The Institute of Ismaili Studies

"Alternative Dispute Resolution: Its Resonance in Muslim Thought and Future Directions"

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Abstract

What is Alternative Dispute Resolution (ADR)? Is it compatible with 'Muslim' conceptions of arbitration and reconciliation? Through a series of examples, the author asserts the need for a plurality of methods in addressing the personal, familial and communal conflicts that occur in the 21st century, beyond those that are and have traditionally been provided by the Nation-State or governing body. Legal plurality has long been a part of Muslim societies, both past and present and alternative forms of dispute resolution, informed by Muslim culture, are now being recognised and accepted as parallel systems to the legal processes already in place in many countries.

Change and the Contemporary World

In describing a major breakthrough in the field of acoustic science recently, a commentator remarked – "the future is past and the present is yet to come." Enigmatic as this may sound, it does help to illustrate very succinctly the present world in which we are living, where development is so exponential, that our ability to grapple with change is under severe strain and very seriously challenged.

In this climate of bewildering change, critical questions about beliefs and philosophies which should guide human destiny, keep coming up. Human society stands at an important crossroads, where the frontiers of knowledge are being extended every hour. Major changes are taking place every day in fields as diverse as information technology, bio-medical engineering, space research, forensic entomology and international law.

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The futurologist Alvin Toffler in his famous book, *Future Shock*, referring to how recent this phenomenon is in the scale of human existence, draws an interesting picture. He divides the last 50,000 years of human existence into lifetimes of approximately 62 years each and comes up with 800 such lifetimes. Of these 800, fully 650 were spent by human societies in caves.

Only during the last 70 lifetimes has it been possible to communicate effectively from one lifetime to another – as writing made it possible to do so. Only during the last 6 lifetimes did masses of humans ever see a printed word. Only during the last four, has it been possible to measure time with any precision. Only in the last two, has anyone, anywhere, used an electric motor and the overwhelming majority of all material goods we use in daily life today have been developed within the present – the 800th lifetime.

The 800th lifetime marks a sharp break with all past human experience, because during this lifetime, the relationship of human beings to resources has reversed itself. This lifetime is also different from all others because of the expansion of the scale and scope of change. Clearly, there have been other lifetimes in which epochal upheavals have occurred. Wars, plagues, earthquakes and famines rocked many an earlier social order. But these shocks and upheavals were contained within the borders of one or a group of adjacent societies. It took generations, even centuries, for their impact to spread beyond their borders. Not so, today, as we all have seen recently. Events not only shake the world within a few seconds, but change the course of human destiny while doing so.

Introducing Alternative Dispute Resolution

It is against this global background that we need to view conflict and Alternative Dispute Resolution or ADR, as the movement is more commonly known. As a social movement, ADR is beginning to gain greater momentum *today***,** than at any other time in the history of human conflict. This is largely due to the inability of the civil justice system, worldwide, to deal with the increasing load of cases coming through it. Coupled with this, is the issue of scarce resources. The civil justice system is coming under increasing strain everywhere, while simultaneously, more and more people are turning to alternative forms of dispute resolution. Conflict resolution experts, in many instances non-lawyers, have entered the scene. This is reinforced by greater proactivity on the part of lawyers themselves, to enter the ADR field. Added to this is a more pronounced judicial activism, buttressed by statutory provisions, which, in many situations, makes resort to ADR a prerequisite to resort to the Courts. Clearly, ADR, as a social movement, seems to have greater potential today than ever before, to be accepted as a *practical and cost effective* conflict resolution system. Further, the Civil Justice System, being largely adversarial and thus alienating, creates in people an aversion to it, in search of an alternative system which engenders greater harmony between disputants and a much better possibility of some form of a long term relationship between them. However, not everyone seems to be convinced of this and human society, whatever we may say, still continues to be egregiously litigious.

In this context, I would like to refer you to a front page story in the Hindustan Times of India of April 2nd, 2001 (coincidentally, exactly a year ago, today). The headline reads "102 and still going strong". When I saw the headline, I thought this was a tribute to a patriarch or a matriarch of an Indian family, with a large brood of children and grandchildren and great grandchildren. But alas, it referred to such people only tangentially. The story is based in Chandigarh, in India. It reads, and I quote:

> This land is my land. This country song from Yankee land could as well be the theme song of four generations of a family from Punjab. Through a century and more, the family has fought over a piece of land, various sections claiming it as theirs. And the battle is hardly over.
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> It all began in 1899 over a piece of land in what is now Pakistan. When partition came, the family came to India. *So* did the litigation. The fight was now over land allocated to it in India, as compensation for land left behind in Pakistan.
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> After going through various lower courts, in 1976, the case went to the Punjab and Haryana High Court when Surdarshan Lab Datta, grandson of Jasuwant Rai, moved against the Union of India and others, demanding his share of the land.
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> He won the case in 1983, but soon thereafter, other members of the extended family, now in its fourth generation since the case was first filed, challenged the judgment. The case has been listed but not heard since.
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> The case has seen over 140 claimants to the land, gone to the Privy Council in London, twice, the Lahore High Court, twice, the Court of Financial Commission (Punjab) twice and to the Supreme Court of India, once. Most of the litigants are dead, but the case goes on – the only difference is that one generation of litigants has been replaced by the next. 'A classic illustration of a litigation engulfing *entire* generations' is how the Judge hearing the case described it.

What is ADR?

Put very simply, ADR says that when there is a conflict between two people or among people or between institutions, *they, themselves*, should be able to negotiate their differences with a view to achieving an equitable settlement and *they, themselves*, should ensure its enforcement through mutual agreement. This may be an over-simplification, because the ADR toolkit has a number of tools and while some, e.g. mediation, allow a greater autonomy to the litigants, others, e.g. arbitration, may grant less control to them. To quote Lon Fuller of Harvard University:

> The central quality of mediation lies in 'its capacity to reorientate the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes towards one another.' (Fuller, 1971, "Mediation: Its Forms and Functions". *Southern California Law Review*).

The primary quality of the mediator according to Fuller, "is not to propose rules to the parties and to secure their acceptance of them, but to induce the mutual trust and understanding that will enable the parties *themselves* to work out their own rules."

Is ADR Something New?

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

A hundred years later, the people of South Africa called upon their then respective leaders, to find an alternative to settle South Africa's problems outside the context of war and civil insurrection – something that was threatening to tear the beloved country apart and draw it into one of the most dangerous bloodbaths in the history of human conflict. No doubt, Nelson Mandela was drawing on a central feature of the African worldview – a concept known as *ubuntu*. To quote Archbishop Desmond Tutu from his book *No Future Without Forgiveness* when an African says that someone has *ubuntu*, it means that such a person is

> generous, hospitable, friendly, caring and compassionate. They share what they have. It also means my humanity is caught up, is inextricably bound up, in theirs. We belong in a bundle of life. We say 'a person is person through other people.' It is not 'I think therefore I am'. It says rather: 'I am human because I belong, I participate, I share.' A person with *ubuntu* is open and available to others…for he or she has a proper self assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are.

In pre-Imperial China, there was, by the third century BCE, if not before, already a marked important dichotomy in legal philosophy between legalist and Confucian schools – a dichotomy that has persisted to the present day, according to Professor Michael Palmer, of the School of Oriental and African Studies, London University, an expert on Chinese law and on ADR. ADR was known to China centuries ago.

Faced with the daunting prospect of clogged secular courts and high legal fees, some people in Canada today are turning to religious courts, thousands of years old, to settle disputes. There are the *Beit Din* used by the Jewish community which function as an arbitration panel dealing with cases involving monetary damages, restitution of property and fall out from failed marriages.

Since 1946, Roman Catholics in Canada have been availing themselves of marriage tribunals, which decide whether a union may be annulled if either party wishes to remarry in the Church. These tribunals are manned by lawyers and experts trained in Canon law. There is an automatic review of all cases by the Canadian appeal tribunal in Ottawa.

In fact, secular courts in Canada are today referring cases to religious tribunals.

According to the Globe and Mail of Canada (February 7, 2000).

> Faith groups seeking justice from their communities are less concerned with such temporal concepts as damages or pride, than with the restoration of right relationships between God and people, and between people: Lawyers - note well.

Muslim Perspectives on ADR

ADR is not new in Muslim thought. The Holy Qur'an very specifically mentions:

> If you fear a breach between them (husband and wife) appoint two arbiters, one from his family, and the other from hers. If they wish for peace, Allah will cause their conciliation. For Allah hath full knowledge, and is acquainted with all things. (IV:35).

The Qur'an refers in several places to the principle of resolving disputes amicably, calling on the protagonists to forgive: for to forgive is ennobling.

In the *sunna* of the Holy Prophet (peace be upon him) the role of the person who reconciles differences between men is amply illustrated in various *hadith*s. The example of the Holy Prophet (pbuh), himself, bears testimony to this respect for the concept of compromise.

In the reconstruction of the Ka'ba, a serious quarrel arose over the setting of the *Hajar al-Aswad* – the Black Stone. Each one of the four leaders of the Quraysh that was in dispute over this issue, was eager to have this honour and ensure he was not outdone by the others. There was an impasse. They could not agree. One of the leaders suggested that the first person to

arrive at the *Haram* the next morning could be the one to place the *Hajar al-Aswad*. As it transpired, the Prophet (pbuh) was the first to arrive at the *Haram.* Not wishing to have the privilege all to himself, he asked each of the contesting tribes to select one leader. He then spread a sheet of cloth and put the *Hajar-al-Aswad* on it, asked the leaders to hold it at four ends and *together* raise it. Thus a serious conflict was averted by the Prophet's (pbuh) prudent action in giving all four leaders an equal honour of placing the stone.

In the field of arbitration, there are the works of both Dr Abdul Hamid El Adhab and Dr Vincent Powell Smith, from whose learned articles, I have drawn. I must acknowledge credit to them and my friend and colleague, Mr Mahomed Jaffer of Pakistan, who first drew my attention to these works in an erudite presentation that he made at a training programme in Houston, Texas in May 2001, organised by the Ismaili National Conciliation and Arbitration Board of the USA.

Dr Adhab refers to the Ayat of the Qur'an which says:

Allah commands you
To render back your Trusts
To those to whom they are due;
And when you judge
Between man and man,
Judge with justice
Verily how excellent
Is the teaching which He gives you!
For Allah hears
And sees all things.

(IV:61)

Dr Adhab continues – The Prophet (pbuh) had accepted to judge an arbitration case or rather he had appointed an arbitrator and had accepted the latter's decision and he had also counselled a tribe to have a dispute arbitrated. The *Khulafa Rashidun* did likewise with respect to disputes relating to goods and obligations.

The memorable letter of Caliph 'Umar to Abu Musa al-Ashari on the eve of his appointment as *qadi* outlines the functions and responsibilities of a Muslim judge. It says, amongst other things:

"Consider all equal before you in the court. Consider them equal in giving your attention to them so that the highly placed people may not expect you to be partial and the humble may not despair of justice from you."

"It is permissible to have compromise amongst Muslims but not an agreement through which *haram* (unlawful) would be turned to *halal* (lawful) and vice versa."

Referring to the application of arbitration to disputes regarding political power, Dr Adhab refers to the Arbitration of Siffin in 661 CE and says that certain principles embodied in that agreement, even today, constitute the essential characteristics of an arbitration agreement worldwide.

Caliph-Imam 'Ali's instrument of instructions to Malik b. Ashtar on his appointment as Governor of Egypt is a remarkable document on the art of governance. In his letter he indicates the approach he wanted to be adopted by his officials in all administrative matters. Defining justice in the abstract, he described its basic purpose as "bringing to everyone what is his due." Elaborating how this can be accomplished, he wrote and I quote: "Do Justice to Allah and do justice to the people, as against yourself, your near ones and those of your subjects for whom you have liking…" (*Nahj al-Balagha*).

Speaking about the qualities of those who should arbitrate, he said: "You must be very judicious in selection of officers for dispensation of justice among your people. For this purpose, you should select persons of excellent character, superior caliber and meritorious record, i.e. from among the best available in merits and morals."

Among the qualities, he mentions: "They should not be satisfied with superficial enquiry or simple scrutiny of a case till everything for and against it has been thoroughly examined; when confronted with doubts and ambiguities, they must pause, go for further details, clear the points and then give the decision."

As another word of caution, Imam 'Ali says: "Do not make haste to arrive at decisions before the time is ripe. Similarly, do not delay decisions and actions when the time is ripe and opportune." I am sure Lord Justice Woolfe would find these words truly music to his ears.

In his *Compendium of Fatimid Law*, the noted Indian Muslim Jurist, Dr Asaf Asghar Ali Fyzee devotes an entire chapter to "Adab al Qadi – the Etiquette of Qadis." Dr Fyzee relies on the *Da'a'im al-Islam* of al-Qadi al-Nu'man (d. 974), the noted Fatimid Ismaili jurist. As to the conduct of the *qadi*, Dr Fyzee states: "The Qadi should: have patience; not show his displeasure to any party; not accept any present from any party *and* the *qadi* should not hold court and perform his functions while he is angry or hungry or sleepy."

According to al-Mawardi, the great Muslim jurist, the *qadi* decides in disputes and brings to an end differences and discords by making peace to the mutual satisfaction of both the parties, either by considering possible solutions to the affairs, or by enforcing an irrevocable judgment based on what is obligatory in the situation.

Sulh in Muslim Contexts

R. Jenning's in his *Kadi Courts and Legal Procedures in the 17th Century Ottoman Keysari*, says:

> *Muslihun* (those who help negotiate compromise and reconciliation) were regular features of the court. Often, litigants reported to the court that *Muslihun* had negotiated *sulh* between them, indicating that a compromise had been accomplished away from the Court.

Just to give you one particular example. The Jordanian law of personal status 1976 article 132 has an elaborate procedure on reconciliation and arbitration. It outlines in great detail the actual procedures to be followed and provides, interalia, for 2 arbitrators of upright character to intervene to bring about reconciliation. Such persons have to be people of experience, integrity and ability to effect reconciliation.

Similar provisions exist in the Personal Law codes of countries such as Syria, Egypt, Kuwait, Libya, Algeria, Morocco, Tunisia, Iran, Iraq and Malaysia, as well as the Muslim Family Law Ordinance of Pakistan.

So basically, Islam premiates reconciliation and settlement of disputes outside an adversarial, formalised context.

ADR and the Contemporary Landscape

You may ask why is all this of importance to us today. And what has all this got to do with us, who are present here.

Well, almost 25 years since Frank Sander of Harvard Law School first coined the phrase ADR at a conference in the USA, leading theorists and practitioners in various parts of the world are questioning the basic principles on which ADR is predicated. In an increasingly globalised world, they are asking, should ADR be predicated mainly on a dominant ideology of individualism, as it is today? This is the concern of ADR writers such as Joseph Folger and David Bush. They are questioning whether ADR should not address the issue of transformation and rehabilitation. How do parties, who have had a conflict *rehabilitate* themselves? Then there is J.P. Lederach, who emphasises the need for cross-cultural conflict understanding. Howard Gadlin of the National Institute of Health and Albie Davis emphasise the concept of *Trust* and how agents of healing need to enhance trust in themselves, and in the process and how the protagonists of conflict, themselves, need to enhance trust in each other before the threshold of mediation can be reached. Trudy Govier of Canada has written on the concept of Trust and how its enlargement can lead to greater potential for settlement of land claims between Canadian Indians and the Federal Government and Michelle Le Baron speaks of the role of community and the need for enhancing cohesiveness when dealing with disputes. A leading trainer in the Ismaili National Conciliation and Arbitration Boards

worldwide, Tony Whatling, himself, has been asking some very searching questions of ADR since having had exposure to some of the international training programmes run by the Ismaili communities in India, Pakistan, East Africa, Syria, North America and Europe. Clearly, ADR is questioning itself and is presently in search for new directions.

At this point in time, Britain has some 1.5 million Muslims representing the diversity and pluralism of the entire Muslim world. For the majority of them, they have completed 50 years of settlement in this country. Among their endeavours to create a "space for Islam" in this country, they have looked at various aspects of their lives. With their children growing up in this environment, the time is fast approaching when Muslims in this country will be elaborating their own creative approaches with regard to settling their own disputes. An example of this is the creative endeavours of the Shar'ia Council of the United Kingdom under the leadership of Dr Zaki Badawi.

What seems to get forgotten is that Muslim societies are themselves legally pluralistic. Legal pluralism has been a part of the Muslim psyche. Through the concept of *takhayur* – Muslims draw on each others' jurisprudence and a great deal of legal development in the 20th century has followed this principle. Furthermore, in countries like India and Pakistan, in the same juridical space, people even today turn to a multiplicity of fora to settle their disputes. Dr Mohamed Azam Chaudry's seminal ethnography, entitled *Justice in Practice* attests to this. I am grateful to Professor Menski of SOAS for drawing my attention to it. In Britain today, Muslim disputes are settled both judicially and extra judicially – largely the latter. British law refuses to recognise this, but the reality is that 1.5 million people in this country come from a background of legal pluralism and the legal thinking is that, willy nilly, recognition will need to be given to the principle of legal pluralism enunciated so eloquently by the Japanese scholar, Masaji Chiba in his work, *Asian Indigenous Law in Interaction with Received Law.*

Reflecting on ADR and its Future

In light of where we find ourselves today, I would like to leave the audience with some thoughts for further reflection.

- If ADR is searching for new directions in an increasingly globalised world where the role of ethics is given more primacy, and

- If leading jurists in the world are calling for the teaching of comparative law and legal pluralism as an acknowledgement of the fact that human societies are not discrete objects of their own, like flotsams and jetsams in the rivers of time, but are closely interconnected, and

- If ADR is enshrined in Muslim juridical thought and if Muslims in the diaspora come from legal pluralistic backgrounds and are practising legal pluralism, then,

Might the time not have arrived for all these issues to be looked at in an integrated fashion? In the ultimate analysis, Alternative Dispute Resolution will only succeed if it takes proper cognisance of the embedded values of different cultures and contributes towards the reinforcement of the concept of community in whose very womb it was originally conceived and incubated. To quote Michelle LeBaron, when referring to dispute resolution in a collectivist culture:

> Each person is like the knots in a large fishing net with its intricate intertwining of innumerable knots. Each person is tied to many others. When all of the knots are firmly tied, the net is in full working condition. If any of the knots is too close or too tight, the whole net is skewed. Each knot, each relationship, has an effect on the whole. If there is a tear, or a gap in the net, the net is not a working one….Nets are to be checked frequently, knots cared for tenderly, and if tears do appear, they must be repaired.

As we traverse the 21st century, we may be able to lay more solid foundations so that we can move towards repairing the tears.

While tears will need to be repaired, tears will need to be wiped and this we can only do by drawing on the collective wisdom of all our cultures, traditions and heritages and make these speak to us with renewed vigour for the needs of the 21st century.