THE CONCEPT OF RECONCILIATION (SULH) IN ISLAMIC FAMILY LAW AND MATRIMONIAL DISPUTE SETTLEMENT PRACTICE IN NIGERIA

Olufadi Lanre Abdul Malik  
Faculty of Law and Shariah,  
Universiti Sains Islam Malaysia (USIM)  
olufadil@yahoo.com

Farah Salwani Muda@ Ismail (Ph.D)  
Faculty of Law and Shariah,  
Universiti Sains Islam Malaysia (USIM)  
salwani@usim.edu.my

Abstract
This research will look or investigate in the principles and rules relating to the matrimonial dispute settlement under the Shari’ah and how they are practicing matrimonial dispute settlement (sulh) in Nigerian or Customary Law. Its legalities, conditions, and principles would be looked in this work. The causes of matrimonial dispute in Nigeria would be mentioned in this paper. Classical works on the matrimonial dispute settlement would be studied in this finding in contrast with Nigerian Customary system. The research will be conducted through a qualitative method using the available materials gathered from library and internet. Material that are obtained include sources like legislation, commentary of the Qur’an and hadith, Islamic textbook by all respected scholars of Islamic studies, journals, articles, and conferences proceedings. The research will concluded by suggestions the way out for the problems.

Keyword: Islamic Matrimonial Dispute Settlement Practice in Nigeria.

1. Introduction
Islam is religion of peace and way of life(1), that is while it introduced the amicable way or introduced the rule of law to settle matrimonial disputes and ensure the smooth running of our worldly affairs, and it has encouraged people to mediate reconciliation among the couple by rewarded for peaceful dispute and conflict settlement. However, the systems of arbitration and reconciliation or amicable settlement (sulh) have a long history within Arab and Islamic societies and have their roots in pre-Islamic Arabia period. Sulh is the preferred result and process in any form of dispute resolution. Furthermore, arbitration is favoured to adjudication in Islamic jurisprudence. In tribal and Islamic cultures, the overarching objective in conflict settlement is collectivity.

2. Concept of (Sulh) and Islamic matrimonial dispute settlement in the Qur’an
Islam encourages every Muslim to do mediation between the husband and wife (couple) in a conflictuals situation in order to restore peace, affection, harmony, and understanding between the couples. Parents or family are primarily required to firstly to mediate between the couple in order to save their marriage or avoid divorce. However according to R. O .The Islamic concept of Sulh (reconciliation) is a
process rather than an event. It is a process which needs to be nurtured over some periods of time in order for it to procure its fruits of justice and peace (2). Notwithstanding the difficulty and arduousness of the reconciliation process, it is a process which is extolled in Islam and as such should be encouraged and supported by each and every conscientious believer. No reconciliation process can be perfect but its contradictions must not be overlooked and they should be continually challenged (3). But in order for a reconciliation process to be sustained it requires magnanimity on the part of all parties. Such a view is supported by the most primary source of Islamic guidance, the Glorious Quran, when it positively affirms the concept in Qur’an thus:

لا خَيْرٌ فِي كَثيِّرٍ مِّن جَعَالِهِمْ إِلَّا مَنْ أُمِرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِسْلَاهٍ بَيْنَ الْئَامِنِينَ وَمِن يَتَفَعَّلُ ذَلِكَ الْبَيْعَةُ مُرَضَّاتَ اللَّهِ

“In most of their secret talks there is no good; but if one exhorts to a deed of charity or justice or conciliation between men, (secrecy is permissible): to him who does this, seeking the pleasure of Allah, We shall soon give a reward of the highest (value)” (An-Nisaa: 114).

Another verse:

وَالصَّلَحُ خَيْرٌ وَأَحْصِرْتُ الْأَنفُسَ الْشَّهَّدَةَ إِنْ تُحْمِيْنَكُمْ وَتَنفَقُواْ فَإِنَّ اللَّهَ كَارِبٌ بِمَا تَعْمَلُونَ خَيْبًا

“Reconciliation is always the best option and selfishness is ever-present in the human soul; but you should be magnanimous and act benevolently towards others and always remain conscious of God, for He is indeed aware of all that you do” (4)

The Islamic equivalent of reconciliation is the Arabic word Sulh. Sulh is an important term in both the vocabulary of the Qur’an and in Islamic jurisprudence. The word itself is used to refer both to a ritualized process of restorative justice and peacemaking and to the actual outcome or condition sealed by that process (5). According to Islamic law the purpose of Sulh is to end conflict and hostility among Muslims so that they may conduct their relationship in peace and harmony (6)

The second context in which the concept of sulh is used in the Quran is in relation to resolving matrimonial disputes. Allah the Sublime advises the following procedure in the context of marital conflicts

وَإِنْ خَفْتُمُ شَفَاقًا بَيْنَهُمَا فَأُعْمَلُواْ حَكَمًا مَّنْ أَهْلِهِ، وَحَكَمًا مَّنْ أَهْلِهَا إِنْ يُرِيدَا إِسْلَامُهَا بِيِبَعْهَا إِنَّ اللَّهَ كَانَ عَلِيْمًا خَيْبًا

“If you fear that husband and wife may break up, then appoint one arbitrator from his family and one from hers; if the couple wishes to reconcile, then Allah will indeed bring about their reconciliation: For Allah has All-knowing and All-aware” (7).

Another verse:
“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; even though human inner-selves are swayed by greed. But if ye do good and practice self-restraint, Allah is well-acquainted with all that ye do” (8)

“If two parties of the believers fall into a quarrel, then make peace and reconciliation between them; but if one of them transgressors beyond all bounds against the other, then fight against the transgressor until it complies with Allah’s command; but if it complies then make peace between them and reconcile them on the basis of justice and fairness; for Allah loves those who are just and act equitable”(9).

These Quranic verses strongly advocate amicable settlement of disputes on equitable and fair ground and gives divine blessing to those who do so.

Beside these verses, Hadiths of the Prophet (SAAS) are loud in supporting peaceful settlement. The Prophet says:“He who makes peace (sulh) between the people by inventing good information or saying good things, is not a liar” (10)

From the above hadith we should know that lie is only permitted during sulh in order to achieve sulh between disputants.(couple)

The prophet also mentioned the rewards waiting for those who establish sulh.
“Narrated Abu Huraira: Allah’s Apostle said: ‘there is a sadaqa to be given forever joint of the human body (which number 360); and for every day on which the sun rise, there is reward of a sadaqa for the one who establishes sulh and justice among people”. (11)

Beside these verses, Umar bin Khattab the second caliph of Islam wrote a letter to Abu Musa Al-Ashari on the letter’s appointment as a qadi contains many rules relating to the administration of justice. One of these rules deals with sulh:

الصلح جائز بين المسلمين إلا صلحا حرم هلا أو أهل حرام

"All types of compromise and conciliation among Muslims are permissible, except those which make harm anything which is halal and a halal as haram". (12)

In the above this letter, the part relating to haram and halal is compromise is based on a saying of the prophet: “if somebody innovates something which is not in harmony with the principles of our religion, that thing is rejected” (13)
3. Concept of Mediation under Nigerian Customary Law

Customarily, Nigerian elders responsible for reconciliation and mediation of any loggerheads within the family, community, and society in order to be at peace and harmony at all time. It is a proverb in Yoruba custom that (Agba kiwa loja, kile odaworo) which simply means, in the presence of elders, there must not be any turbulent and catastrophic situation in the house. For that proverb, when there is any single misunderstanding between husband and wife, the elder always strive into settle because the eldest of the family would be held responsible and blamed for negligence if he or she failed to settle the conflict quickly. If there is marital conflict, the elders of the family will come up for the mediation in order to save and restore affection and love within the two parties.

Customary law in Nigeria

Nigeria is made up of different and several ethnic groups and cultures out of which each made its own varieties of customary law. Ethnic customary conceptualized as the indigenous law that applies to the number of different groups in a society or community. However, customary law is a system of law that reflects and reveals the culture, custom, value and habits of the people whose their activities are regulated by their custom. The subject matter is mainly dominant in the personal and family aspect such as marriage, divorce, guardianship and custody of children, conflict mediation within the family, and succession. In Nigeria, system of customary law is different and varies from one society to another society that is, Igbo culture is vary from Hausa culture while both are different from Yoruba culture and vis-versa. As a matter of fact, Nigerian customary law is unwritten, uncertain, and difficult to ascertain. Nevertheless, it is flexible and has the capacity to adapt the social and economic changes without losing its character. It also has capacity to settle any rancor and conflict within the family without filing the case in the court of law. Customary law is usually enforced in customary courts where most cases are presided over by non-legal trained personnel. (14) Nigerian Customary Law may apply and adopted in some situation and conditions as it is provides that:

“A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence” (15)


Arbitration as a mechanism of settlement of dispute has been with Nigerians from time immemorial as it has been with mankind from the beginning of its creation. The existence of the method as a means of dispute resolution is based on the fact that conflicts and controversies are inevitably a daily occurrence in society from time immemorial, this may be in the form of personal disagreements, religious crises, political, ethnic, marital disputes, chieftaincy matters, land and community boundary dispute and even economic conflict and which from time are settled one way or the other through an organized traditional dispute resolution mechanism like arbitration. Historically therefore arbitration and other mechanisms of dispute settlement is one of the processes used in dispute resolution in most ethnic groups in Nigeria like many other communities in African countries. (16) Thus, arbitration is a traditional arrangement in Nigeria for settlement of matrimonial dispute and abiding by the judgment of selected persons in the community, on disputed matters as opposed to reference to court for litigation. This can be seen in the words of Ezediaro ;(17) where he said;
“Arbitration as a method of settling dispute is a tradition of long standing in Nigeria. Referral of a dispute to one or more layman for decision has deep roots in the customary law of many Nigerian communities. Such a method of dispute resolution was only reasonable one, for the wise men or the chiefs who were the only accessible judicial authorities. This tradition still persists in certain villages and communities, despite the centralized legal system and the attendant efforts at modernizing and reform of legal system.”

5. Islamic Arbitration
It is instructive to note from the onset and as rightly observed by Akanbi M. M (18) that there is no evidence of judicial pronouncement confirming the application of Islamic arbitration mechanism as a method of disputes resolution in Nigeria, neither was there any on its validity or even the legality or otherwise. This is because there has not being any reference of disputes relating to Islamic customary arbitration to court for adjudication or any dispute relating to or connected with or arising from arbitration.

The fact however remains that Islamic legal system is one of the three recognized and enforceable legal system in Nigeria and evidence abound in Shariah of arbitration as one of the practical method of dispute settlement. Historically it is established that in the early stage of Islam and after the death of Prophet Mohammed (PBUH) arbitration was employed in dispute resolution in Islam.

The practice of customary Islamic arbitration in the Northern Nigeria has it legal basis and foundation from the primary source of law, that is, the Holy Quran, the Sunnah of the Holy prophet Muhammed (PBUH), Ijma’a, Qiyas, Ijtihad, Istihisan etc. more importantly, the Nigerian Muslims particularly the North where Muslims are predominant, follow the Maliki school of jurisprudence and where arbitration is regarded as Tahkim or sulh as a form of contract where by parties agree to bring any dispute/conflict or disagreement arising from the terms of a contractual agreement before hakim or arbitration for settlement (19).

6. The Origins of the Nigerian Legal System
The Nigerian legal system comprises a number of different layers of law, being based significantly on English law whilst incorporating also local Customary and Islamic (Shari’a) law. Customary law in particular adds a great deal of complexity to the legal system on account of the fact that it is not uniformly applied, rather, the customs which are recognised as law are often recognised only at the localized geographic level and do not apply to all groups throughout the country. In short, the customary law in one region will differ from that elsewhere. Nigeria’s periods of military rule have further complicated the legal system because of the Decrees and Edicts which were issued during these periods. Many of these items of legislation remain in force despite the fact that they conflict with other laws, indeed often with the Constitution of the Federal Republic of Nigeria, 1999. (20)

Establishing the Existence and Application of Customary Law
Customary law is, as stated above, recognized by the Nigerian legal system. The question of what constitutes the applicable Customary laws in relation to a particular matter is often, however, a difficult question. If a party wishes to invoke the application of a rule of customary law in court proceedings, Section 14(1) of the Evidence Act 1990 requires that party first to establish the existence and content of the customary rule as a matter of fact which is to be proved by appropriate evidence. Appropriate
evidence will include the following sources of customary law: opinions of persons having special
knowledge of native law and custom; opinions of native chiefs or imam; any books and any manuscript.
An exception is created for those rules of customary law which have been recognized and applied by
Courts of superior or coordinate jurisdiction so often that the Court asked to apply the relevant rule now
would be justified in assuming that the persons or class of persons concerned in the area look upon the
relevant rule as binding in relation to circumstances similar to those under the Court’s consideration
(see Section 14(2) of the Evidence Act 1990). By this latter approach, a Court is able to take “judicial
notice” of the existence of a particular customary law without the need for its proof by specific
evidence.

7. Islamic Matrimonial Dispute Settlement Practice in Nigeria
Dispute according to advanced learner’s dictionary, is an argument or a disagreement between two
people, groups or countries; discussion about a subject where there is disagreement. However, Islamic
law considers marriage ‘an important contract, a strong bond, a challenging commitment in which both
parties find mutual fulfillment and self-realization. (21) This is because marriage in Islam is regarded first
and foremost as religious act, an act of responsible devotion. But Islam does not make the contract
absolutely indissoluble. If it cannot work well for any valid reason, it may be dissolved.(22) Therefore, in
every form of Islamic matrimonial dispute settlement in Nigeria, the possibility of breakdown of the
marriage can lead to divorce.

8. Arbitration (Ṣulh) Practice under Nigeria Law
The practice of Ṣulh in matrimonial dispute settlement under Nigeria law can be divided into three
namely:
   a. Ṣulh process of marriage dispute settlement under customary court in Nigeria.
   b. Ṣulh of customary marriage by the Customary and Area Courts in Nigeria.
   c. Ṣulh under Islamic Law Marriage.

9. Reconciliation (Ṣulh) Process of Marriage Dispute under Customary Court in Nigeria
First of all, customary laws can be defined as following:
Customary law is practices which by common adoption and long unvarying habits, have come to have
the force of law.
   Its, Rules which in a particular community have from long usage obtained the force of law.
   Its, A body of customs, accepted by members of the community as binding upon them.
   Its, Organic or living laws of the indigenous people, which regulate their lives and transactions.
   Its, Usages or practices of the people, which by common adoption and acquiescence and long
   and unvarying habits, have become compulsory and have acquired the force of law with respect
to place, or the subject matter to which it relates. (23)

Generally, in all disputes at customary law, the customs place a lot of emphasis on negotiation and
arbitration but more importantly in disputes relating to family matters which includes marriage.
Marriage is considered a very important social institution upon which the web of societal associations is
built in most customs in Nigeria.

It is certain that customary marriages are dissoluble under the law. Divorce at customary law may be
effect without judicial intervention. (24) The general conception of marriage at customary law is that
family is a corporation made up of people of common descent (25)’ and marriage is a compact between two families. (26)

The family head and the principal member as well as friends of a couple and their religious leaders are all key players in any reconciliatory efforts in estranged marriages in Islam or customary law. (27) Because of the power or respect exhibited by such people their reconciliatory efforts often yield positive results leading to a reunion of the couple. The basic nature of customary law and practice is the concept of yielding and compromise. Most Nigeria families adhere to the concept of good relationship thus they will try their best to resolve the problem among themselves within the family without seeking outside assistance.

Upon the failure of intra family mediation the dispute may be reported to the formal or institutional mediation like mosque,(imam) the Oba (King) in Yoruba cultures who is seen as the father of all. He adjudicates with the aid of his chiefs and endeavors to bring the feud to an amicable settlement of family dispute. Except in cases of matrimonial misconducts, which are considered grave (e.g. adultery or pregnancy by a wife for another man, attempt of one spouse to kill another) most matrimonial feuds are settled at this level.

10. Reconciliation (Ṣulh) of customary marriage by the Customary and Area Courts in Nigeria.
Customary marriages are conducted under the various customary laws applicable in each locality. The customary and Area Courts are generally established for the administration of customary law which includes customary marriages. While these courts are designated Area Courts in the southern states they are designated Area Courts in the northern states.(28) The various Customary and Area Courts laws regulate the proceedings of these courts. (29) These laws contain identical provisions about the jurisdiction of the courts.

For instance the Lagos State law (30) provides in section 16 (1) read with second schedule part I that the civil jurisdiction of Customary Courts includes ‘unlimited jurisdiction in matrimonial causes and other matters between persons married under customary law or arising or connected with a union contracted under customary law (31). The courts in the exercise of their power therefore adjudicate over matrimonial causes .Section 18 of the law provides that ‘in civil causes and matters a customary court may promote reconciliation among the parties thereto and encourage and facilitate amicable settlement thereof. (32) While these courts have the power to embark on reconciliatory mission it is only when parties are properly before them that this duty can be performed.

11. Reconciliation under Islamic Law Marriage
Marriage in Islamic Law may be dissolved by divorce in the case of a permanent marriage or waiver of the remaining period in the case of a temporary marriage. (33)

Dissolution of the Islamic marriage can take different forms. (34) From the principles governing the dissolution of Islamic marriages there are vestiges of an attempt at the entrenchment of a reconciliatory process. Two forms of reconciliation can be identified;

11.1 Reconciliation by Revocation of Divorce
*Talaq* is one of the processes of dissolving an Islamic marriage. The husband in Moslem marriage to sever the union adopts it. It involves making a legal statement by which the divorce is pronounced with the requisite intention. It is a requirement of the law that it should not be pronounced in a manner that does not leave room for reconciliation. The man should therefore control his emotion when pronouncing it. One of the attributes of *talaq Sunnah* is that it allows for reconciliation. The woman
waits for three periods of cleanliness after a revocable divorce (Talaq raj’iy). During this period of iddah the man can rescind his decision to divorce the woman. (35) The condition for the exercise of this right by the husband is that he did not make the separation total at the time it was pronounced.

11.2 Reconciliation through the iddah period

Iddah refers to the waiting period during which women, who are separated from their husbands as a result of death or divorce, count the prescribed days and month of menstrual periods or periods of cleanliness. It is that period within which women should not enter into a new marriage contract till the stipulated period expires. (36)

The first purpose of iddatul talaq is reconciliation. (37) The essence is to afford the estranged couple a period for peaceful and amicable reconciliation. Such reconciliation may be initiated by the parties themselves or by close associates and relatives. A party is therefore afforded the opportunity to change his mind. In order to ensure that the iddah period affords an opportunity for reconciliation Islamic law stipulates that the woman in the man’s house and under his care must observe the iddah (38)


The causes of matrimonial dispute in Nigeria can be divided into three namely:

a. Causes of matrimonial dispute from the husband.
b. 2-Causes of matrimonial dispute from wife.
c. 3-Causes of matrimonial dispute from both.

1. Causes of Matrimonial Dispute From the Husband. Are these following, comprise the behaviors exhibited by the husband which in turn to matrimonial or marital dispute.

   a. oppression and rough treatment
   b. refusing to maintain her financially,
   c. injustice among wives in polygamy family.
   d. breaching pre-marital agreements.
   e. abandonment
   f. financial problem

2. Causes of matrimonial dispute from wife.

   a. Being disobedient to and garrulous with her husband
   b. Being negligent in carrying out domestic chores and duty to her husband
   c. Going out without her husband’s permission
   d. Lack of domestic skill.
   e. Lack of proper dress or dress up alluring for her husband

3. Causes of matrimonial dispute from both.

   a. The nature of the husband’s or wife’s work
   b. Different in personal and career goal
   c. Unnecessary jealousy and suspicion
   d. Transgressing against the matrimonial rights of one another,
   e. Unfriendly to cleanliness and adornment by either of the spouse
   f. Child-rearing issue
   g. Religious and cultural deference
   h. Sexual incompatibility
References
2. Rashied omar, A.khutuba 17 December, 2010. Reconciliation in islam.p1
3. Ibid.p2
11. Al-Bukhariyy,Muhammad Mushin khan.. Sahih. al-Bukhariyy.vol.3,p.533, Eng.tr.by Muhammad muhsin khan(Dar-Al Arabia, Beirut,n.d
12. Ibid.p.543.
14. Ibid.p.4
23. Abdallati, 1998: A man perfects half his religion when he marries; for the other half, he must place is trust in Allah’ (Hadith)
27. Ibid.
28. Ibid.
30. See for example Customary Courts Law Cap 34 LLS 2003; Customary Courts Law (WRN Laws 1959 Cap 31) applicable to the states in the former western region. Customary Courts Edict No 9 1969 (Cross River State); Area Courts Edict No 2, 1967 (Kwara State); No 1 1968 (Bauchi Borno and Gongola States)

31. Ibid
32. Ibid
33. Identical provision are in the Area Courts laws For example Part II Second Schedule area Courts Edict 1968 (b.p.s.) section 17 (1)
36. Qur’an 2 verse 228.
37. Ibid.
38. Al-Qur’an 65 verse 1.