TRACING THE CONCEPT OF NEGOTIATION IN LAW, PAKISTANI LEGAL SYSTEM AND *SHARĪʻAH* (ISLĀMIC LAW) (A Comparative Study)

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Abstract: This study inspects the concept of "Negotiation" as an informal amicable alternative mode of dispute resolution. In the beginning, it focuses on its introduction in terms of meaning, history, scope, various strategies and present status in the family of Alternative Dispute Resolution (ADR). In the second phase, it discusses the relevant Pakistani legislations related to negotiation and its functioning in the legal system of the same country. The study also explores the zones in Pakistani laws that need improvements and recommends proposals for it. Additionally, the present work identifies the causes of highly limited utilization of all ADR techniques including 'Negotiation' in Pakistani context, and offer solutions therefore. It also outlines the reasons behind reluctance of judges towards proper implementation of ADR provisions. Most notably, it traces the concept of negotiation under *Sharīʻah* and explores the relevant provisions of the Holy *Qur'ān* and *Sunnah* on the subject and calls for their purposive and beneficial construction. A sort of comparison of *Sharīʻah* and law approaches towards 'Negotiation' could also be found. A short brief concludes the discussion at the end and suggests that the technique of 'Negotiation' ought to be utilized both in civil and criminal disputes; having regard to the public policy. It may also be utilized in *Hudūd* issues before its cognizance by the State authorities. A content analysis technique of qualitative research has been tracked for the investigation of the issue under discussion.

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1. Introduction

Differences and disputes are the inherent features of the human society. A complete control on its birth is not possible, it may, nonetheless, be resolved amicably, managed wisely, and minimized considerably. Human history has, primarily, recorded two modes of dispute resolution; determination of issues through compulsory formal adjudication, and settlement of differences by consensual informal processes, technically called Alternative Dispute Resolution (ADR). Actually, all the remaining major modes of ADR, such as Arbitration, Mediation and Conciliation have their roots in Negotiation by one way or another. Every arbitration process follows an agreement which is always preceded by a sort of negotiations. The process of mediation is an assisted negotiation. Conciliation is, in fact, an indirect negotiation conducted by a comparatively more proactive intervener. Though their negotiating behaviors differ, and their negotiating capacities are not the same, every human being negotiates in one shape or the other, in his daily life. Negotiation is the solitary mode of dispute resolution that is free from any kind of external interference and influence of outsiders, hence remains highly confidential, decidedly successful, and vastly fruitful besides being economical, flexible and sensible. It has got a universal acceptance due to its effective and efficient role in resolving social, commercial, national and international disputes and conflicts. It is quite hard, rather impossible, to ascertain the first ever utilization of negotiation, it could be, nonetheless, presumed that this technique is as old as human history itself. It is rightly said that man is born with negotiating behavior and that the over-centuries-increase in the size of his brain is due in part to his use of this capability. Even the largest survival of human beings as compared to other species of his kingdom is said to be, inter alia, due to their negotiating behavior.[1] This behavior could lead to success only if there is will to resolve the dispute and courage of giving concessions to the other party, otherwise, the process would enter into impasse. The need of negotiations has a direct noxious with the complex and plural growth of our society. Today, its significance and need is, therefore, direr than ever.

Negotiation processes has various stages and each of them requires its own techniques. Variety of strategies is available to carry out the process. It is mainly classified on the basis of existing and planning for future disputes. The present study shall give a minute discussion on all these prepositions. It

also looks at the highly limited functioning of negotiation in Pakistani legal system, both on criminal and civil sides, as it shall refer to a considerable number of judgments of Pakistani courts on the subject, exploring areas of amendments and improvements for incorporation of negotiations as a tool of dispute resolution and its justified utilization. It shall also detect the causes of unsatisfactory implementation of ADR provisions and shall propose suggestions for improvement. *Qur'ān* (the sacred book of Muslims) and *Sunnah* (transmitted record of the teachings, deeds, saying, silent permission or silent disapproval of the Holy Prophet (PBUH) carry numerous provisions for negotiation as a mode of conflict management. They place great emphasis on negotiation skills and its strict observance during the process. The need is to trace those provisions and interpret them properly. The study explores such provisions, holds a detailed discussion on its purpose-based construction, and highlights both the *Sharīʿah*[2] (Islāmic law) and law approaches towards negotiation on a comparative. For the reason that instances of 'Negotiation' in inter-personal issues are rarely available in *Sharīʿah*, the study mainly focuses on the role of 'Negitiation' in resolution of disputes between Muslims and other nations.

2. Meaning Jurisdiction of the Term 'Negotiation'

Negotiation (often used plural) literally means objective-based discussion, meaningful talk and direct communication. It refers to exchange of expressions and comparing of apparently inconsistent views on some issue. The word has a Latin origin "*negotatus*"; the past participle of "*negotiare*" that means to carry on business. It's another cognate is "*negotium*"; the compound of "*nec otium*" which means 'no spare time'. It also denotes a formal discussion and bargaining for achieving an agreement.[3] According to West's Thesaurus, it means coming to terms and adjusting of differences.[4] This last meaning is quite nearer to the technical sense of the term. Technically, it has got three meanings. In law of Instruments (promissory note and bills of exchange and lading), it means the transfer of a commercial paper or instrument for value by delivery or endorsement.[5] Here, the product is negotiable instruments which are not the subject of the present work. In International Law, on the other hand, the term "negotiation" refers to a diplomatic procedure whereby representative of States, either by direct personal contact or through correspondence engage in discussing matters of mutual concern and try to resolve their differences.[6] The

outcome of the process is also known as 'negotiated justice'. This category, though, has a remote link with this study, but it also lies out of our current discussion. In connection with this study, negotiation is the direct and intervention-free interaction between two or more differing parties to reach an agreement.[7] Ginny Pearsum Bames says, "Negotiation is a resolution of a disagreement, using give and take, within the context of a particular relationship. It involves sharing ideas and information and seeking a mutually acceptable outcome".[8] The Pepperdine University of USA had defined, rather described, negotiation as "Negotiation is a communication process used to put deals together or resolve conflicts". It is a voluntary non-binding process in which the parties control the outcome as well as the procedure by which they will make an agreement, as most parties place very few limitations on negotiation process. It allows for a wide range of possible solutions maximizing the possibility of joint gains".[9]

It is quite strange that, at the time, a concise and precise definition of negotiation could not be found. Almost all the legal and judicial dictionaries and thesauri have defined the term in its commercial sense (negotiable instruments). The reason is understandable. The phrase ADR, to which negotiation belong, is hardly 45 years old, for it is the product of 1970's. No legal dictionary or judicial thesaurus defines it as a mode of dispute resolution. Most of the writers, particularly those related to the subject, have tried to describe the process in lengthy detailed statements; that could not be called definition under any stretch of legal explanation. See, for instance, what Don Peters, Professor of Law at University of Florida, says; "Negotiation encompasses any exchange of information made by two or more parties in search of an agreement to do or refrain from doing something. Negotiation occurs when suggestions, proposals, solutions, offers, counter-offers, concessions, positions or arguments are shared".[10] From all the above descriptions, the following essentials of negotiation could be concluded (1) It is a direct communication mechanism (2) Its objective is resolution of differences (3) Its stimulant is the consent of the parties(4) The outcome is non-binding (5) Procedure and formulation of solution remain in the control of parties.

Keeping the above meaning of negotiation in view, its similitude in Arabic would be "*mufāwadāt*"[11]: a phrase usually used in the books written by cotemporary authors on International Law of Islām. As it will be discussed

in detail later, Pakistani statutes do not define 'negotiation expressly. In criminal issues, it has been accommodated in the concept of 'plea bargain', as it appears in Accountability Laws. In civil disputes, the meaning and application of 'negotiation' could be traced out in the generic phrases of Pakistani laws, such as "any alternative method of dispute resolution" and the phrase "any such other means" as used in the Code of Civil Procedure 1908 and Family Courts Act 1964. Pakistani courts also take the support of those generic terms while giving decisions on negotiation-based compromises.[12]

3.Strategies of Negotiation (Techniques and Ways)

The captioned strategies refer to the ways and techniques required for conducting negotiation proceedings. There are four phases of negotiations; preparation, opening, bargaining and closing. In the first phase, parties are to prepare and collect the material for the process, for the reason they are to state their case and the opposite party would not be made satisfied on the basis of mere stories. Actually, this material exposes the strength of the stances of the parities. The strength of the case guides a party that how minimum and how maximum he should expect from the process. At the stage of opening, both parties come to know about the initial position of the other side. Initial position would expose the maximum expectations of parties. The bargaining stage narrows down the differences. At this phase the basic areas of differences are pulled out from the stances and positions of the parties. Here, the parties need to develop a realistic approach. They should keep their expectations in the light of situation developed during the process. They must accept that a mutually acceptable agreement could never be reached unless there is some withdrawal from their initial positions. Each party ought to mentally ready that he would be supposed to give some concessions to the opponent; an indispensable phenomenon in the process of negotiation. In the absence of these factors, there may be a breakdown in the process and the parties would enter to an impasse. The closing phase is the formulation of final agreement; a compromise deed that will tie the parties in contractual liabilities. This is the fruit of the whole process that re-establishes terms between the disputing parties, bringing them to a state of sympathy and co-operation.

Negotiation is always a voluntary process to be initiated and entered into. It operates as primary device to resolve any problem. In this process, conduct

of the parties becomes more important than the subject matter. Elements like insincerity, malafide and non-cooperation would always prove fatal. The outcome of negotiation is a joint decision. Such decision could not be expected from parties having repelling sentiments. A successful negotiation process, therefore, shall always need these essentials; (1) Co-operation (2) Avoidance from irrelevant discussions (3) Consciousness about time constraints (4) Belief of the parties that no other mechanism would bring a better solution than negotiation (5) Belief of the parties that a mutual agreement is not something impossible (6) Admittance that 'to leave some and to take some' is the fundamental feature of the process. Co-operation means that the party should sacrifice his own interests in the wanting circumstances. Such negotiator is known as 'Accommodator'. Negotiation would not prove successful if a party always tries to protect his interests through negotiated means and even at the cost of the other party's interests, rights and benefits. This kind of negotiator is called 'Competitor'. The following two famous strategies of negotiation have emerged from this concept of co-operation and competition.[13]

(A) Competitive or Adversarial Strategy:

The focus remains on the obtaining of objectives. The party wishes victory at any rate, even at the cost of the other. He takes an extreme position and tries for one-sided gains. With him, there is a very limited scope of concessions. The party wishes the outcome in the shape of win-lose approach and searches for an agreement that may benefit him only. To achieve his goal, the negotiator uses various tactics and generates maximum pressure on the other negotiator. This is a blind approach to joint gains.[14] This kind of strategy is also called 'Positional Bargaining' or 'Distributive Bargaining'. The moving of the parties from their original positions to a compromising one is known as "Negotiation Dance".[15] In situation like this, the chances of arrival to an agreement highly decrease. There always remains likelihood of breakdown and impasse. As a result, threat to the future relation of parties becomes probable.

(B) Integrative or Interest-based Strategy:

Here, the focus remains on amicable solution. The peaceful settlement is the main objective. The strategy adopted is to make concessions, to ensure joint gains and to maintain good relationships. It may, sometimes, demand the sacrifice of one's own interests. For this characteristic, this kind of

negotiation is also called 'the soft negotiating strategy', 'the principled bargaining', negotiating on merits' and 'the accommodative approach'.[16] This approach has some advantages e.g. (1) It reduces the chances of breakdown and impasse, (2) It results in a better agreement based on win-win situation, (3) It closes the chances of repudiation of the agreement in the future, (4) It results in improved organizational effectiveness, (5) It ensures the restoration of ties between the disputing parties.

4. Negotiation Skills; BATNA and WATNA

Art is necessary for every performance. In negotiation it matters a lot. To bring the opposite party to a consensual situation is not an easy job. The process, nonetheless, starts with communications. As a result of communications, the things shall surface. So the commencement of communications is the first step in the process. Every negotiator must have quality communications skills. Negotiation denotes an exchange of information. This exchange would not be fruitful if runs short of required skills. As stated earlier that a party has to present his case in an appropriate order, organize the facts properly and that he is to be mindful of the time and conscious for the feelings of the other party. A negotiator must be ready and able to; (1) Perform properly even in unfavorable circumstances and prepare for facing hard times, (2) Target and arrange for necessary expected concessions; the real fuel for making the process go, (3) Be mindful of the needs and expectations of the other party, (4) Fix objectives and asses them off and on, (5) Collect necessary data for the process, (5) have an alternative agenda in case of failure of primary plan of action.

The whole process of negotiation depends on the skills of negotiator. No doubt, the expertise that a negotiator needs varies from person to person, culture to culture and issue to issue. A negotiator should be conscious about BATNA and WATNA. The former means Best Alternative to Negotiated Arrangement, while the later denotes Worst Alternative to Negotiated Arrangement. BATNA takes account of risk factors involved in examining the present solution that include time, expenses and the like. If a party sees the BATNA in any other mechanism, he must leave the negotiation process. If he foresees that all other options/mechanisms would prove WATNA, he must continue negotiations.[17] Deadlock is common in the process of negotiation; a natural phenomenon which cannot be ignored. A negotiator must have some skills to deal with the situation and to overcome the

difficulty in an appropriate way. These skills include; (a) Defer the proceedings for some time, (b) Shift the focus from the problematic area and, (c) Trading a concession. The best way to avoid a deadlock is, nevertheless, the breaking down of an issue to smaller parts, if it is capable of separation. Every part should be separately negotiated. This will pave the way to reach to a final agreement without facing any breakdown.[18]

5. Negotiations as Regard to its Subject and Approaches

Negotiations are mostly held regarding some dispute already happened. Apart from other so many, early settlement conferences and mandatory settlement conferences in pending cases are the good examples of this kind. Negotiation process may also be utilized in respect of differences which happening is highly probable in some future times. Negotiation is, thus, be divided into the two groups (1) Dispute Negotiation: Here, the focus remains on resolving existing issues, (2) Transaction Negotiation: the focus is on reaching agreement for the future. Emphasizing on the significance of this distribution, Sridhar says:

> "While it is often helpful to appreciate this difference between dispute negotiation and transaction negotiation, it is also beneficial to appreciate that many negotiation situations involve the resolution of both past issues as well as planning future relations".[19]

Some researchers have considered the various strategies of negotiation (described above) as its kinds. According to them, negotiation is of two kinds; the distributive and the integrative.[20] Again, on the same procedure, some other writers have made five kinds of negotiation on the basis of the behavior of a negotiator.[21] Each kind has the distinct features and outcomes. These are: (1) Avoidance: in this phenomenon, there is no win situation at all. Here, the negotiator who prefers a peaceful resolution at any rate loses all or some of his claims. The people who avoid taking of risks due to some other priorities usually adopt this approach. (2) Competition: He is the negotiator who wants to achieve all of his claims through negotiation process; therefore, he is deadly rigid. He wishes to protect his interests even at the cost of the opponent. Negations in this situation may only be successful if the other party is avoider, if not, the process would fail. Such negotiator is called 'Competitor'. (3) Accommodative: Here, one negotiator sacrifices some of his interests for the other party. It means that he give

some concessions. He does not perform like the avoiding disputant. He is also not like a rigid negotiator. He is, rather, co-operative in nature. His grade lies between the Avoider and Competitor. In ADR's aspect, he is known as 'Accommodator', owing to the fact of his accommodative nature (4) Compromising inclinations: In this kind, the very nature of the negotiator inclines towards a compromise. He can be placed somewhere, for example, between the assertive and cooperative parties. He accepts all that is expedient and that's why he does not reject partial solutions as it minimizes the bulk and strength of differences. He sees that some distance has been covered towards destination. This kind usually splits the differences. In this kind a negotiator changes his positions. Sometimes he becomes a 'Competitor' and an 'Accommodator' some other time. In some stage he becomes an 'Avoider', while at some other stage he turns a 'collaborator'. Apparently, this kind seems to lead to a weak settlement, it is, nevertheless, important from the view that it could be utilized when all other strategies would fail. This kind of negotiator is called 'Compromiser'. (5) Collaborative-based: in this kind, negotiation process terminates in a win-win situation for both the parties. It is the most popular and successful technique. The negotiator gives the same importance to the issue and interest of the other party as he cares for his own. The process requires a lot of diligence, hard work and a great deal of patience as well. Resultantly, solutions that could satisfy both the parties emerge.

6. Negotiations in Pakistani Legal System (Negotiated Justice)

The term 'negotiation' as a mode of ADR, to the best of our belief, except with the two exceptions of Small Claims and Minor Offences Courts Ordinance 2002 and National Accountability Bureau (NAB) Ordinance 1999, does not occur expressly in any Pakistani statute.[22] On civil side, by way of interpretation, we can say that the phrase "any alternative method of dispute resolution" and the phrase "any such other means" as used in the Code of Civil Procedure 1908, have generalized the scope and meaning of the dispute resolution techniques.[23] The only restraint is that such method of resolution shall not be unlawful and inconsistent with the provisions of the same Code.[24] By this way of construction, it necessarily includes negotiation. What to say of negotiation, it encompasses even the decision of disputes on the basis of throwing lots, the resolution of disputes on the basis of *Half* (swear) on Holy *Qur'ān* by either party, or other methods which

may have yet to come

7. Negotiations in Civil Suits and the Role of Pakistani Courts

Because of the generic nature of the relevant ADR provisions as said above, Pakistani Courts hold: "Law did not bar recourse to any method of alternative dispute resolution".[25] In another case, giving effect to the compromise on the basis of negotiation between the parties, Justice Sayyed Zahid Hussain observed,

> "The parties are represented by their learned counsel. They are also present in person. During the course of hearing, as a result of deliberations and understanding, a compromise marked 'A' accompanied by cite plan marked 'B' duly signed by them has been filed in the court. ----- Since settlement of disputes through compromise and amicable means is one of the recognized modes, there is no factual or legal impediment in disposing of the matter in such a way. -----The petition is disposed of accordingly".[26]

The most interesting case in this regard is that of Messrs Alstom Power Generation, the contractor of famous Ghazi Barotha Hydro Power Project. The Water and Power Development Authority (WAPDA) granted to this organization a contract for supply and commissioning of Control, Instrumentation and Telecommunications. Some disputes arose between the two. The organization moved a petition in the Lahore High Court with the prayer that the WAPDA authorities should be directed to act judiciously, fairly and in a manner to advance and not to defeat the objective of the law. They may be further directed to fulfill their obligations in the terms of clause 50.3 of the contract and to commence negotiations with the petitioner for amicable settlement. Mian Ashiq Hussain; learned counsel for the respondent argued that though he had serious objections to the maintainability of the petition, yet his client had instructed him that the WAPDA has no objection to enter into out-court negotiations with the petitioner as prayed for. The court said further that all the precedents kept before the court by the learned counsel of petitioner reveal that disputes should preferably be resolved through amicable means in such like matters. Such clauses as to negotiation etc. have become a necessary part almost of all commercial contracts. The courts are also expected to encourage the parties to prefer such modes under the theme of Section 89 (A) and Order X, rule 1-

A (III) of Code of Civil Procedure, 1908. With these remarks, the court disposed of the petition accordingly.[27]

Section 10 of the Family Courts Act 1964 bounds the judge to affect a compromise or reconciliation between the disputing spouses. Now, what should be the modus operandi for such proceedings, the Act is silent about it. The rules framed under the Act also do not provide for any procedure. The matter has been left to the discretion of the Family Court. What happens practically in Pakistani courts is that the family judge usually gives an opportunity to the parties to converse with each other. Sometimes, he leaves the parties alone in his retiring room for the purpose of negotiations. The commencement of negotiation is the first successful step towards a compromise or reconciliation. The judge intentionally leaves them alone for he knows that the majority of family disputes trace back to the strained relations between other members of both families. Such members are usually reluctant to cause direct negotiations between the spouses. Judicial experience reveals numerous compromises and reconciliations between the disputing spouses on the basis of direct negotiations in the court.[28]

8. Negotiations in Criminal Cases (Pakistani Legal Perspective)

The concept of plea bargain has been expressly accommodated in the National Accountability Ordinance (NAB) 1999.[29] Bargaining means negotiation of the terms of a transaction or agreement. Plea bargain, in criminal law, means a negotiated agreement between the prosecutor and the accused wherein the former agrees to admit a lesser charge or the leveled charge and the later promises a lenient view in conviction. Sometimes, the agreement requires the admission of petty charges by the accused and the dropping of serious charges by the prosecutor. In the courts of Magistrates, the accused agrees to the bargaining on condition that he should be exempted from custodial punishment and that only fine shall be imposed.[30] An accused must uphold his or her end of the deal, such as pleading guilty on a particular date, cooperating in the investigation of another offense, or testifying against a co-accused, otherwise the plea bargain may be revoked. The process of plea bargaining is also known as 'Negotiated Justice'. In some jurisdictions, it is known as 'Negotiated Plea'.[31]

The theory of Negotiations about benefits in return for an act of self-condemnation was, for the first time, introduced in Anglo-American justice

system in nineteenth century.[32] Now, Plea bargaining is common in England, Canada, and most other nations of the British Commonwealth; despite of the criticism of human rights groups.[33] Very recently in 2005, the concept was introduced to the Indian Code of Criminal Procedure 1973. Section 265 was amended by the Indian parliament. The courts may now entertain the application of accused for plea bargaining within the limits prescribed therein and may initiate negotiation between the accused and the prosecutor.[34] The concept is, nonetheless, alien to Pakistani Code of Criminal Procedure 1898. The above facts show a direct nexus between 'negotiation' and 'plea bargain'. Actually the former leads to the later. Because of this relationship between the two, the experts define the plea bargain as the result of negotiation between the prosecution and the defense that led the accused to plead guilty in return of an offer by the prosecution. In Crown Courts, an accused is entitled to seek an indication from the judge of the maximum sentence that would be imposed if he were to plead guilty.[35]

Sections 25 and 25-A of the NAB (Amended) Ordinance deal with the willful return of unlawful gains and assets by a holder of public office or any other person via plea bargain, at the stages of inquiry, investigation or trial. The plea bargain is always preceded by successful negotiations. To ensure the free consent of the accused, the Pakistani Courts have, on so many occasions, directed the National Accountability Bureau and Governor State Bank of Pakistan to avoid using their position and authority for exerting influence while negotiating with the detainee for the purpose of settlement. The courts held further that any type of alternative resolution like the "plea bargaining" envisaged under section 25 of the Ordinance is to be encouraged in the interest of revival of economy. Accused should be persuaded without threat and pressure. The courts have gone a step ahead and insisted that any settlement should be subjected to the approval of the Accountability Court and amendment to this effect should be introduced to the relevant provisions.[36]

The plea bargaining has effective bearings on the judicial proceedings both at pre-trial and post-trial stages. Even pre-arrest bail has been granted to accused in order to avail the option of plea bargain in NAB cases.[37] In another case, where the accused submitted an application for voluntary return under section 25, but no action could be taken by the NAB

authorities due to the office of Chairman being vacant for several months. Resultantly, accused was arrested, kept in physical remand/custody for 42 days and then was sent to judicial lock up. The court released the accused on bail.[38] Again in another case, the Supreme Court of Pakistan held that presumption should be given to the validity of bargaining and the settlement between the creditor and debtor should not be rejected by the NAB high-ups, except for reasons to be recorded. The court directed that an amendment should be introduced to fetter the discretion of the Chairman, National Accountability Bureau and that the recommendations of the conciliation committee and Governor State Bank of Pakistan be made binding on the Chairman.[39] As a result, Section 25-A (e) and (g) underwent amendments in 2002. Section 26 of the NAB Ordinance provides for tendering of pardon at the stage of investigation or inquiry. The philosophy behind this section is the same as in section 337 of the Code of Criminal Procedure 1898. The Prosecution, sometimes, for the purpose of detecting the whole episode of the commission of the offence needs the assistance of a person connected with the offence directly or indirectly. To achieve this objective, the Prosecution negotiates the issue with such person and makes him an approver. What value his evidence carries, is beyond the ambit of this study, but it could be easily inferred that as a result of this negotiation-based agreement, the investigating agency becomes able to discover the name of all co-accused and full details of the incident. The powers of the NAB authorities under the above section to negotiate and tender pardon cease at the filing of reference, not at the commencement of trial. They may, nevertheless, exercise these powers with the permission of the trial court. In the absence of such permission, proceedings would be a nullity.[40] The process of negotiation has got so much importance in the Pakistani Courts that in *Khalid Aziz v. State,* the court has nullified the admissibility of approver's evidence but, at the same time, allowed the Prosecution to tender pardon to the co-accused if it so desires.[41]

As explained earlier that Code of Criminal Procedure 1898 has no provision for plea bargaining, it has albeit the provision of tendering pardon to an accused.[42]Previously, pardon was to be tendered by District Magistrate or Sub-divisional Magistrate, but now this power lies with the officer in-charge of the Prosecution in the district, commonly known as District Public Prosecutor (DPP).[43] Actually, the exigencies and interests of both

Prosecution and the accused lead to negotiation between them. The negotiations process terminates in a contract between the two. The contract may accommodate present or future conditions of any nature provided they are not illegal, immoral and incapable of performance.[44] This negotiation-oriented contract is so important that if once concluded cannot be revoked later. A pardon once tendered and accepted cannot be withdrawn subsequently. Orders passed under section 337 are not revisable under section 435 read with sections 439 and 439-A of the Code of Criminal Procedure 1898.[45] Besides, the significance of such negotiations-based settlement is evident from the fact that it converts an accused to the status of a competent witness. In Pakistani legal system, an accomplice is a competent witness against his associates.[46] Conviction can be based on his sole evidence provided it is corroborated in material particulars and is not exculpatory.[47] For his status, there is special provision in the *Qanun-e-Shahadat Order 1984* that flows as: An accomplice shall be a competent witness against an accused person, except in the case of an offence punishable with *hadd* and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.[48] Further, in case of withdrawal from the pardon on the basis of breach of condition by the approver and he regains the status of the accused, his statement under section 337 as approver cannot be used as his confession. He may be proceeded with under section 339 Code of Criminal Procedure 1898, as no pardon was granted to him.

9. Pakistani Laws (Criminal Trial Procedure) Need Amendment

What has been stated above about the Code of Criminal Procedure 1898 pertains to theory. In practice, plea bargain, in an informal way, takes place in appropriate cases governed by the said code. There are so many factors which render a case appropriate for the purpose, such as nature of the case, offense not being serious, the extreme age of the accused, accused being first offender, being a student, accused suffering from a decease that may endanger the lives of other inmates, the sufficiency of the undergone period in the judicial lock up, the non-availability of the complainant, the misplacing of case property, particularly, in timber and contraband cases, accused being a public servant and above all the weakness of the prosecution's case. In the courts of magistrates, informal plea bargain takes place on the implied agreement that the convict shall be handed over to Probation Officer. The major stimulant for plea bargaining in such courts is

the reluctance of the accused towards custodial punishment.

In the above situation, it is highly desirable that necessary amendments should be introduced to the trial procedure of Code of Criminal Procedure 1898. The concept of plea bargain in appropriate cases should be allowed, and the phrase "appropriate case" should be unequivocally defined. The law makers should not be hesitant to take benefit from the Indian experience referred to above. The plea bargain, within the above limits, should also be introduced to all those minor Acts/statutes that have a separate trial procedure.

10. Causes of Limited Utilization of Negotiations in Pakistani Legal System

Many reasons could be attributed to highly limited utilization of negotiation in Pakistani legal system: first [the addition of 'ly' is wrong], the reluctance of judges towards resolution of disputes through all modes of Alternative Dispute Resolution, including negotiations. They feel themselves safe in adhering to regular adjudication. There are fewer chances of objections on the court, for every step is taken as per requirement of the procedural laws. The indulgence of a judge in informal processes, according to them, exposes them to objections on one hand, and adversely affects their professional level on the other. There are chances for advance expression of the pinion of the judge and a sharp party may read the mind of the judge in non-regulated and restraints-free proceedings. The judges believe that efforts for resolution of disputes are against the nature of their job. Even mere interactions with negotiators, mediators and conciliators may lead to social contracts, avoidance of which is obligatory for a judge. To be informal doesn't suit to a person who is, by all definitions, formal. The judges also argue that the people mostly make recourse to the courts after they have already exhausted the informal modes. It would be futile to repeat the same process. Further, usually, the weaker comes to the court for seeking remedies against the stronger. Referring him again would mean his deprivation from the court's help.

Secondly, the application of ADR techniques, particularly negotiations requires a good deal of knowledge on the subject, strict adherence to the skills of each technique, and courage not to care for mere apprehensions and apprehended objections. The learned judges still need comprehensive

trainings on all three topics. Their know-how on the subject is not up to the mark due to the non- inclusion of ADR in the syllabi of law colleges from where they are graduated. In judicial academies, there are either no specialized trainings on the subject or courses of the trainings are not properly prepared. If a training is ever arranged, the whole concentration is focused on mediation.[49] Negotiation is always neglected in such hardly and rarely arranged trainings. It is natural that not having the required knowledge and skills on the subject would make judges less inclined to its application. There are many who complain about the poor implementation of ADR's provisions by courts. What is being actually and practically done to Section 10 of the Family Courts Act 1964, in the courts is awful enough. Negotiations are arranged between the spouses in excessively nominal manner, most probably with less intension to affect reconciliation, and with more eagerness to write in the memorandum (order sheet) that mandatory provision has been complied with. While acting under an ADR's provision, how the learned presiding officer could be justified in saying, "I am a judge, not an ADR expert"?

Thirdly, the attitude of advocates to peaceful settlements is, sad to say, extremely condemnable. What to say of encouragement, they do discourage their clients to enter into negotiations with the opponent. They presume that techniques of peaceful resolutions have been invented to kill their profession and to deprive them of their livelihood! This presumption is not correct for many reasons: (1) All cases are not fit for amicable informal settlements, (2) Parties may negotiate to their attorneys and counsel, (3) Negotiations in a pending case does not necessarily take away their entitlement to fees; a veiled major concern for opposing the use of informal ways for peaceful settlements of disputes. The advocates should believe that opposing peaceful settlements would degrade them in the society. Abraham Lincoln has rightly advised the lawyers in this connection.

> "Discourage Litigation. Persuade neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees, expenses and a waste of time. As a peacemaker, the lawyer has a superior opportunity of becoming a good man".[50]

Fourthly, the element of unawareness of the general public regarding the significance of informal mechanisms for resolving differences has worsened the situation further. They do not know that their wish to get their

opponent vanquished is not always good. One may not be called victorious if he spends millions in a dispute worth thousands. Besides, the people psychologically feel fear of their own decisions and are usually not ready to accept the responsibility of their own opted attempts and decisions. In case of unfavorable decision of regular adjudication, they feel easy to console their selves be saying "It was an imposed process and we had no other option".

To overcome all the above situations, necessary trainings should be arranged for all concerned. Courses for the trainings should be wisely prepared with special focus on ethics, patience and tolerance, respect for opponent's views and feelings, and the necessity of "leave some and take some" arrangements; an indispensable attitude for living and working together. Religions play an important role in promoting awareness on the subject and inculcating its significance in the minds of its followers. To this end, special lectures of religious scholars should be arranged in trainings, seminars and workshops on amicable settlements. Both electronic and print media ought to be utilized to promote public awareness on the subject.

11. Conceptual Framework of Negotiations in *Sharī'ah*

In connection with all kinds of expressions, *Sharī'ah* has placed great emphasis on openness and clarity. With the exceptions of contracts[51], it gives top priority to the letters used in some expression. We see that there are numerous rulings that contain special instructions for the proper use of tongue; the source of expression, dialogue and, of course, negotiations. The use of equivocal words in common conversations has been discouraged. Believers have been directed to speak words straight to the point as they have been directed to be soft during negotiation with the Non-believers and to be gentle while speaking to the common people. Negotiations are nothing else but are bilateral expressions. The following verses of the Holy *Qur'ān* regarding clarity, straightforwardness and keeping softness and sobriety during communication are of great significance. On clarity and on avoidance of ambiguous expressions the Holy *Qur'ān* provides:

> O Believers, do not say. "Ra 'ina" but say, "Unzurna " and listen a to what is said........[52]

In connection with negotiation skills, *Sharī'ah* has recommended the required essentials such as patience, tolerance, sacrifice, sincerity, foregoing,

regard for the opponent's feelings and beliefs, leniency, and softness while talking to others.[53] On juxtaposition, *Sharī'ah* highly discourages selfishness, rigidity, revenge, jealousy, and all attitudes that convert a human to a wild beast. Take, for example, these verses "Let them forgive and show indulgence".[54] "And if ye efface and overlook and forgive, then lo! Allah is Forgiving and Merciful",[55] "Keep to forgiveness and enjoin kindness and turn away from the ignorant",[56] "and argue not with the people of Scripture unless it be in a way that is better",[57] "Reason with them in a better way"[58] are few examples from the Holy *Qur'ān* that laid basic strategies for negotiations. All those verses call for a proper course of behavior in dealings with the public at large, particularly, in communications and negotiations with them. A believer could not be in ill-communicator even to a self-turned ignorant fellow (misbehaving addressee). To be slave of one's own ambitions has been highly criticized. Such person has been likened with an animal in the Holy *Qur'ān* Allah (The God Almighty) says:

> "Now had We so willed We could indeed have exalted him through those signs, but he clung to earthly life and followed his carnal desires. Thus his parable is that of the dog who lolls out his tongue whether you attack him or leave him alone. Such is the parable of those who reject Our signs as false. Narrate to them these parables that they may reflect".[59]

There are so many other verses in the Holy *Qur'ān* that convey the same meaning and emphasize that a true believer should not always hank after his interests. He should care for others as he cares for himself. He is rather required to give more and take less. It could be easily inferred from all those verses that *Sharī'ah* recommends accommodative approach and condemns competitive approach in negotiations. To *To b*e extremely rigid and to transgress while disputation, have been declared the characteristics of a hypocrite.[60] The prophet (PBUH) said, "

Four traits whoever possesses them is a hypocrite and whoever possesses some of them has an element of hypocrisy until he leaves it: the one who when he speaks he lies, when he promises he breaks his promise, when he disputes he transgresses and when he makes an agreement he violates it.[61]

He also said, on another occasion, "*The most hated of men to Allah is the one given to fierce and violent disputation".*[62] On another time, the Holy Prophet (PBUH) applauded Ka'ab bin Malik for exonerating the debtor from half of

the debt.[63]

The above references from the Holy *Qur'ān* and *Sunnah* of the Holy Prophet (PBUH) confirm that *Sharīʿah* recommends 'accommodative', and not 'competitive' approach in negotiations. It needs no argument that *Sharīʿah* is always inclined towards peaceful settlement of differences. It welcomes and encourages all modes that lead to this noble objective. Negotiations could not be excluded from such modes. It is rather the most important of all modes because each such mode begins with a sort of negotiations. For example, Mediation is an assisted negotiation. Conciliation is also carried out through negotiation and the conciliator basically negotiates with the disputing parties. Similarly, an arbitration agreement is always preceded by negotiations. By this way, negotiation could be termed as the mother mode of all ADR techniques. In Islāmic Jurisprudence, it could be connected to the concept of *Fath al-zarā'iʿ* (opening of sources).[64] Under this concept, the *Imām* (ruler) may cause legislation for resolution of disputes through negotiations. He may establish special institutions for it. He may also amend the procedure and may make the Negotiations a condition precedent for filing a suit. The following sub-topics would reveal that *Sharīʿah* recommends resolution of disputes through negotiations in all areas ranging from domestic differences to international issues, from private family matters to public litigation and cases pertaining to public interest (constitutional and political disputes).

12. The Holy *Qur'ān* on Negotiation

A number of verses carrying the subject of negotiation could be found in the Holy *Qur'ān*. The good examples amongst them are the verses pertaining to negotiation in matrimonial differences. Though there has been a great deal of discussion whether a decree of *Khula*[65](separation between spouses through agreement), without of the consent of husband, could be granted by the court. The jurists are, nonetheless, at concurrence on the point that *khula* does not necessarily require the decree of the court and that it can be affected by the spouses in their private capacity. In this second aspect, *khula* is always preceded by negotiations between the wife and husband, directly or through attorneys. The offer of the wife, the acceptance of the husband, the fixation of compensation (*badal al-khula*), the time of payment and the issues pertaining to the care and welfare of children are some of the matters that could not be settled without meaningful negotiations. The legality of

Khula impliedly calls for the necessity of negotiations between the parties. Other ways of separation, such as *Mubārāt* (process of mutual exoneration) and *Talāq alā-māl Talāq alā-māl* (divorce against money) are also preceded by the process of negotiation.[66]

It seems the first ever negotiations that took place were between Noah (PBUH) and his nation. It may be, rather, called the closest negotiations to the creation coming down of man to the earth, for the reason that, historically, there is a difference of one century between Adam (PBUH) and Noha (PBUH).[67] A dialog that form round about 10-14 verses of the Holy *Qur'ān*, carries the details of the negotiations.[68] No doubt the last verses point out the failure of these negotiations, but this discussion is concerned with the utilization of negotiations only and not with its success or failure. Commentators of the Holy *Qur'an* say that these verses reveal the conversation between Noah (PBUH) and his nation.[69] The subject matter of these negotiations was the dispute of the oneness of Allah (The God Almighty). Other examples could be that of conversation between King Nimrod and Abraham (PBUH)) and a comparatively lengthy dialog between Abraham and his nation. Both could be seen in the following text:

"Bethink thee of him who had an argument with Abraham about his Lord, because Allah had given him the kingdom; how, when Abraham said: My Lord is He Who giveth life and causeth death, he answered: I give life and cause death. Abraham said: Lo! Allah causeth the sun to rise in the East, so do thou cause it to come up from the West. Thus was the disbeliever abashed. And Allah guideth not wrongdoing folk".[70]

Almost every Messenger has negotiated with his nation and sometimes with the Chief Executive (ruler) of his times. Chapter of the Holy *Qur'ān* "the Poets" contains all such negotiations. The negotiations of Moses (PBUH) with his nation as well as with King Pharaoh have been recorded by the Holy *Qur'ān*. These negotiations can be found in a dozen of places in the Holy Book. Worth mentioning are his negotiations with Pharaoh regarding the release of his nation's men from the slavery chains of the King. Moses (PBUH) and Aaron both were directed to adhere to sobriety while negotiating with Pharaoh.[71]The Prophet Muhammad (PBUH) was directed by Allah (The God Almighty) to invite the people of Scriptures to negotiations. Marmaduke Pickthal has translated the relevant portion of the verse as "O people of the Scripture! Come to an agreement between us and

you". It is evident that such an agreement could not be reached without successful negotiations. Further, the verse also points to the fact that in order to arrive at a mutually acceptable agreement, one should try to consider the point of concurrence between the parties, on priority basis. This approach was also adopted by the Prophet Muhammad (PBUH), in his famous letter to the Roman King (*Hiraqal*).[72]

The Holy *Qur'ān* also provides that how negotiations ought to be conducted. It has been explained earlier that *Sharīʻah* recommends an accommodative and not competitive approach in negotiations. Negotiations with opponent should be in a better way. One must not adhere to the arguments for the sake of arguments. Obstinacy must be avoided. All factors that lead to the termination of negotiations in failure must be given up. The opponent should not be given a message to feel that he is being degraded or his interests are being kept at stake. He should be treated in a way to feel an environment of sympathy and protection of his interests.[73]

13. Negotiations in Criminal Cases (the Position of *Sharīʻah*)

All arguments mentioned above are enough evidence of utilizing of negotiations in civil disputes and cases. The reason is the presumed permissibility of freedom of owner of a civil right. Negotiations in this area are allowed as a rule, and its prohibition would require a special ground such as matters pertaining to public policy As far as its application to criminal issues is concerned; the application may be extended to it with the sole exception of *Hudūd* (Pre-stated fixed punishments under Islāmic law, requiring special evidence in terms of quality and quantity). The underlying reason is that almost all ta'aziri[74] punishments are the right of the State (*haq-ul-saltanah*). Admittedly, every owner of the right has a right to dispose it as he thinks fit subject to necessary limitations. In connection with awarding ta'aziri punishments, both in quantum and quality, the Ruler (the hakims and qadis on his behalf) have quite good discretion. The only condition is its exercise in the public interest. In cases of *Hudūd*, necessary distinction should be drawn between *Hudūd* offences and *Hudūd* cases. The former means the commission of the prohibited act whereas the later refers to the cognizance of case by the concerned authorities, technically known as registration of a case. Negotiations may be conducted in *Hudūd* offences before registration of case on the basis of hadith, ""Resolve *Hudūd* issues amongst you by mutual apologizing (exonerating), because when they are

reported to me, Execution becomes obligatory".[75] Here, the phrase "resolve" accommodates the process of negotiation. *Qazhaf* (offense of blaming someone with adultery) is admittedly *hadd* irrespective of the fact whether the right of Allah (The God Almighty) or the right of victim is dominant. The jurists, holding the later opinion, advocate the admissibility of *sulh* (reconciliation) in *qazhaf*. The Shafai School is of the view that the right of victim is dominant, inheritance would, therefore, run in *qazhaf* and that, on compromise, the punishment would stand dropped.[76] This is an example of a situation where compromise be given effect at a very belated stage in the case of *qazhaf*, long after the cognizance of the authorities. Imam Malik has also been reported to have permitted composition of *qazhaf* offence.[77] Imam Mawardi is also of the same opinion.[78] The Law Reforms Committee of Egypt has recommended the legislation on this view.[79] Another episode is that of Safwan b. Umayyah when he forwarded the burglar of his cloth-sheet to the Holy Prophet (PBUH). The Prophet ordered the amputation of hand. Safwan said, "I didn't mean that! This may be a charity for him". The Prophet replied, "Why didn't you do that before you brought him to me".[80] Malik b. Al-Zubair b. Al-Awwam (May the God be pleased with him)) narrates that once zubair saw a person taking a thief to caliph/*sultān*. Zubair wanted him to release the detainee. He responded that he would take him to the Authority/Sultan first. Zubair then said, "When you will bring him before Sultan, then say curse upon the interceder and the interceded for".[81]

14. Conclusion

Negotiation is the most important and parent mode of all informal mechanisms of resolution of differences. *Sharī'ah* and law both recognize 'negotiation' as a primary, informal and amicable mode of dispute resolution. A fewer Pakistani statutes have express provisions for negotiations. The role of negation in Pakistani legal system is highly limited, for the reason that trial procedures provided by both civil and criminal codes do not have express provisions for negotiations. There is very little awareness about significance of negotiation in the general public, particularly the litigants. They do not know that what could be obtained in amicable settlements is far better than a nominal victory in the regular adjudication. Ignorantly, their primary objective is not the declaration of their right, their total concentration remains on the defeat of the opponent. The Personnel of the justice sector, especially the judges and advocates have

a little know-how on the subject for the obvious reason that the syllabi of law faculties and colleges have no course on the subject. There are so many other reasons for reluctance of judges to proper implementation of ADR provisions, such as feeling themselves unsecured in deviation from procedural laws, apprehension of objections of parties, apprehension about pre- expression of opinion and reading of their minds by sharp and smart parties, developing of social contracts and much more. The attitude of lawyers towards ADR seems to be highly condemnable. They have developed inaccurate presumptions against all processes of peaceful settlements including negotiations. These processes never prove fatal to their profession. They may perform as good negotiators on behalf of their clients. Besides, Plethora of cases is not fit for informal mechanism which could be more than sufficient for their adversarial practice. To overcome all the above shortcomings in general public, judges and lawyers, special purpose-aimed trainings are to be arranged by Federal and Provincial Governments in various academies. Courses for such trainings ought to wisely prepared with particular focus on ethics, patience and tolerance, respect for opponent's views and feelings, and the necessity of leaving some and taking some arrangements for living and working together Negotiations may be conducted in civil cases as a rule. Exceptions may be made on the basis of public policy.

Negotiation may also be utilized in criminal cases except *Hudūd* subject to public interest. As far as *Hudūd* are concerned, necessary distinction must be drawn up between *Hudūd* offences and *Hudūd* cases. Negotiations may be conducted in the former section in the light of available evidences from Sunnah. In this connection, proper amendments should be introduced to Section 345 of the Code of Criminal Procedure 1898. Relevant schedules of the code should also be amended accordingly. As a whole, no negotiations in repugnance to the norms of *Sharī'ah* are allowed. The absolute concept of plea bargain, as has been envisaged in the National Accountability Ordinance (NAB) 1999, needs rectification. A blind compromise upon the public money in a case, where the required evidence for *ta'aziri* punishment is available, amounts to malfeasance of the NAB officials. The powers of these officials should, therefore, be subjected to judicial scrutiny and court's approval. Law allows all strategies of negotiations whereas *Sharī'ah* recommends 'accommodative', and not 'competitive' approach in

negotiations. Success of negations always requires the will of parties for a peaceful resolution, their readiness for giving concessions, and their adherence to negotiation skills during the process. The resolution between the parties will operate as contract between them. In law, it would be a contract in its ordinary legal sense and the parties shall be bound by its contents. Usually, no right emerges from this contract in respect of person not party to the contract. In *Sharī'ah*, the contract of compromise may take the features of contract of sale, gift, lease and the like. Consequently, the rules of the relevant contract shall come into play accordingly. So, in case of sale, it may be revoked by the parties, option of inspections and option of defect shall apply, invalid conditions shall render it void or irregular, and it shall also create right of pre-emption for the pre-emptor. Moreover, the parties shall also be liable to pay the prescribed tax of the government upon sales. In case of becoming gift, it cannot be revoked by the donor, taking of physical possession will be necessary, and the subject matter must not be a *Mushā'*(joint undivided immovable property). If it be lease, then no transfer of title shall take place, the usufruct of the subject matter must be certain and lawful, duration must be known, and the contract shall cease either on the termination of period, on the death of one of the parties or on the turning of the subject matter into non-existence.

Notes and References

1 Robert Benjamin, The Natural History of Negotiation and Mediation: The Evolution of Negotiative Behaviors, Rituals, and Approaches, (June, 2012), http://www.mediate.com/articles/NaturalHistory.cfm, last accessed on May 17, 2016.

2 *Sharī'ah* means the legal system that is primarily derived from the Holy *Qur'ān* and *Sunnah* (traditions) of the Holy Prophet (PBUH).

3 Lan Brookes, *The Chambers Dictionary*, 10th Edition (Edinburgh: Chambers Harrap Publishers Ltd, 2007), 1008. A. S Hornby, *Oxford Advanced Learner's Dictionary*, 1023. Also visit http://encyclopedia.thefreedictionary.com/negotiate.

4 Zaheer Cheema, *West's Legal Thesaurus/Dictionary* (Lahore: Manzoor Law Book House), 514, 515.

5 John Burke, *Osborn's Concise Law Dictionary*, 230. See also Bryan A. Garner, *Black's Law Dictionary* (USA: West; a Thomson Reuters business, 2004), 1136. Also see, John S. James, *Stroud's Judicial Dictionary* (London: Sweet and Maxwell Limited, 1986), 3:1673.

[6] Elizabeth A Martin, *Oxford Dictionary of Law* (Oxford: Oxford University Press, 2006), 354.

[7] These details are given at the official website of ADR Services, NC (an organization that provides ADR services since long time). For more details visit http://www.adrservices.org/conciliation.php.

[8] Ginny Pearsum Bames, *Successful Negotiating* (US: Career Press, 1998), 14. The book is also available at http://books.google.com.pk/books/about/Successful_Negotiating.html?id=t2ljf3adB2QC&redir_esc=y ,last accessed on March 7, 2015.

[9] L. Randolph Lowry and Jack Harding, *Mediation: The Art of Facilitating Settlement* (see for this reference Madabhushi Sridhar, *Alternative Dispute Resolution, Negotiation and Mediation*, (2006) (Reprint 2010), 234

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[11] Ghazalah, Hassan, *Qāmūs Dar al-ʻlm li al-Mutalāzāmāt al-Lafaziyah* (Beirut: Dar Al-ilm lilmalaeen, 2007), 881.

[12] Dr. Mrs Yasmin Abbas v. Rana Muhammad Hanif and others, PLD 2005 Lahore 742.

[13] Madabhushi Sridhar, *Alternative Dispute Regulation: Mediation and Negotiation,* 179.

[14] Herb Cohen, *You Can Negotiate Anything*, (USA: Bantam; Reissue edition , 1982), 120. The book is also available at http://www.amazon.com/You-Can-Negotiate-Anything-Negotiator/dp/0553281097, last accessed on Feb. 13, 2015. Also see, Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement without Giving In* (USA: Penguin Publishing Group, 1992), 9.

[15] Howard Raiffa, *The art and Science of Negotiation* (USA: Belknap Press, 1998), 47, 48.

[16] Madabhushi Sridhar, *Alternative Dispute Regulation: Mediation and Negotiation,* 187.

[17] Ibid. 193.

[18] John Mattock and Jons Ehrenborg, *How to be a Better Negotiator* (London: Kogan Page, 1997), 65. The book is available at http://www.amazon.com/How-Better-Negotiator-John-Mattock/dp/8175544236, last accessed on Feb. 13, 2015.

[19] Madabhushi Sridhar, *Alternative Dispute Regulation: Mediation and Negotiation,* 195.

[20] GICE, B-School, *Types of Negotiation*, available at http://blog.gice.in/negotiation-types/, last accessed on Feb. 20, 2015.

[21] Madabhushi Sridhar, *Alternative Dispute Regulation: Mediation and Negotiation,* 174- 176.

[22] See Section 17(b) of the SCMO Ordinance. The *Salis may* facilitate negotiations between the parties and steer the direction of discussion with the aim of finding a mutually acceptable solution]. Also see Section 5(l) of the NAB Ordinance. ["Freezing" includes attachment, sealing, [prohibiting], holding, controlling or managing any property either through a Receiver or otherwise as may be directed by the Court or Chairman NAB, and in case it is deemed necessary the disposal thereof, by sale through auction or negotiation subject to confirmation by the Court or by Chairman [NAB] as the case maybe after public notice.

[23] Section 89(A) and Order 10, Rule 1-A (III), inserted through Ordinance XXXIV of 2002. Also see *NLR 2002* Fed. St. 206, w.e.f. 27.7.2002.

[24] Ibid.

[25] *Messrs U.I.G. (Private) Limited through Director and 3 others v. Muhammad Imran Quraishi*, 2011 CLC 758.

[26] *Dr. Mrs Yasmin Abbas v. Rana Muhammad Hanif and others*, PLD 2005, Lahore 742.

[27] *Messrs Alstom Power Generation through Ashfaq Ahmad v. Pakistan Water and Power Development Authority through Chairman and another*, PLD 2007 Lahore 581. *Cable & Wireless v. IBM United Kingdom Limited* available at http://www.cedr.com/library/articles/Fut_for_ADR_clauses.pdf (last accessed on Feb13, 2015). In this 19-page judgment, Mr. Justice Colman maintained that as per agreement between the parties, effect must be given to escalating dispute resolution procedure. The parties should go for negotiations first, then for other modes of ADR and lastly for litigation.

[28] See a chronic case titled as *Mst. Ajminah Bibi v. Bakhtyab R/o Wari Dir Upper*, Civil Suit no. 26/3FC of 2008, decided on September 3, 2009, on the basis of negotiation-based compromise, …………the wife sued her husband after seventeen long years stay in her parents' home. Her youngest son, whom she herself left, was 18 years old now. She had two sons more. Due to the strong tribal traditions, they could not meet each other during this lengthy period of self-imposed separation. The story is lengthy enough and highly tragic as well. Allah (The God Almighty) gave us the strength. We advised the counsel of both parties to avoid traditional advocacy in the case. They proved enough co-operative. Direct communications commenced. In two or three hearings, we succeeded in reconciliation. What was more wonderful in this case is that usually such disputes arise with the first wife, but this was a dispute with the second wife. The root of the fatigue was the unpleasant relations between the wife and the mother of husband, not due to being in-laws, but being a niece and paternal aunt inter se.

[29] See Section 25 and 25-A of *NAB (1st and 2nd Amendments) Ordinance, 2000*.

[30] One may wonder that how the agreement of accused and prosecutor could bind a court. The answer is simple. One must know that criminal fora are actually tribunals. In tribunals, matters may be determined on consideration of policy, expediency and discretion to enable them to achieve the objective for which they were established. The term is derived from the tribunes, magistrates of the Classical Roman Republic. "Tribunal" originally referred to the office of the tribunes, and the term is still sometimes used in this sense in historical writings. They are not courts stricto senso. According to a decision of Lahore High Court "the tribunals are not necessarily courts of law though they are undoubtedly exert judicial powers. Further, there is meaningful difference between a magistrate and a judge. The judge functions under a particular procedure and strictly follows the legal provisions, whatever the situation may be. The magistrate is to work under a particular policy. In appropriate cases, he considers (beyond the record of the case) the circumstances at the time of the decision, the expected effect of the decision, the apprehended repercussions and above all the policy under which it has been established. On criminal side, we see that Magistrates sometimes, despite a high scope of further inquiry, reject the bail petition on the ground that the release of accused at such earliest stage would adversely affect the society. Again, they some other times reject a bail petition on the sole ground of 'moral turpitude' despite further scope of inquiry and despite the offence not falling within the prohibited class under section 497 of the Code Of Criminal Procedure, 1898. His decision is a quasi-judicial act (the application of law to the facts by an administrative officer) and cannot be called a judicial act, for the reason that he is not a judge. Who has not heard the famous sentence of the legal fraternity, "A Magistrate

is not a Judge". It is because of his capacity as magistrate, and not as judge, that he is the supervisor of the whole Investigation. He issues search warrants, grants both Police and Judicial custodies, conducts Identification Parades, records (sometimes) statements of the witnesses and much more. He remains so much instrumental in the in Investigation, and yet hears the case in trial. We see that a judge is a judge when he is presiding over a court, but a magistrate is magistrate everywhere; in his office, in the market, at his home and in a public gathering, whether it is office time or otherwise. He is rightly called the officer of the State. The District Magistrate and the magistrates subordinate to him function as persona designate and as a court, under CrPC. No doubt, a judge has more powers than a magistrate but his decision must always be based on available record. [Aamir Raza, Code of Civil Procedure, 22, 23. See also *Muhammad Ya'aqoob v. Zahir Alam and 10 others,* PLD 1976 Quetta(e) 77. Also see *Mst. Gaman v. Taj Din*, PLD 1968 Lahore 987. *Iftikhar Ahmad v. the Muslim Commercial Bank Limited and another*, PLD 1984 Lahore 69. Also see *Fauj Din and another v. Akhtar Mahmood Khan Additional District Judge Multan and 4 others,* PLD 1988 Lahore 352. Details are also available at http://www.differencebetween.info/difference-between-magistrates-and-judges, and also at http://en.wikipedia.org/wiki/Tribunal, last accessed on Feb 17, 2015.

In Islamic Jurisprudence, the terms '*hakim*' and '*qadhi*' are interchangeable expressions. Nonetheless, giving effect to the technical sense of each term, a *hakim* would mean a magistrate and the *qadhi* would refer to a judge.

The above facts are enough to clarify that not only in plea bargaining, but on each issue of public importance, the Criminal Fora are always taken on board.

31 Zaheer Cheema, *West's Legal Thesaurus/Dictionary* (Lahore: Manzoor Law Book House, 2010), 514, 515.

32 Mirjan Damaska, "Negotiated Justice in International Criminal Courts."*Journal of International Criminal Justice* 2, no. 4 (2004): 1018-1039

33 Law Library, American Law and Legal Information, *Guilty Plea: Plea Bargaining* - A Comparative Perspective, available at http://law.jrank.org/pages/1285/Guilty-Plea-Plea-Bargaining-comparative-perspective.html, last accessed on Feb. 18, 2015.

34 See section 265 (b) to 265 (L) of Chapter XXI-A, Indian *Code of Criminal Procedure 1973*. Also see Surender Kumar, and Kulwant Singh, *Concept of Plea Bargaining and Criminal Law in India*: An Analysis, available at http://voresearch.org/documents/2013/1.4/1402.pdf, last accessed on Feb. 18, 2015.

Concept of Plea Bargaining and Criminal Law in India: An Analysis, an article by Surender Kumar and Kulwant Singh, available at http://voresearch.org/documents/2013/1.4/1402.pdf, last accessed on Feb. 18, 2015.

35 Elizabeth A. Martin and Jonathan Law, *Oxford Dictionary of Law*, 396. Dr. Shakil Ahmad, *P Ramanatha Aiyar's Law Lexicon*, 1363. Further details are available at file:///C:/Users/HP%20Notebook/Downloads/836-1551-1-PB.pdf, last accessed on Feb. 14, 2015. http://www.thefreedictionary.com/plea+bargain, last accessed on Feb. 14, 1015. http://definitions.uslegal.com/p/plea-bargain/, last accessed on Feb. 14, 2015.

36 *Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others,* PLD 2001 SC 607. In the light of this 343 pages lengthy judgment, section 25 and some subsections/portions of Section 25-A were amended accordingly via the National Accountability Bureau (Amendment) Ordinance 2002.

37 Muhammad Akram Quraishi; the learned Ex-Judge Lahore High Court, *National Accountability Bureau Ordinance 1999* (Lahore: Manzoor Law Book House, 2010),

161. We, the author, have gone through the referred case by the author "*Najma Swalih Sayyed v. the State through National Accountability Bureau (Sindh) Karachi and another* 2009 SLJ 330". The pre-arrest bail was allowed and confirmed due to *malafide* on the part of NAB and not for the reasons stated by the author.

[38] See *Adil Saleem v. National Accountability Bureau*, 2011 YLR 2307. Also see Ashfaq Ali, *Comments on National Accountability Bureau, 1999* (Lahore: Al-shams Law Book House, 2012), 470-494.

[39] *Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others*, PLD 2001 SC 607.

[40] See sections 31-B and 25 of the NAB Ordinance, 1999. Also see *Khalid Aziz v. the State,* PLD 2003 Peshawar 94. The court allowed the petitions of Khalid Aziz Ex-Additional Chief Secretary of the then NWFP and Mst. Neelofer Khalid and held that the examination-in-chief of approver Shah jehan, being unprotected, should not be considered against the co-accused.

[41] Ibid.

[42] See section 337 of the *Code of Criminal Procedure 1898.*

[43] The section 337 got amendment through Ordinance XXXVII of 2001.

[44] See *Qamar-uz-Zaman and another v. the State*, PLD 1981 Lahore 543.

[45] See *Fauj Din and another v. Akhtar Mahmood Khan Additional District Judge Multan and 4 others*, PLD 1988 Lahore 352.

[46] See subsection 2 of 337 of CrPC. Also see *Qamar-uz-Zaman and another v. the State*, PLD 1981 Lahore 543. It may be noted here that the principles laid down in cases *Abdur Rashid and another v. the State*, 1970 PCrLJ Dacca 722, and *Noor Shah and another v. the State*, 1976 PCrLJ Lahore 1265, have not been followed. In these judgments, the learned judges held that an accused is always an accused and that tendering a pardon will not convert him into witness.

[47] See *Ashiq Hussain Shah v. Ashiq Ali Shah and another*, 1982 SCMR 1110. Also see *Hassu v. the Crown*, 1969 SCMR 621. See also *Muhammad Yasin v. the State*, 1995 MLD Lahore 1663. *Mudassir Iqbal v. the State*, 1997 PCrLJ Lahore 1962.

[48] See Section 16 of *Qanun-e-Shahadat Order, 1984.*

[49] The Khyber Pukhtunkhaw Judicial Academy (KPJA) of Pakistan, where one of the co-author holds the office of 'Director Instructions' has arranged approximately 03 specialized trainings including 01 training of the trainers (TOT) on ADR. Unfortunately, no space has been given in the prescribed course to 'negotiations'. The main reason for this non-inclusion was the insistence of donor agency on 'mediation'. The manual prepared by the Academy on the subject has no 'Lesson' on negotiation.

[50] Abraham Lincoln, Notes for a Lecture, July 1, 1850.

[51] Under Islamic Law, the implied and intended meanings of words used are given effect in all kinds of contract. So, if the cognate of gift is used in a transaction for a valuable consideration, the contract of sale shall conclude and a contract of *Hibbah* (gift). Such transactions are governed by a legal maxim "Not literal but the intended meanings shall hold sway in contractual transactions".

[52] The Noble *Qur'ān*, 2:104

[53] Ahmad Hameed Abbud Al-alwani, *Al-tasamuh fi Al-islam* (Beirut: Dar Al-ma'arifah, 2013), 19-30. The book is actually the thesis of the author for Master in Shariah Studies, from Faculty of Shariah at Tarablas Universiy Lebanon. He has allocated round about twelve pages (25-37) for Accommodative and avoidance- based negotiations. The book is a nice discourse of concept of forgiveness and tolerance in

every walk of life such as religion, politics, civil transactions, dealing with prisoners of war, military men's conduct during war and the like.

[54] The Noble *Qur'ān*, 24:22.

[55] The Noble *Qur'ān*, 64:14.

[56] The Noble *Qur'ān*, 7:199.

[57] The Noble *Qur'ān*, 29:46.

[58] The Noble *Qur'ān*, 16:125.

[59] The Noble *Qur'ān*, 7:176.

[60] The Noble *Qur'ān*, 2:204.

[61] Muslim B. al-Hajjaj, *Sahīh Muslim, kitāb al-'īmān*, hadith no. 26, reported by Abdullan B. Amr.

[62] Muhammad b. Ismail al-Bukhari, *Sahīh al- Bukhārī*, *Kitāb al-Ahkām,* hadith no.6686, reported by Ayesha (May the God be pleased with Her).

[63] See the chapter of this thesis, sub-topic 'Meaning and Significance of *sulh*/Conciliation'.

[64] *Sadd al-zarā'i'* means blocking the lawful means to an unlawful end. *Fath al-zarīah* means a situation where, for the achievement of a legal and beneficial purpose, lawful means and resources are opened and facilitation is provided. To give interest-free loans to the citizens, to create opportunities of jobs and employment, less interference of the State in private business sector, awarding of scholarships for higher education inside and abroad, and steps to access to information and service and much more are the outcomes of this concept. See Hussain Hamid Hassan, *An Introduction To The Study Of Islamic Law* (Islamabad: Leaf Publications, 1997)*, 186.*

[65] In Islamic law it is form of divorce , initiated by the wife, which is effected by the return of her husband's wedding gift

[66] In *khula*, the offer of separation against some consideration comes from wife. The use of word *Khula* or its cognates is necessary. When the husbands accepts it, separation takes place and marriage terminates. All mutual rights automatically stand ceased. The separation shall operate as one *Talaq Bayen* meaning thereby that the partners may, if they so wish, reenter into afresh marriage contract. In *Mubarat,* the offer of separation may come from either side. There is no difference in effects of both. Moreover, *Mubarat* is a contract between the spouses and need not the decree of the court. In *Talāq alā-māl* the use of word *Khula* or its cognates is not necessary. The mutual rights of spouses do nod cease automatically, it will rather need express mentioning. Besides, if the consideration happens to be unlawful such as wine or pigs, one Talaq bayen shall take place in case of *Khula*, and one Talaq Rajai (revocable divorce) shall take place in case of *Talāq alā-māl.* See Tanzil-ur-Rahman, *Majmua Qawanin-e-Islam* (Islamabad: IRI Press, 2004) 2: 570-602. See also Muhammad Muhyuddin Abdul Hameed, *Al-ahwāl al-shakhsiyyah fi al-Shariah al-Islāmiyyah* (Beirut: Al-maktabah al-ilmiyyah, 2003), 326-342.

[67] Muhammad b. Habban Al-basiti, *al-Musnad al-s\Sahīh ''alā al-Taqāsīm wa al-anwā'*, Hadith no. 3092 (Beirut: Dar Al-kutub Al-ilmiah, 2010), 3:67. Details are also available at http://www.onislam.net/english/ask-about-islam/islam-and-the-world/worldview/459298-hadith.html, last accessed on Feb. 11, 2015. Also see Sayyed Muhammad Amjad Altaf, *Urdu Dairah Ma'arif Islamiyah* (Lahore: Danishgah Punjab Lahore, 2010), 22:473-75. See also , Ismail b. Muhammad, Ibni Kathir, *Tarīkh Ibni Kathīr,* Urdu Trans. by Muhammad Asghar (Karachi: Dar Al-isha'at, 2008), 1:126.

[68] The Noble *Qur'ān*, 26: 105-116. The full record of these negotiations can also be found in Chapter Hud, 11:25-34.

[69] Board of Scholars, *Dars-e-Qur'an*, 4:482.

[70] The Noble *Qur'ān*, 2:258.

[71] The Noble *Qur'ān*, 20:44.

[72] The Noble *Qur'ān*, 3:64. See also the commentary on this verse in *Guldasta-e-Tafasir* by Muhajir Madani Abdul Qayyum. Also see Ahmad Hameed Abbud Al-alwani, *al-Tasāmuh fī al-Islām,* 31. The script of the letter could be found in *Sahīh Muslim, Kitvb al-jihād wa al-siyar,* reported by Ibni Abbass. Also see for the details and scanned copy of this letter, Muhammad Hameedullah, *Majmū'ah al-wathāiq al-siyāsiyah* (Beirut: Dar al-nafāis, 2009)108-110.

[73] See the commentaries on verses 125 and 46 of *al-Nahal* and *al-Ankabut* respectively, in *al-Kashāf* by Mahmud bin Umar al-Zemahshari, *Tafsīr Ibn-e-Kathī r* byIsmail bin Kathir. *Ahsan al-tafāsīr* by Muhadis Dihlawi Sayyed Ahmad Hassan, *Tafhī m al-Qur'an by Sayyed al-Maududi*, *Dars-e-Qur'an* by Board of Scholars, *Tafsīr 'uthmānī* by Allamah Shabbir Ahmad Usmani as recompiled by Muhammad Wali Razi, *Tafsir Mājidī* by Maulana Abdul Majid Daryabadi, *Tadabbur-e-Qur'an* by Maulana Amin Ahsan Islahi and *al-Tafsīr al-Munīr* by Wahbah al-Zuhaili. I have already said that the technical sense of each mode of ADR is quite new. No legal dictionary or judicial thesaurus has taken 'negotiation' in ADR's perspective. Same is the case with the commentators of the Holy Qur┐n. They have interpreted the phrase '*mujādalah'* to denote conversation (*bahth*) and discussion. Had they alive today, they would have construed the phrase to mean negotiations directly.

[74] In Islamic law, *Ta'zir* refers to punishment for offences at the discretion of the judge or ruler of the state.

[75] Sulaiman b. Al-Ashath, *Sunan Abū Dāwūd*, *Kitāb al al-Hudūd, hadith no*. 971. The author has captioned the chapter as "Appology in Hudūd when unreported].

[76] Abu Ishaq al-Sherazi, *al-Muhazzhab*, 2:286.

[77] Muhammad b. Ahmad Ibni Rushd, *Bidāyat-ul-Mujtahid* (Beirut: Dar Ihya Al-turath Al-arabi, 1992), 2:572.

[78] Abu Al-Hassan Ali b. Muhammad al-Mawardi, *al-Ahkām al-Sultāniyah wal Wilāyāt al-Dīniyah* (Beirut: dar al-Arqam, n.d), 307.

[79] Aadil Abd al-Maujud, Supervisor of the Committee, *Taqnīn al- Sharī'ah al-Islāmiyah* (Beirut: Dar al-kutub al-Ilmiyah, 2013), 734.

[80] Malik B. Anas, *al-Mu'atta, Kitāb al-hudūd,* reported by Safwan b. Abdullah b. safwan, with Urdu trans. by Allama Wahid-uz Zaman (Lahore: Maktabah Rahmaniah, n.d.), 584. Also see Imam Muhammad b. al-Hassan, *Mu'ata al-Imām Muhammad, Kitāb al- hudūd*, with Urdu Trans. of Mawlana Shamsuddin (Lahore: Maktabat-ul-Ilm, n.d.), 375-376.

[81] Malik B. Anas, *al-Mu'atta, Kitāb al-hudūd, 585.*