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Title: The Philosophy of Mediation: Questions and Responses from Diverse Parts of the World and Especially from the Islamic Tradition

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In this paper, the author highlights the fact that the concept of mediation exists in many cultures and traditions in the world and that, unfortunately, its centrality as a dispute resolution mechanism in Islam is obfuscated by a negative image of the faith shaped largely by media images internationally.

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The Philosophy of Mediation: Questions and Responses from Diverse Parts of the World and Especially from the Islamic Tradition

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Abstract

In this paper, the author highlights the fact that the concept of mediation exists in many cultures and traditions in the world and that, unfortunately, its centrality as a dispute resolution mechanism in Islam is obfuscated by a negative image of the faith shaped largely by media images internationally.

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According to Lon Fuller:

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*".[1]

We need to ask ourselves: Is this notion new? It has existed in many cultures and traditions for centuries and today, I am going to briefly touch on how people from different parts of the world have responded to this notion with a special reference to the Islamic tradition.

In the twentieth century – a century of conflict – we have a number of examples of individuals who were able to utilise the concept of mediation to settle either interpersonal disputes or international conflicts.

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* (lawyer), knowledgeable in English, so that he could mediate between themselves and their European lawyers in South Africa. The Porbander office looked around and found a young, recently-trained, Gujarati lawyer 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* (lit. people's court) 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.

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[1] Fuller, L., 1971, Mediation, Its Forms and Functions, *Southern California Law Review*, Vol. 44, pp. 305-339.

A hundred years later, in 1993, in the political context of the dismantling of Apartheid, the people of South Africa called upon their respective leaders to find an alternative to settle South Africa's problems outside the context of war and civil insurrection. This was threatening to tear the country apart and draw it into one of the most dangerous bloodbaths in the history of human conflict. No doubt, Nelson Mandela, one of the protagonists, was able to draw on a central feature of the African worldview – a concept known as *ubuntu*. To quote Archbishop Desmond Tutu, from his book[2], 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 a 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 the ancient Greek world disputing parties considered mediation-arbitration to be a natural, perhaps the most natural, method of resolving differences in various contexts that they could not settle themselves. Sometimes, however, they resorted to litigation or self help when they did not get their way. The mediation element for them was primary.

Mediation was also prominent in other cultures, such as in the philosophies of Tao Te Ching and Confucius in ancient China and in India.

In Judaism, both in a *halachic* and a philosophical sense, mediation is an ideal process of conflict resolution. Because it is not a formal judicial proceeding, it does not violate the Biblical prohibition for a Jew to engage in legal action in a non-Jewish court. Mediation is actually the preferred method of conflict resolution used by Jewish courts in a process called *psharah* which translates as 'compromised' settlement: capturing the essence of the benefits of mediation, the Talmud states that only *psharah*, and not *din* (strict law) constitutes the ideal of justice, i.e. judgement of peace and judgement of righteousness. This formulation elegantly expresses the unique characteristic of mediation and its ability to provide an integrated justice, balancing the values of fairness, peacefulness and compassion.

In the New Testament, (Matthew 5:25) there is strong endorsement for an alternative form of dispute resolution. The New Testament cautions:

> *"Come to terms with your opponent in good time while you are still on the way to court with him, or he may hand you over to the judge and the judge to the guard and you will be thrown into prison."*

The same concept of mediation is also found in Islam, whose image today, unfortunately, is obfuscated by incidents of terrorism and negativism, exaggerated by the news media and exacerbated by rampant Islamophobia. This is a phenomenon that was also faced by Christianity in the Medieval period. This obfuscation, sadly, tends to eclipse, among other things, the message of mediation that the great Prophets of these religions brought to mankind.

The Holy Qur'an is very explicit on this. Alternative Dispute Resolution or ADR, is deeply embedded in the Holy Qur'an and in the traditions of Prophet Muhammad (Peace be upon him), as well as in the teachings of the Shi'a Imams from the family of the Prophet (*Ahl al-Bayt*).

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[2]   Desmond, T., 1999, *No Future Without Forgiveness*, New York: Doubleday, p31

The Qur'an says:

> "*If you fear a breach*
> *Between them two (i.e. 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 has full knowledge,*
> *And is acquainted*
> *With all things".*
> Qur'an (IV:39)

This concept of reconciliation and harmony is also found in the traditions (*sunna*) of Prophet Muhammad whose life is filled with examples of mediated solutions to human problems. There is a well documented incident that during the reconstruction of the Ka'ba, the building in Mecca to which Muslims go for pilgrimage, a dispute arose over the placing of the Black Stone (*Hajar al-Aswad*) into the building. Each of the four tribes of the Quraysh wanted to have the honour of placing the stone, to the exclusion of the others. An impasse arose and the matter was referred to the Prophet. He asked each of the contesting tribes to choose a leader. He then spread a full sheet of cloth on the floor and placed the stone in the centre, asking all four leaders to each hold it at one end and raise it together. Thus, a serious conflict was averted by the Prophet's prudent action in giving all four leaders an equal honour of placing the stone.

Hazrat 'Ali b. Abi Talib, the fourth caliph of Islam and the first Shi'a Imam, extolled the virtue of dialogue and the value of compromise. He likened the assistance given to solve human disputes to prayer and encouraged negotiated settlements within the principles of the ethics of the faith.

In Islam, governance of the polity requires scrupulous adherence to the principles of justice and equity. In the words of Hazrat 'Ali, the person who is chosen to dispense justice or decide matters should be one

> *who is full of learning, clemency and piety, who will not be disturbed by disputes, who will not be angered by opposing parties, who will not be exasperated by the faltering speech of the stammerer... who will not fall a prey to temptation nor to fulsome praise...*[3]

If a dispute arises between two parties, the *muslihun* (dispute resolver) is obliged to persuade the parties to settle it within the community's own provisions for mediation, and ensure its settlement in the fairest manner possible even it if hurts either of them personally.

For the Qur'an says: *O believers, be you securers of justice, witnesses of Allah, even though it be against yourselves, and your parents and kinsmen, whether the man be rich or poor.*

Elsewhere in the Qur'an, it says:

> *If two parties of the believers fight, put things right between them; then, if one of them does wrong against the other, fight the insolent one till it reverts to Allah's commandment. If it reverts, set things right between them equitably, and be just.*

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[3]   Al-Qadi al-Numan, 1991, *Da'aim al-Islam*, v. 1 and 2. ed. AAA Fyzee, Dar al-Adwa, Beirut,.

Surely, Allah loves the just. The believers are indeed brothers: so set things right between your two brothers, and fear Allah; haply so you will find mercy.[4]

According to a Prophetic tradition, the reward for bringing about reconciliation between quarrelling groups is equal to that of prayer. This ethic is highly commended in Hazrat 'Ali's exhortations:

Do not separate yourself from your brother unless you have exhausted every approach in trying to put things right with him... Do not be harsh with your brother out of suspicion, and do not separate from him without first having tried to reason with him... Seek reconciliation with your brother, even if he throws dust at you.[5]

Sulh (negotiated settlement) in Muslim contexts

R. Jennings 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.

To give 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 procedure to be followed and provides, *inter alia*, for two persons 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.

These concepts are not abstract. They are lived each day by different Muslim communities from Indonesia in the East to Morocco in the West, as well as being extant in diasporic communities in the Western world. In my own community, the Isma'ili Muslim community, we have the system of Conciliation and Arbitration Boards in some 20 countries of the world and over the past 10 years, we have been conducting training programmes on contemporary approaches to mediation globally to refurbish an ancient tradition. Programmes have been held in Afghanistan, Pakistan, Syria, United Arab Emirates, Kenya, Uganda, Tanzania, Portugal, USA, UK, Canada and France. Our most recent programme in France was held in May 2010. Our training programme globally has recently been recognised by the College of Mediators (UK), the highest Regulatory Body in the United Kingdom for mediation.

Conducting training programmes in such diverse parts of the world is a very challenging exercise. You may ask what are some of the critical questions that have arisen and which need to be addressed. I will highlight only three main ones:

First, there is no one module identical from one country to another that will work. Cultures are diverse and conflict is a complex phenomenon. One has to be flexible on the module one uses without in any way compromising on the basic principles of mediation. We have found that a highly individualistic, problem solving module utilised mainly in the Occident, does not always work in societies that are more relational in their cultural make-up. Hence, adaptation is always needed.

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[4] Q.49:9-11.

[5] 1992, *The Sayings and Wisdom of Imam Ali*, ed. S. F. Haeri, England, Muhammadi Trust of Great Britain & Northern Ireland.

Secondly, some of the best dispute resolvers are from the societies themselves. They understand the culture, the traditions, the norms and the values. By refurbishing existing systems through appropriate training programmes, one is able to provide a service to a community that is culturally relevant and acceptable.

Thirdly, there is no one processual module and often communities, depending on their levels of development, utilise an approach which may be closer to the directive end of the mediation spectrum rather than the facilitative end. To force a change will not always work. One needs to lead people gently and help them embrace principles of contemporary mediation practice which encompass notions such as better listening skills, greater gender equity and greater concern for fairness and justice.

I have tried today in this brief lecture to show how mediation, as a concept, exists in all our cultures and how the contemporary practice draws upon a value system that is universal and located in diverse parts of the world, including the Islamic tradition.