concluded. It would, however, be subject to the subsequent approval of the defendant. Interestingly, if the third person himself accepts the responsibility of payment, if any, again the *ṣulḥ* is good. More fascinatingly, if a conciliator, during highly strained relations between the spouses, negotiates *khul‘* with the husband on his own risk, without permission of the wife, nothing goes wrong with the

khul'. Even in the absence of such risk, *khul'* shall take place if the wife approves it subsequently.⁴⁷ One can guess the significance of *ṣulḥ* from the fact that when once a compromise/*ṣulḥ* is affected and the parties accepted it, its revocation is not allowed even at the consent of both parties.⁴⁸

Discovering the Criterion for Fitness of a Case for *Ṣulḥ*

This twofold subtopic points to twofold objective i-e (a) what issues are capable to admit *ṣulḥ* and what are not so capable? (b) In what kind of cases, the court would accept compromise? This would require us to answer some basic questions. For example:

- (a) Whether civil and criminal nature of a case matters?
- (b) Whether the punishment of an offense being '*ḥadd*' is one and the only responsible factor to render a case unfit for *ṣulḥ*?

It is Incorrect to Presume that Civil and Criminal Nature of a Dispute Matters while Considering a Case for *Ṣulḥ*

The prime objective of a civil case is to provide remedy to the effected claimant. For the reason that almost all civil cases carry the element of infringement of a private right, the jurists of Islamic law are at concurrence that civil issues are, as a rule, fit for compromise. Of course, some cases may be exempted on the basis of public policy. For instance, the civil cases that necessarily require the decree of the court or the sanction of the court is the requirement of some Act, may also be exempted such as the probate of a will or *faskh al-nikāḥ* (Annulment of marriage contract) on the basis of a husband being not equivalent (*ghair kufwū*), or on the basis of dower being less than that of her equivalent (*mithl*), or on refusal of wife to accept Islam after embracing Islam by her husband, annulment under the plea of missing of husband and annulment on the plea of *khiyār al-bulūgh* (option of puberty).⁴⁹ Similarly, the cases where the rights of children, and weaker litigants are exposed to risk, should not be referred to conciliators under public policy. This list could, however, not be kept rigid

and will always remain open to decrease and increase according to the demand of circumstances. The inclusion and exclusion in the list is the sole domain of legislature and the courts must not encroach thereupon. On the other hand, a number of criminal cases, particularly, the offenses against human body (*Jināyat*) including murder cases (*qiṣās*) admit *ṣulḥ*. Imām Abū Ḥanīfah argues that when ‘*afw* (absolution of murderer for no value) by the heirs of the deceased is allowed, how affecting a *ṣulḥ* (compromise against value that may exceed the limit of *diyyat*) could be prohibited. Clarifying the consequents of *ṣulḥ* further, he says that *ṣulḥ* renders the murderer as innocent in terms of life security, and if the heir kills him after affecting a proper compromise with him, the heir shall be executed in *qiṣās* (retaliation).⁵⁰ Ibn Qudāmah has claimed the concurrence of all schools in this regard.⁵¹ Criminal offenses punishable with *ta‘zīr* punishment, on the same way, could be the subject of *ṣulḥ*. In most of such cases the compromising party would be the State, and in a very little number of such cases, the victim would be the compounding side. This later kind is currently known as victim-offender conciliation.⁵² The former kind (when the State compounds) is now-a-days dealt with under the concept of “Plea Bargain”.⁵³ Discussion in the following would also suggest that *ḥudūd* issues, even, could be the subject of conciliation. From here, it can be concluded that although most of the civil disputes could be resolved through *ṣulḥ*, it would, nonetheless, not lead to presume that civility of a dispute is necessary for rendering a case fit for *ṣulḥ*. Had it been so, all civil cases would have been fit for *ṣulḥ* without any exception and no criminal case would have been fit for compromise.

Presumption of Absolute Bar on Conciliation/Ṣulḥ in Ḥudūd Offences is Unfounded

A presumption has dominated the field that there is no room for compromise/*ṣulḥ* in *ḥudūd* issues. The presumption is due to our insufficient legal and judicial education and, more dominantly, lack of information about the Islamic Law and its jurisprudence. This absolute negation of *ṣulḥ* is not correct jurisprudentially. The legal fraternity, both academicians and practitioners, must differentiate between composition

of a case and composition of an offence; as far as *hudūd issues* are concerned. The commission of an unlawful act is an offence. When the event of this offence is reported to the authorities or the authorities themselves take cognizance of such offence, it becomes a case. No doubt, *hudūd* cases are not compoundable but *hudūd* offences, other than those of moral turpitude, may be compounded. Abdullah b. ‘Amru b. al-‘Āṣ (رضي الله عنه) has reported the Prophet (ﷺ) to have said; “Resolve *hudūd* issues amongst you by mutual apologizing (exonerating), because when they are reported to me, execution becomes obligatory”.⁵⁴ Another episode is that of Ṣafwān b. Umayyah when he forwarded the burglar of his cloth-sheet to the Prophet (ﷺ). The Prophet (ﷺ) ordered the amputation of hand. Ṣafwān said, “I didn’t mean that! This may be a charity for him”. The Prophet (ﷺ) replied, “Why didn’t you do that before you brought him to me”.⁵⁵

Mālik b. al-Zubair b. al-‘Awwām (رضي الله عنه) narrates that once Zubair (رضي الله عنه) saw a person taking a thief to the caliph/*sultān*. Zubair (رضي الله عنه) wanted him to release the detainee. He responded that he would take him to the Authority/*Sultān* first. Zubair (رضي الله عنه) then said, “When you will bring him before *Sultān*, then say curse upon the interceder and the interceded for”.⁵⁶

As a counter argument, it may be contended that the Prophet (ﷺ), as reported by Abū Hurairah and Zaid b. Khālid (رضي الله عنه), had nullified the compromise in a case of adultery, where the father of the offender had compensated the husband of the women, by giving him a servant and hundred sheep. The Prophet (ﷺ) executed the lady and punished the offender with hundred whips/lashes and a year of exile. “O Onais, take her early in the morning, if she (still) confesses, then stone her to death”.⁵⁷ This story negates the admissibility of *ṣulḥ* in *hudūd*. The objection is jurisprudential in nature and, therefore, has to be responded on the same way. It has already been explained, in the previous lines, that when the Authority takes cognizance, no room for compromise remains. Had this case not been reported to the Prophet (ﷺ), no punishment would have been inflicted? The incident, albeit, points to the power of the authority that on taking cognizance, he may declare the earlier compromise null and void. The following discussion will further clarify the above discussion.

Qadhaf is admittedly *ḥadd* irrespective of the fact whether the

right of Allah or the right of victim is dominant. The jurists holding the later opinion advocate the admissibility of *ṣulḥ* in *qadhaf*. The Shāfi'ī School is of the view that the right of victim is dominant, inheritance would, therefore, run in *qadhaf* and that, on compromise, the punishment would stand dropped.⁵⁸ This is an example of a situation where compromise be given effect at a very belated stage, long after the cognizance of the executive. Imām Mālik has also been reported to have permitted composition of *qadhaf* offence.⁵⁹ Imām Māwardī is also of the same opinion.⁶⁰ The Law Reforms Committee of Egypt has recommended the legislation on this view.⁶¹

The above evidences are sufficient to convince that it would be wrong to presume an absolute bar on *ṣulḥ* in *ḥudūd* offences. It may also be noted that the *Shari'ah* does not recommend the reporting of *ḥudūd* issues to authorities, it rather discourages the same. In the famous case of Mā'iz al-Aslami, reported by Hazzal b. Nu'aim, the Prophet Muḥammad (ﷺ) alerted Hazzal⁶² saying, "Had you veiled him with your sheet, it would have been better for you".⁶³ Necessary to be noted in this connection is that composition of such offences at the pre-reporting stage would not mean the expunging of the offence. The offenders shall remain sinful until sincerely repented. The composition would merely keep the commission unnoticed and the offender will escape proceedings only.

The above details support the utilization of mediation and conciliation in *ḥudūd* offences before they are reported to the concerned authorities. In case of *qadhaf*, these mechanisms may be utilized even during the pendency of the case and even just before the execution of punishment; the extremely belated stage.

The Response of the Defendant Plays Significant Role in the Classification and Effects of *Ṣulḥ* on the Case

Ṣulḥ may be between Muslims and non-Muslim fighters (*ahl-ul-ḥarb*). It may be between the rebellions and the ruler (*caliph*). It may also be between disputing spouses. But this work would be kept confined to the *ṣulḥ* which may take place between ordinary litigants in connection with some property, transactions and commercial matters. While filing the written statement, a defendant either admits or denies the contents

of the plaintiff. Sometimes, he submits an evasive reply that amounts to his silence (*sukūt*). A compromise may take place in any of these three situations, resulting in different effects.⁶⁴ This can be elaborated profoundly in the following.

Compromise on Account of Admission of the Defendant
(*Ṣulḥ Ma' Iqrār al-Mudda'ā 'Alaihi*)

This may occur in a situation where the plaintiff claims the ownership of some property, which is in the possession of the defendant. The defendant, while submitting a cognovits,⁶⁵ admits the claim. Thereafter, if he affects a compromise with the plaintiff, giving him a part of the suit-property or property other than the suit-property, or usufruct of a property for a determined period, there would be nothing bad in this agreement. All schools of thought concur on the validity of this agreement.⁶⁶ Now, if the subject of compromise is a property, other than the claimed one, the agreement shall take the color of a contract of sale; for there is a consensual exchange of two properties. All rules of the sale contract would become applicable in this situation. As effect, *inter alia*, it will create right of pre-emption in case the property was immovable. Similarly, indeterminacy (*gharar*) may prove fatal for such compromise. Various kinds of contractual options, such as, option of defect, option of examination and option of keeping certain conditions, shall also run. The existence and capability of handing over of the subject matter at the time of conclusion of *ṣulḥ* will become compulsory.⁶⁷ The compromise will take the effect of a lease contract; if its subject matter happens to be a usufruct. Resultantly, its period must be determined. The death of either party would vitiate the contract as it occurs in a lease contract.⁶⁸ All schools of thought are at concurrence that all factors, that would invalidate a lease contract, would also invalidate this kind of *ṣulḥ* and the vice versa.⁶⁹

Compromise on Account of Denial of Defendant
(*Ṣulḥ Ma' Inkār al-Mudda'ā 'Alaihi*)

It will take place where the defendant denies the claim of the plaintiff. In Pakistani courts, this occurs in 99% suits. If the defendant,

during the hearing of the case, affects compromise with the plaintiff on a portion/part of the claimed property, as it occurs in near about 60% suits in Pakistani courts. This type of *ṣulḥ* is permissible according to the Ḥanafī, Mālikī and Ḥanbalī Schools.⁷⁰ They argue that the plaintiff believes himself justified and the defendant also believes himself right; but gives a part of the claimed property just to put an end to the dispute and to get rid of it as early as possible. This happens when some people, due to their noble status and undisputed repute in the society, or business in some significant enterprises, or to avoid oath proceedings in case of non-availability of plaintiff's witnesses, do not want to be indulged in litigation. The *ṣulḥ* is a recommended/*mandūb* act, and that no part of this type of *ṣulḥ* renders a lawful as unlawful and the vice versa.⁷¹ That's why Imām Abū Ḥanīfah says, "I see *ṣulḥ* '*ala al-inkār* permissible, for it satisfies the need of amicable resolution of disputes".⁷²

Shāfi'ī School and Ibn Abi Lailā, on the other hand, see this kind of *ṣulḥ* impermissible. They argue that if a plaintiff takes the property falsely, it will be the devouring of another's wealth which is taboo. If he takes it in a good belief, yet he takes a thing before the declaration of his title by a competent court.⁷³

Al-Ṣan'āni has expressed a middle view. He says that the absolute approval of this kind of *ṣulḥ* is as incorrect as its absolute denial. The ruling about this *ṣulḥ* shall vary from case to case. There is no bar on plaintiff to take something in return of his compromise; if he believes the genuineness of his claim. The denial of the defendant would make no difference. If he (plaintiff) knows the falsehood of his claim, the compensatory property or amount (*badal al-ṣulḥ*) would be taboo for him. As far as the defendant is concerned, there would be two situations. He would be under obligation (*wujūb*) to hand over the compensatory property to the plaintiff, if he believes the rightness of the plaintiff's claim but denies it for some reasons. If the defendant believes the correctness of his own denial, his *ṣulḥ* would be permissible (*mubāḥ*) and he may give the compensatory property to the plaintiff to get rid of his fatigue.⁷⁴

On the analysis of arguments forwarded by all the learned jurists, it could be easily concluded that they concentrated more on the religious side of the issue as compared to its judicial effect. By considering both

aspects of the matter, it would surface that in case of falsehood of claim, the plaintiff would be no doubt sinful but the court would give effect to the compromise, giving effect to the apparent facts and circumstances. In the absence of any *malafide* on his part, there could be no blame on him. As far as the defendant is concerned, he is, by law, allowed to dispose his property for any lawful objective, and what could be a lawful objective more than to get rid of cumbersome, lengthy, uncertain and counter-productive litigation.

***Compromise on Account of Silence of Defendant
(Ṣulḥ Ma' Sukūt al-Mudda'ā 'Alaihi)***

In this case, the defendant neither admits nor denies the claim. So it also covers evasive written statement. In connection with the validity of compromise in this situation, controversy between the jurists is the same as in the preceding kind of *ṣulḥ* i.e. *ṣulḥ ma' al-inkār*.⁷⁵ The above Shāfi'ī's opinion in *ṣulḥ ma' al-inkār* seems to have been based on his famous statement “no word can be attributed to one who keeps silence”.⁷⁶ The opinion of the majority seems to have been based on the exception to the general rule “silence, in response-wanting situations, amounts to affirmation.”⁷⁷ In brief, according to majority, including Ḥanafis, all the three kinds of *ṣulḥ*, above mentioned, are lawful and permissible. Resultantly, the title of the defendant in the subject matter of compromise shall cease.⁷⁸ No retreat from compromise would be allowed. A subsequent suit for nullifying of compromise and restitution of such property shall be liable to dismissal. As a procedural effect, It is evident from the above that compromise/*ṣulḥ* operates as *res judicata* in the *Sharī'ah* whereas, in Law, it creates estoppels by conduct only.

Legal Effects of Ṣulḥ

When the contract of *ṣulḥ* is concluded, the law comes into action and clothes it with some legal effects- both substantial and procedural. Those could be concluded as below.⁷⁹

1) It terminates the suit permanently and operates as *res judicata*,⁸⁰ meaning-thereby; the court would not reopen the issue for regular hearing between the same parties. Here, the *Sharī'ah* defers

with law and goes a step ahead of it by placing a bar on the fresh suit. In law, the *ṣulḥ* operates as estoppels⁸¹ only, and as such it does not bar the subsequent suit. In criminal side, *ṣulḥ* also terminates the case to the extent of victim and the right of *ta'zīr* remains with the State.

2) When the *ṣulḥ* is on account of admission of the defendant in respect of immovable property, it will create right of pre-emption in the favor of a third adjoining person; as per details stated above.

3) When *ṣulḥ* takes the effect of contract of sale, it creates all requirements and consequential effects of sale, such as, all essentials of validity, transfer of title, option of return on account of defect (*khiyar-e-'aib*) and option of examination (*khiyar-e-rūyat*) and many others. The rules of dissolution of contract of sale (*iqālah*) shall also apply. *Iqālah* may be entered into by the parties, and the *ṣulḥ* contract may come to an end in all civil and criminal cases with the sole exception of *ṣulḥ* in murder (*qiṣās*).

4) If the *ṣulḥ* turns to a lease contract, the relevant lease rules will govern it. Fixation of the duration, death of one of the parties and the devastation and destruction of the subject matter would bring about many changes.⁸²

5) When the *ṣulḥ* becomes as sale or gift, it will prevent any disposition in the subject matter of *ṣulḥ*, before taking possession, more particularly when the property is a movable one.⁸³

6) Once a compromise/*ṣulḥ* is affected and the parties accepted it, its revocation is not allowed; even at the consent of both parties.⁸⁴ Revocation through *iqālah* is a sole exception to this rule.

Problem with Pakistani Statutes and Courts

Pakistani statutes do not mention the phrase “*ṣulḥ*” except *Shara'ī Nizām-i 'Adl Regulation 2009* wherein the terms *ṣulḥ* and *muṣliḥīn* (conciliators) could be found.⁸⁵ The mechanism provided by the Regulation is highly confusing and the judges and advocates could not ascertain its contemplation whether it is arbitration or conciliation. The relevant provision contains the phrase *ṣulḥ* which points to non-adjudicatory process and at the same time, it provides for recording of evidence, inspection of the documents and visit and inspection of the spot which are the main features of *taḥkīm*.⁸⁶ This anomaly could be removed either

by some rule made under section 17, or by some judgment of the apex courts, but unfortunately neither the Government has framed the required rules nor any judgment of the appellate *fora* has emerged in the long span of eight years. Another such term is *sālis* (or *thālith*) which has been used in the *Small Claims and Minor Offences Courts Ordinance 2001*.⁸⁷ This law also suffers from the same defect. On one side, it requires the *thālith* to issue a certificate of voluntariness (being pleased with the settlement) of the parties, and on the other, it requires him to issue an award which means his findings based on evidence and other solid material.⁸⁸ One wonders how voluntariness and award would run together and how a process could be adjudicatory and non-adjudicatory at the same time with the same persons.⁸⁹ This feature of the Ordinance has rendered it almost redundant, and one could hardly find a court decision under it, particularly in the criminal jurisdiction. In the KP Province, all judicial magistrates, civil judges and *‘ilāqah qādīs* are notified as judges of the Small Cases and Minor Offences Court, nonetheless, none of them have ever inked down a judgment under the Ordinance.⁹⁰ The Conciliation Courts Ordinance 1961 is still intact. Truly speaking, it is a dead piece of legislation and is poor to the extent that it even does not define conciliation. Almost all its contents carry the features of binding arbitration, such as the mandatory adjudication of the scheduled civil and criminal cases by the conciliation courts, recording of evidence, the issuance of decree and then its execution, and the provisions of judicial review.⁹¹

The remaining statutes contain the phrases like ‘mediation’, ‘conciliation’, ‘reconciliation’, ‘compromise’ and ‘amicable settlement’. Some of the examples of such laws could be *the Federal Excise Act 2005, Finance Act, 2007, Income Tax Ordinance 2001, Industrial Relation Ordinance, KP Local Government Act 2013, Sindh Local Government Act 2013, Punjab Local Government Act 2013, Income Tax Ordinance 2001* and many more. Worth mentioning is also the fact that this country has no specific law on the subject where proper meaning and definition could be found, with ease, for the relevant terms. The multiplicity of phrases has created hardships, rather confusions, in understanding and ascertaining their meanings. Whether all these terms carry the same meaning, similar meaning or distinct meanings? If they carry the same meaning, then why conciliation and mediation have been

collectively used in the *Code of Civil Procedure 1908*?⁹² Why the *Family Courts Act 1964* mentions both words of compromise and reconciliation?⁹³ Why the Urdu terms of Arabic origin “*thālith*” and “*muṣleḥ*” were preferred in some special legislation? On the other hand, the present trend of internationally interchanged use of mediation and conciliation has further intensified the situation. The apex Pakistani courts have also not touched this aspect in their judgments and the prevailing confusion, as a result, has been adversely affecting the impact and productivity of all provisions, calling for amicable and peaceful settlements. A proper legislation on the subject is, therefore, needed where all these anomalies should be cleared in the definition clause with further necessary explanations and details, such as, who could be a party to compromise and who couldn't be, what could be the subject of compromise and what couldn't be, and what would be the legal effects of a compromise in a civil case as well as in criminal? Similarly, the procedure, scope and limits of compromise should also be clarified.

As explained above, Pakistan has no specific substantive law on conciliation and compromises, however, its legal system provides for procedure to be adapted by the courts at the time when the parties have already entered into a compromise. In civil cases, the Pakistani courts invoke Order 23 of the *Code of Civil Procedure 1908*, for passing orders on the basis of compromise (*ṣulḥ*). In order to achieve the required number of monthly disposal, more particularly when the case is old and falls in the targeted zone under the Judicial (Policy Making) Committee, they accept compromises haphazardly and mostly remain unobservant. Being in such a state of affairs, they give no consideration to denial or admission of the defendant. The details forwarded by jurists in this regard are altogether alien to them. The maximum they know is the fact that *ṣulḥ* is highly valued in the *Shari'ah*. To them, a compromise merely means an agreed upon settlement, it has nothing to do with the stance of the defendant or any type of contract of sale, lease or gift. When the senior judges of the District Judiciary were asked about the maintainability of the pre-emption suit, where the cause of action has been shown as a compromise on account of admission of the defendant, they replied that they would dismiss the suit for the want of absence of sale contract and would not accept the plea that the compromise of the present defendant in a previous case has amounted to contract of sale. Similarly if the

compromise would carry the element of usury (*ribā*), they would accept it as valid agreement and would grant a decree accordingly. Another good example could be given from pre-emption (*shuf'ah*) cases pending in courts. If a pre-emptor affects a compromise with the defendant on some value against his right of pre-emption, the learned judge would allow it and would announce his judgment accordingly. He remains ignorant of the unsaleable nature of the right of pre-emption. In such a situation, a judge should, following all schools of thought, reject the compromise and dismiss the suit for the absence of element of harm (*darar*).⁹⁴ Had there been any harm, the pre-emptor would have never accepted value against it. In brief, they would have no care for the different legal effects of various kinds of compromise under the *Sharī'ah*. The situation is not different on criminal side and the learned magistrates and judges accept compromises in criminal cases as inattentively as they do in civil cases. Whenever a compromise is presented before them, they follow section 345 (6) of Code of Criminal Procedure 1898, and deal composition of an offence as acquittal and as such do not grant *ta'zīrī* punishment even in appropriate cases. The Pakistan Penal Code provides for *ta'zīrī* punishment in section 311 and section 338(E), under the warranting circumstances despite composition or wavering, in the offenses of hurts and *qatl-i-'amd* (murder). This confinement is not inconsonance with the *Sharī'ah* which permits rather calls for *ta'zīrī* punishment in all offenses and criminal cases having regard to the facts and circumstances of the case, despite composition and wavering.⁹⁵ Sad to say that no case of conviction could be found even under these two sections, what to say of the remaining penal sections. At present, in the KP Province only, 201 Civil Judge-cum-Judicial Magistrates, 25 Section 30 Magistrates, 25 Session judges, 100 Additional Sessions Judges, and 12 judges of Anti-Terrorism Courts are functioning,⁹⁶ and none of them has ever convicted any accused under the above sections. Worth mentioning are the compromises in common murder cases i.e. the cases not falling within the meaning of terrorism. Across the country, the session judges acquit the accused on production of compromise. Usually, they do not ask the State's representative (Public prosecutor) of his opinion about *ta'zīrī*. In the *Sharī'ah*, when *qīṣās* could not be imposed due to compromise, *ta'zīrī* punishment becomes mandatory in appropriate cases and it may extend to imprisonment for life.⁹⁷ Mālikis are even of the opinion that the

judge is under legal obligation to award *ta'zīr* if *qiṣās* is taken away by compromise. They have even fixed the *ta'zīr* in such a situation as hundred lashes and imprisonment for one year.⁹⁸ During a training session on *Hudūd* laws in KP Judicial Academy, the participant judges were extremely astonished on hearing that there was an effective difference between *Hudūd* cases and *Hudūd* offenses and that there could be a space for *ṣulḥ* in the later. They were stunned on knowing that *ṣulḥ* could be affected in *qadhaf* cases; even at a very belated stage of hearing. Under Islamic Law and jurisprudence, *ta'zīr* punishments have their own characteristics in terms of required proof, objectives and effects of compromise. Except a very few number of cases where the *ta'zīr* could be the right according to some jurists, punishment under *ta'zīr* is the right of the ruler (government), technically known as *ḥaqq al-salṭānah*. This right remains with the *qāḍī*/judge despite compromise of the complainant and accused in criminal cases. In the *Sharī'ah*, compromise in criminal cases does not necessarily mean acquittal of the accused. The contents of the section 345(6) of the *Code of Criminal Procedure 1898* and ultimately the judgments of some apex Pakistani courts on this subsection, which call for the necessary acquittal of the accused on the basis of compromise, are apparently inconsistent with injunctions of *Sharī'ah* or, at the least; they are misunderstood and misinterpreted as well. A *qāḍī*/judge is supposed to see and check the contents of the compromise. In Pakistan, at times, compromises reveal the statement of the complainant about the innocence or non-involvement of the accused in the occurrence. Here the compromise shall lead to acquittal because it is not a compromise in the real sense; it is rather an admission by the complainant of baseless or inadvertent allegation against the accused. In most of the cases, compromises are affected in a way where the accused accepts the pardon of the complainant as against his transgression. Here, the compromise amounts to the admission of fact by the accused. The courts in Pakistan acquit the accused on the basis of compromise then and there. This practice is against the spirit of *Sharī'ah*. Here, a *qāḍī* or judge is required to consider whether the circumstances and facts of the case warrant infliction of punishment as *ta'zīr*, and on finding reasons for doing so, he shall be under obligation to convict the accused and impose punishment despite compromise between the parties. Of course, section 338(E) and section 311 of the *Pakistan Penal Code*

1860 permit the relevant trial courts to award punishments as *ta'zīr* despite of compounding of the offense by parties, having regard to the facts and circumstances of the case. This much is not sufficient and the discretion of judges and *qāḍīs* should be expanded to all offenses, punishable with punishment other than *ḥadd*. Once, in response to the query of three-member bench of the Supreme Court, Mr Munir A. Malik, the then Attorney General of Pakistan (AGP) had formulated eighteen points and has sought the guidance of august Supreme Court of Pakistan in connection of composition of offenses under section 345 of the *Code of Criminal Procedure 1898*. The Supreme Court has observed that the trial courts and the High Courts should not accept compromises with closed eyes. In one of his points, the learned AGP claims that acceptance of the commission of the offence is a condition precedent for compromise.⁹⁹ This stance is quite similar with *ṣulḥ ma' al-iqrār* (compromise on account of admission). To cope with the situation, on one hand section 345(6) of the *Code of Criminal Procedure 1898* should be amended accordingly, and on the hand, the judges, magistrates and *qāḍīs* should be imparted comprehensive training on the subject.

Conclusion

The *Sharī'ah* has its own scientific system of informal techniques of dispute resolution. The system offers two modes for amicable and peaceful resolution of disputes: the *tahkīm* (self-binding resolution) and the *ṣulḥ* (non-binding settlement). This system is more practicable, expeditious, simpler and easier as compared to the modern ADR mechanism. The ADR is, no doubt, cheaper but the *ṣulḥ* and *tahkīm* are basically *probono publico* (free of cost). Necessary difference should, however, be drawn up between *Iṣlāḥ* and *ṣulḥ*. The former refers to a procedure where every effort for amicable settlement of dispute is made and, as such, it corresponds to the generic phrase ADR, whereas the later means a contract between the disputants which uproots the dispute and terminates the litigation; and is similar to the total sum of mediation and conciliation of the ADR modes. The *Sharī'ah* and law both recognize the resolution of disputes through peaceful modes, nonetheless, the former places more emphasis on it as compared to the later. In the *Sharī'ah*, if *ṣulḥ* is the important part of pre-trial proceedings on one hand, it is also

a process to be rewarded for in the eternal life on the other. Worth mentioning is the fact that *ṣulḥ* operates as *res judicata* in the *Sharī'ah*, and operates only as *estoppels* in law. *Ṣulḥ* can be affected both in civil and criminal cases. Civil or criminal nature of a dispute does not determine the fitness of a case for *ṣulḥ*. The sole criterion is this connection could be the involvement of element of public policy in a case. Necessary distinction should also be made between commission of *Ḥudūd* offenses and *Ḥudūd* cases. The former could be the subject of amicable settlement whereas the later couldn't be so. *Qadhaf* offences could be the subject of compromise; even long after it becomes a *qadhaf* case. Almost in all cases of *ta'zīr*, the compromising party is the government, and the judge or *qāḍī* may award punishment despite the compromise between the parties, having regard to the facts and circumstances of the case. In the *Sharī'ah*, compromise in a criminal case does not necessarily amount to the acquittal of the accused, as it is required by section 345(6) of the *Code of Criminal Procedure 1898*. The section should necessarily be amended, for it speaks against the injunctions of *Sharī'ah*. In the process of compromise in a civil case, stance of the defendant in his written statement plays a significant role and his *ṣulḥ* shall operate as sale, lease or gift as the circumstances may demand. There is multiplicity of phrases in ADR enabling provision of Pakistani statutes and it has caused confusions in understanding and ascertaining the meanings of those phrases. A comprehensive legislation on the subject of *ṣulḥ* has, therefore, become the need of the hour. The learned judges have developed a habit of accepting compromises blindly. This practice has largely defeated the purpose of laws, both on criminal and civil sides. To handle with the situation, judicial academies of the country should develop comprehensive refresher courses and should invite the judges for specialized trainings. The pre-service training manuals of the academies should also contain separate modules on the subject.

Notes and References

1. Ibrāhīm b. Muhammad Ibn Farhun, *Tabṣīrāt-ul- ḥukkām*, Beirut, Dar-ul Kutub al-'Ilmiyyah, 1995, p. 17.

2. Article No. 227(1), the Constitution of Islamic Republic of Pakistan.
3. In conventional law, the mediation is, sometimes, defined by what it is actually not. Several models of mediation have been invented and a number of approaches have been developed towards it. Some differentiate between mediation and conciliation while some do not admit any difference between the two. Some others have clothed it with the features of arbitration. Almost all Pakistani statutes have used mediation in the meaning of conciliation. The Conciliators Commission of Japan treats mediation and conciliation in the same meaning. The UNCITRAL Model Law on International Commercial Conciliation 2002 has expressly washed out any distinction between mediation and conciliation. The Indian Arbitration and Conciliation Act 1996, has used 'conciliation' in the meaning of arbitration. Resultantly, no universal definition has been surfaced so far despite the overwhelming popularity of mediation as compared to the remaining modes of Alternative Dispute resolution (ADR). This has confused the mediators and practitioners what to do and what should not. Unfortunately, the boundaries between arbitration, mediation and conciliation are blurring day by day. [See the Explanation attached to Section 1(2) of the *Indian Arbitration and Conciliation Act 1996*. *The Free Dictionary by Farlex*, Newton Arbitration, available at, <http://legal-dictionary.thefreedictionary.com/Mediation-Arbitration>, last accessed on June 5, 2016. Madabushi Sridhar, *Alternative Dispute Resolution*, 244, 245. Article 1(3) of the UNCITRAL Model Law on International Commercial Conciliation 2002. The text is available at <http://www.sccinstitute.com/filearchive/2/21748/ml-conc-e.pdf> (last accessed on Feb. 26, 2015)].
4. The specific mentioning of arbitration (*Tahkīm*) is due to the fact that the *Sharī'ah* recognizes it as a sub branch (*far'*) of regular adjudication (*qādī*), for the reason that its process is adjudicatory and the award is binding. The jurists (*fuqahā*) are, therefore, at concurrence that an arbitrator must have the qualifications required for a *qādī* (judge). So, it is not an alternative mode though informal. Even a considerable number of western writers do not accept arbitration as a member of ADR family. See, Zainuddin Ibn Nujaim, *al-Baḥr-ur Rā'iq*, Beirut, Dar al-Ma'arif, n.d., vol. VII, p. 24. Also see Ibrāhīm b. Muhammad Ibn Farhun, *Tabsīrat-ul Hukkām*, Beirut, Dar-ul Kutub al-'Ilmiyyah, 1995, vol. XVII, p. 50. Alaed Din Ali b. Khalīl, *Mu'īn-ul Hukkām*, p. 27. Also see Ibn 'Ābidīn, *Hāshiyah Radd-ul-Muhtar*, vol. VIII, p. 141. See also Al-Ghuzzi Esa b. Uthman, *Ādāb-ul-Qadā*, p. 35.
5. *Al-Sulḥu min al-Salāḥi wa Huwa Did-ul Fasād, wa al-Islāhu nāqid-ul Ifasād*) please see for this text and the related discussion, al-Shaikh Qāsim al-Quunuwī, *Anīs-ul Fuqḥā fita'rifāt al-Mutadawilāti bain al-Fuqḥā*, Jeddah, Dar-ul Wafā, 1986, p. 245. Also see Mudghamish Jamal Abd-ul Ghani, *al-Furūq fi al-Lughah*, Beirut, al-Resalah Publishers, 2006, p. 369. See also Muhammad Amim-ul-Ihsan, *al-Ta'rifāt al-Fiqhiyah*, Beirut, Dar al-Kutub al-'Ilmiyyah, 2009, p. 130. See also Ali b. Muhammad al-Jurjani, *Kitāb-ul Ta'rifāt*, Beirut, Dar Al-Ma'arif, 2007, p. 124.
6. The Noble Qur'ān, II:11.
7. *Ibid.*, VII:142.
8. *Ibid.*, VII:85.

9. *Ibid.*, XXVI:151-152.
10. *Ibid.*, XXVII:48.
11. *Ibid.*, IV:128.
12. *Ibid.*, XXX:41.
13. Shabbir Ahmad Usmāni, *Tafsir Usmāni*, III:527.
14. Mufti Muhammad Shafī, *Ma'arif al-Qur'an*, I:544.
15. Kamil Ahmad Abd-ud Daim al-Qazi, *Islāh Dhāt al-Bain fi Daw al-Sharī'ah al-Islāmiyah*, al-Eskandariyyah, Dar Al-eeman, 2014, p. 22. The author writes, *Al-Sulhu Huwa al-Wasfu, wal-Islāhu Huwa al-Fī'lu li Ihlāli Dhālikaal-Wasfi wa Izālati Diddihī*".
16. Muslim b. Hajjāj, *Ṣaḥīḥ Muslim, Kitāb al-'Aqdiyah, Bāb Islāh al-ḥākim bain al-Khasmain*.
17. Muḥammad b. Isma'il al-Bukhārī, *al-Bukhārī, Kitāb al-Sulh, Bāb Islāh bain al-Nāss*.
18. Pertinent here to note is the fact, that the phrase ADR was invented in 1970s. Before this, the terms 'dispute settlement' 'conflict resolution' and 'mediation' etc were dominating the field. In the United States, no one used the phrase ADR even in the 1970s. During this whole decade, libraries and other book-shelves were dominated by books titling 'Labor-management Mediation' and the term ADR was yet to come in common usage. [Jerome T. Barrett & Joseph P. Barrett, *A History of Alternative Dispute Resolution*, San Francisco, Jossey-Bass, 2004, pp. 188-189, 256-257].
19. Even in law, the conciliation does not mean a compromise. Conciliation is a noun from conciliate, a transitive verb. It literally means to pacify, to appease, and to make somebody less angry or friendlier especially by a kind deed. It is the action of stopping someone being angry. The word has got a Latin origin: *Conciliatus*, the past participle of *conciliare* that means to assemble or to unite. In other words, it is the bringing of two persons/things nearer to each other. This last meaning is very much closer to the technical sense of the term. Technically, it means an effort of a third neutral person for bringing two opponents together to end a disagreement. Some hold that conciliation is the settlement of dispute without litigation. [A S Hornby, *Oxford Advanced Learner's Dictionary*, 310. *Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com/dictionary/conciliate>, last accessed on July 7, 2015. Avtar Singh, *Law of Arbitration and Conciliation*, Lucknow, Eastern Book Company, 2007, p. 433].
20. Ibn 'Ābidīn, *Radd-ul-Muhtār 'Ala al-Dur al-Mukhtār*, vol. XII, pp. 282-283.
21. *Ibid.*
22. Al-Sarakhsī, *al-Mabsūt*, Quetta, Maktaba Rashdiah, n.d., vol. XX. p. 146.
23. Ibn Farhun, *Tabṣirat-ul Hukkām*, vol. II, p. 55.
24. *Al-Mujallah*, Section No. 1531.
25. Ibn al-Hummām, *Takmilah Fath al-Qadīr*, Quetta, Maktabah Ashrafiah, n.d., vol. VIII, p. 423.
26. Mufti Muhammad Shafī, *Ma'arif-ul Qur'an*, Karachi, Idarat-ul-Ma'arif, 2012, vol. I, pp. 438-39. See also Abd-ul-Qayyum, *Guldasta-i Tafāsir*, Multan, Idara Ta'lifāt Ashrafīyah, 1428 A.H., vol. II, p. 156.

27. Wahbah al-Zuhali, *al-Tafsīr al-Munīr*, Quetta, Amir Hamza Kutubkhana, n.d., vol. II, pp. 679-680.
28. The Noble Qur'ān, II:224.
29. Muslim b. al-Hajjāj al-Qushairi, *Ṣaḥīḥ Muslim, Kitāb al-Aiman*, , reported by Abu Hurairah, Lahore, Islami Kutubkhana, n.d., p. 474, (the *ḥadīth* has also been reported by all *Ṣiḥāḥ Sittah*, Except Ibn Majha].
30. Imam Ahmad b. Hanble, *Musnad Ahmad*, narrated by Ummi Kulthum, Lahore, Little Star Printers, n.d., vol. XII, p. 292.

[In the reign of Caliph 'Umar, a person asked his wife to disclose on oath whether she really loved him. The wife replied that if she was required to declare on oath, then the answer was 'No'. The husband filed a complaint with 'Umar, and he summoned her. On her appearance, the caliph inquired about the statement. Confirming the statement, she replied that she was under compulsion of oath to speak the truth. She asked astonishingly whether she could tell a lie after oath. 'Umar said, "You ought to do that. A connubium (legal co-habitation) need not to be necessarily love-oriented. People do live with each other as regard for religion and honor for their families". See Taufiq al-Wa'i, *al-Kitbah wa l'adad al-Khatib*, Al-Mansurah Egypt, Dar Al-Yaqin, 1999, p. 291.
31. *Al-Ṭabarānī, Al-Mua'jam al-Kabir*, vol. III, Asif Sadeeq Printers Lahore, p. 100, *Ḥadīth* No: 3825.
32. Muhammad b. Ali al-Shaukani, *Fath-ul-qadīr*, Riyadh, Dar Al-muayyed, 2009, p. 1901.
33. Shabbir Ahmad Usmani, *Tafsīr Usmānī*, Karachi, Dar-ul-Isha'at, 2007, vol. III, p. 745.
34. The Noble Qur'ān, LXVIII:16.
35. *Ibid.*, 11-13.
36. Abul'A'la-Maududi, *The Meaning of Qur'ān*, English Trans. by Ch. Muhammad Akbar, *Al-Nisa*, IV:114, Lahore, Islamic Publications, 2011, vol. I, p. 377.
37. The Noble Qur'ān, LVIII:9-10.
38. Professor Ahmad al-Hamlawi, *Shazh al-'Urf fi fan al-Sarf*, Beirut, Dar-ul-Fikr, 2003, p. 30.
39. Ali b. Khalil al-Tarablasī. *Mu'in al-Ḥukkām*, pp. 122-123. Also see Mahir Abdul Majid Abbud, *al-Uṣūl al-Qādaiyah fī Risālati al-Fārūq 'Umar (RA)*, Beirut, Dar al-Lutub al-Ilmiyah, 2009, pp. 76-78.
40. Abn Farhun, *Tabsirat-ul-Ḥukkām*, vol. II, p. 54. See also Ali b. Khalil, *Mu'in al-Ḥukkām*, p. 123.
41. *Ṣaḥīḥ al-Bukhārī, Kitāb al-Khuṣūmat*, Darussalam, Riyadh, 1997, Vol. III, p. 345, *Ḥadīth* No. 2418.
42. Muhammad Ibn Sirin, *Tafsīr al-Aḥlām*, Chapter No. 53, Cairom Dar al-Iddah li al-Turath al-Islami, n.d., p. 383. It may be noted that dream's interpretation has been a separate and permanent discipline of *Sharī'ah*. The Prophet Muḥammad (ﷺ) said, "*Ru'ya* (Genuine dreams) come from Allah and unreal dreams from sitan". He said further that real dream is forty sixth of Prophecy". See the reference above and also *Ṣaḥīḥ al-Bukhārī, Ḥadīth* No. 7005, and *Ṣaḥīḥ Muslim, Ḥadīth* No. 2261, as narrated Abū Qatādah.
43. Muḥammad b. Aḥmad al-Sarakhsī, *al-Mabsūt*, Beirut, Dar al-Ma'rifah, n.d., vol.

- XX, pp. 58, 133-170, 178.
44. Qudāmah Al-Maqdasi, *Al-Mughni'*, Al-Rawhahh, Qatar al-Wataniyyah, n.d., vol. II, pp.122-131.
 45. Their books are *Lil-Iṣlāhī Hadf wa Minhāj* (2004), *Qawā'id al-T'amul bain al-Nāṣṣ*, 1998, *Al-Ṣulḥ al-Qāḍī*, 2001, *Al-Ṣulḥ wa al-Taḥkīm*, 2003, *Iṣlāh dat al-Bain*, 2014, respectively.
 46. Wahbah Al-Zuhaili, *al-Fiqḥ al-Islāmi wa Adillatuhu*, Damascus, Dar-ul-Fikr, 1989, vol. V, pp. 293-324.
 47. See Fariduddin Aalim b. al-'Ala, *al-Fatāwā al-Tātārkhāniyah*, pp. 230-237. Also see Wahbah al-Zuhaili, *al-Fiqḥ al-Islāmi wa Adillatuhu*, vol. V, p. 320.
 48. Muhammad bin Muhammad bin Asim al-Undulusi, *Sharḥ Ibn al-Nāẓim li Tuḥfat al-Hukkām*, Beirut, Dar Ibn Hazm, 2013, vol. II, p. 635.
 49. Muhammad Muhyuddin Abdul Ḥamīd, *al-Aḥwal al-Shakhṣiyah*, Beirut, al-Maktabah al-Ilmiah, 2003, pp. 244-246. In *faskh*, some situations do not require the decree of the court such as *faskh* on the basis of apostasy or under the plea of falling within prohibited degree. Here, the spouses may get self-separation. The situations that necessarily require the decree of the court, as discussed above, are of very fragile nature. Here, if recourse is not made to the *qāḍī* or the *qāḍī* is yet to decree the suit and one of the spouses dies, the surviving shall have no entitlement to legacy. For more details, consult the above reference. Also see Mufti Aziz-ur-Rahman, *Fatāwā Dār-ul-Ulūm Deoband*, Karachi, Dar-ul-Isha'at, 1986, vol. VII, pp. 146-151.
 50. Al-Kāsāni, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, vol. X, pp. 4653-4655. See also Abdul Karim Zaidan, *Al-Qiṣāṣ wa al-Diyat fī al-Sharī'ah al-Islamiyyah*, Beirut, Resalah Publishers, 2007, pp. 125-127.
 51. *Al-Mughni*, vol. VII, p. 755.
 52. Madabhushi Sridhar, *Alternative Dispute Resolution: Negotiation and Mediation*, p. 228.
 53. Section 25 and 25-A of *NAB (1st and 2nd Amendments) Ordinance, 2000*.
 54. Sulaiman b. al-Ashath, *Sunan Abū Dāwūd, Kitāb al-Ḥudūd, Ḥadīth No. 971*. The author has captioned the chapter as “Appology in *ḥudūd* when unreported].
 55. Mālik b. Anas, *al-Mu'ṭta, Kitāb al-Ḥudūd*, reported by Safwan b. Abdullah b. Safwan, with Urdu trans. by Allama Wahid-uz Zaman, Lahore, Maktabah Rahmaniah, n.d., p. 584. Also see Imam Muhammad b. al-Ḥassan, *Mu'aṭṭa al-Imām Muḥammad, Kitāb al-Ḥudūd*, with Urdu Trans. of Mawlana Shamsuddin, Lahore, Maktabat-ul-Ilm, n.d., pp. 375-376.
 56. Mālik b. Anas, *al-Mu'aṭṭa, Kitāb al-Ḥudūd*, p. 585.
 57. *Al-Bukhārī, Ṣaḥīḥ al-Bukhārī, Kitāb al-Ḥudūd, Ḥadīth No. 6827*.
 58. Abū Ishaq al-Sherazi, *al-Muhadhdhab*, vol. II, p. 286.
 59. Muḥammad b. Aḥmad Ibn Rushd, *Bidāyat-ul-Mujtahid*, Beirut, Dar Ihya al-Turath al-'Arabi, 1992, vol. II, p. 572.
 60. Abu Al-Hassan Ali b. Muḥammad al-Māwardi, *al-Aḥkām al-Sulṭāniyah wal Wilāyāt al-Dīniyah*, Beirut, Dar al-Arqam, n.d., p. 307.

61. Aadil Abd al-Maujud, Supervisor of the Committee, *Taqnīn al-Sharī'ah al-Islāmiyah*, Beirut, Dar al-Kutub al-Ilmiyah, 2013, p. 734.
62. Hazzal was the person who convinced Mā'iz to confess.
63. Sulaiman b. Al-Ashath, *Sunan Abū Dāwūd, Kitāb al al-Ḥudūd, Ḥadīth No. 972*.
64. See *al-Mujallah*, Section 1535. Also see Fariduddin Aalim b. al-'Ala, *Al-Fatāwā al-Tātārkhāniyah*, Quetta, Maktabah Rashidiah, 2010, p. 227.
65. It is a written confession by a defendant in an action that he had no defense. John Burke, *Osborns Concise Law Dictionary*, p. 79.
66. Al-Sarakhsi, *al-Mabsūt*, vol. XX, p. 147. Al-Kāsāni, *Badāi' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, vol. VI, p. 101. Ibn Al-Ḥummam, *Takmilah Faṭḥ al-Qadīr*, vol. VII, p. 423. Ali b. Khalil, *Mu'in al-Ḥukkām*, p. 123. Ibn Rushd, *Bidāyat-ul-Mujtahid*, vol. II, p. 377. Abn Farhun, *Tabsirat-ul-Ḥukkām*, vol. II, p. 54. Al-Sherazi, *Al-Muhazhab*, vol. I, p. 333. Al-Sharbini, *Mughnī al-Muhtāj*, vol. II, p. 177. Ibn Qudamah, *Al-Mughnī*, vol. IV, p. 482.
67. See Fariduddin Aalim b. al-'Ala, *al-Fatāwā al-Tātārkhāniyah*, p. 228.
68. *Ibid*.
69. Kāsāni, *Badāi' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, Urdu Trans. by Mufti Abdul Wahid, Lahore, Diyal Singh Trust Library, 2013, vol. VI, p. 135. Ibn al-Ḥummam, *Takmilah al-Faṭḥ al-Qadīr*, vol. VII, p. 31. *Al-Dardīr; al-Sharḥ al-Kabīr*, vol. III, p. 310. *Al-Sharbini, Mughnī al-Muhtāj*, vol. II, p. 178. Ibn Qudamah, *al-Mughnī*, vol. IV, p. 483.
70. *Ibid*. See also al-Mustafa Al-Khinn, *Athār al-Ikthilāf fī al-Qawā'id al-Uṣūliyah fī Iktilāf al-Fuqahā*, Beirut, Muassasah al-Risalah, 2012, pp. 545-546.
71. *Ibid*. See additionally, al-Sharbini, *Mughnī al-Muhtāj*, vol. II, p. 179. Ibn Qudamah, *Al-Mughnī*, vol. IV, p. 486.
72. Muhammad Al-Khudhari Bic, *Tārīkh al-Tashrī' al-Islāmi*, Beirut, Dar al-Qalam, 1983, p. 210. See Wahbah al-Zuhaili, *al-Fiqh al-Islāmi wa Adillatuhū*, vol. V, p. 296.
73. Al-Sherazi, *al-Muhadhdhab*, vol. I, p. 333. Al-Sharbini, *Mughnī al-Muhtaj*, vol. II, p. 179. See also al-Mustafa al-Khinn, *'Athār al-Ikthilāf fī al-Qawā'id al-Uṣūliyah fī Iktilāf al-Fuqahā*, pp. 545-546.
74. Muhammad b. Ismail al-Ṣanā'ani, *Subul al-Salam*, Beirut, Dar al-Ma'arif, 2005, vol. III, p. 93.
75. *Ibid*. See also Wahbah, *al-Fiqh al-Islāmi wa Adillatuhū*, vol. V, p. 297.
76. Al-Mujallah, Section No. 67. Wahbah Al-Zuhaili, *Uṣūl al-Fiqh al-Islāmi*, vol. I, p. 555.
77. Dr. Ramzi Muhammad Ali Daraz, *Aḥkām al-Sukkūt fī al-Fiqh al-Islāmi*, Beirut, Manshurat al-Alabi Al-Huquqiyah, 2011, pp. 283-286. Al-Mujallah, Section No. 67. Zuhaili Wahbah, *Uṣūl al-Fiqh al-Islāmi*, vol. I, p. 555.
78. Wahbah al-Zuhaili, *al-Fiqh al-Islāmi wa Adillatuhū*, vol. V, p. 298.
79. Al-Kasani, *Bādā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, vol. VI, p. 53. Ibn al-Ḥummam, *Takmilah al-Faṭḥ al-Qadīr*, vol. VII, p. 29. Wahbah al-Zuhaili, *al-Fiqh al-Islāmi wa Adillatuhū*, vol. V, p. 322.
80. *Res judicata* is a rule of civil procedure that bars a fresh suit between the same parties on some issue already decided by a court of competent jurisdiction. It has been based on the principle that a thing decided should be received as truth

- and that a judicial decision is conclusive until reversed, Johan Burke, *Osborn's Concise Law Dictionary*, London, Sweet & Maxwell, 1981, p. 289.
81. *Estoppels* is a rule of law of evidence which precludes a person from denying the truth and correctness of a fact deposed by him in his previous statement and has led others to believe such, Johan Burke, *Osborn's Concise Law Dictionary*, p. 136.
 82. Wahbah Al-Zuhaili, *al-Fiqh al-Islāmi wa Adillatuhū*, vol. V, p. 324.
 83. *Ibid.*, vol. V, p. 322.
 84. Muhammad bin Muhammad bin 'Aṣim al-Undulusi, *Sharḥ Ibn al-Nāzim li Tuḥfāt al-Ḥukkām*, Beirut, Dar Ibn Hazm, 2013, vol. II, p. 635.
 85. *The Sharai Nizam-e-'Adl Regulation, 2009*, Section 13.
 86. Section 13(1) of the *Sharai Nizam-e-'Adl Regulation 2009*. It may be noted here that the first part of this law has been repealed by the Establishment of Civil Mobile Courts Act 2015. This repealing law is, however, not yet in force for want of notification from the Provincial Government of KP. The relevant section reads as under:
 - (1) Short title, extent and commencement. – (1) This Act may be called the Establishment of Civil Mobile Courts Act, 2015.
 - (2) It shall extend to such areas of the Province of the Khyber Pakhtunkhwa as Government, in consultation with the Chief Justice of the High Court, notifies from time to time.
 - (3) It shall come into force on such date as Government may, by notification in the official Gazette, notify in this behalf.
 87. *The Small Claims and Minor Offences Courts Ordinance 2001*, Sections 2, 14.
 88. *The Small Claims and Minor Offences Courts Ordinance 2001*, Sections 14-16
 89. One of the authors, Dr. 'Attaullah, in his capacity of trainer at the KP Judicial Academy since its inception, has been, off and on, inquiring the learned trainee judges of such judgments but has not received a single reply in affirmative.
 90. See Sections 3, 8 and 11 of the Ordinance.
 91. *The Code of Civil Procedure 1908*, Section 89(A).
 92. *The Family Courts Act 1964*, Section 12.
 93. Al-Kāsāni, *Bad'i' Ṣanā'i' fī Tartīb al-Sharā'i'*, vol. VI, p. 53. Ibn Qudamah, *Al-Mughnī*, vol. V, p. 17. Al-Mardawī, *Al-Inṣāf*, vol. V, p. 247, Malik b. Anas, *Al-Mudawwanah*, vol. IV, p. 377.
 94. Abdul Qadir Awdah, *al-Tashrī' al-Jinayī al-Islāmi*, Beirut, Muassasat al-Risalah, 1984, vol. II, p. 686.
 95. <https://www.google.com.pk/#q=Peshawar+high+court>, last accessed on September 25, 2016.
 96. Ibn 'Ābidīn, *Ḥashiyatu Radd-ul-Muhtār 'l al-Dur-ul-Mukhtār*, vol. III, p. 196. Al-Mawardī, *al-Aḥkām al-Sultāniyyah wal wilāyāt al-Dīniyyah*, p. 269. Abdul Qadir Awdah, *al-Tashrī' al-Jinayī al-Islāmi*, vol. II, p. 183
 97. Muhammad b. Ahmad Ibn Rushd, *Bidayat-ul-Mujtahid*, Beirut, Dar Ihya al-Turath al-'Arabi, 1992, vol. II, p. 96.
 98. See for all eighteen points, <http://nation.com.pk/national/02-Oct-2013/agp-files-formulations-regarding-pardon-cases>, last accessed on 10th Feb. 2015.