Sharī'ah Court-annexed ADR: The Need for Effective Dispute Management in *Waqf*, *Hibah* and *Wasiyyah* Cases in Malaysia[♣]

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Abstract

Being one of the most progressive Muslim countries in the 21st century, Malaysia has remained the cynosure of all eyes in the Muslim world. One of the major institutions in governance is the administration of justice system, which generally promotes access to justice as the last hope for the less privileged. To this end, this paper attempts to reconstruct the need to build on existing initiatives in the administration of justice mechanism of the Sharī'ah judiciary in Malaysia with special reference to disputes involving waqf, hibah and wasiyyah issues. It is therefore argued that rather than waiting for emerging issues such as cases involving waqf survey to emerge before coming with up with sustainable mechanisms, which are fundamentally Sharī'ah-based, it is always more fitting to be proactive in a fast-growing economy such as Malaysia.

1. Introduction

In furtherance of the objective of becoming an industrialized nation in the Year 2020, it is imperative for the stakeholders to identify key areas that are necessary for immediate action in order to lay a sound footing for positive transformation of the Malaysian economy. While one may not need to argue that the economy of the country does not operate on its own, there are significant legal and regulatory mechanisms that do support such aspirations in the drive towards an industrialized nation. Access to justice to all, particularly the less privileged, is a fundamental feature of developed nations. According to Lord Woolf, M. R. in his report "Access to Justice", a civil justice system should meet the following principles: "(1) be *just* in the results it delivers; (2) be *fair* in the way it treats litigants; (3) offer appropriate procedures at a reasonable *cost*; (4) deal with cases with reasonable *speed*; (5) be *understandable* to those who use it; (6) be *responsive* to the needs of those who use it; (7) provide as much *certainty* as the nature of particular cases allows; and (80 be *effective*: adequately resourced and organised."[1] These are all meant to create an enviable justice system in the increasingly competitive world. In fact, a glimpse at the 2013 Budget of Malaysia reflects this trend of undaunted attention to issues involving legal aid in the

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[1] Lord Woolf MR, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995), p. 1.

administration of justice system in the country.[2] Fortunately, the Sharī'ah Judiciary in Malaysia has constantly pursued these goals in its unrelenting reforms over the years. One may ask whether there are rooms for further improvement? This paper seeks to answer this question.

There has been much focus on matrimonial cases in the Sharī'ah Court in Malaysia while less attention has been paid to emerging trends in Islamic property law, which statutorily fall under the jurisdiction of the court. The case studies for Islamic property law in this study, as conspicuously delineated in the title, involve three major issues: *waqf* (charitable endowment), *hibah* (gift), and *wasiyyah* (bequest) cases. Though these cases are of special status when considering their impact on the larger society, the Sharī'ah Court is often seized with the jurisdiction to hear and determine the rights and liabilities of parties in respect of them. More often than not, most families end up washing their dirty laundry in the public in these kinds of cases. Therefore, in order to avoid such circumstances where the parties are compelled to spill the beans, some other alternative measures may be introduced to ensure the sustainability of any decision arrived at either through amicable settlement or an enforceable court judgment. While we shall discuss the jurisprudential issues relevant to the administration of justice system, this study does not intend to discuss the juristic opinions of the Muslim jurists on the validity, extent or limitations of each of these instances of disposition of property whether through *waqf*, *hibah* or *wasiyyah*. The study focuses on some case law and the imperativeness of applying sustainable mechanisms for dispute management in related cases.

This paper is organized into four major sections. First, the paper gives a general overview of effective dispute management in Sharī'ah Court adjudication with special reference to Malaysia. Second, the nature of *waqf*, *hibah*, and *wasiyyah* cases as major mechanisms for the disposition of property is examined. Third, the paper presents some case studies, which were mined from a careful selection of some reported cases involving *waqf*, *hibah* and *wasiyyah* issues. Fourth, a proposed framework is presented for Sharī'ah court-annexed dispute management system that would cater for the needs of all parties from different spheres of life in Malaysia.

2. Importance of Effective Dispute Management in Sharī'ah Court Adjudication

There is no doubt that judges occupy a significant position in the governance of any state. Islam gives a high degree of recognition to the role and functions of the judiciary under a constituted government. During the classical era of Islam, there was no clear delineation between the functions of the *qadi* and arbitrators or even *sulh* officers. However, with the gradual crystallization of the administration of justice system in Islam, there was tremendous transformation in the theory and practice of judicial functions. During the formative stages of Islamic jurisprudence, the role of judges transcended adjudication of disputes. The judges were proactive in effectively managing disputes within the society. The mere fact that the classical understanding of the judiciary as identified by Muslim jurists (such as Al-Mawardi and Abu Ya'la) in their writings encompasses three major analogous components – *qada*, *mazalim* and *hisbah* – lay credence to the argument that the functions of judges were all-encompassing. These practically involve active engagement in effective dispute management to ensure social cohesion and promote reconciliatory attitude among the people. Malaysia, being a melting pot of disparate cultures and religious affiliations, mirrors the nature of the first Islamic State in Medina.

2 "The Government is committed to ensuring that every rakyat who is accused in a court receives a fair trial in accordance with their rights guaranteed by the Constitution. The Government has provided a launching grant of RM14 million to National Legal Aid Foundation for those who cannot afford legal representation. For 2013, an additional allocation of RM20 million is provided." See "The 2013 Budget Speech – Prospering The Nation, Enhancing Well-Being Of The Rakyat: A Promise Fulfilled", at http://1malaysia.com.my/speeches/the-2013-budget-speech-prospering-the-nation-enhancing-well-being-of-the-rakyat-a-promise-fulfilled/"

The main thrust of dispute management is judicial case management with a view to promoting settlement of disputes that are amenable to amicable resolution in order to avoid the usual inexorable rancorous enmity associated with litigation or opening up a can of worms.[3] This section therefore focuses on three related areas – Sharī'ah basis for dispute management as part of the duties of judges in Islam, the increasing prominence of dispute management in modern court adjudication, and finally the current practice of dispute management in the Malaysian judicial milieu.

2.1 The Sharī'ah Basis for Dispute Management as Part of the Functions of Judges

As hinted above, there is preponderance evidence in the classical sources supporting dispute management in the adjudication of disputes in Islamic legal history. Most of the prophetic traditions on adjudication of disputes, amicable settlement of disputes, or negotiated settlement collectively form epoch-making precedents for modern practice of dispute management. Islamic law considers a number of effective dispute resolution mechanisms as part of the case management role of a judge.[4] In explaining the case management role of the *qāḍī* within the court system, Al-Khaṣṣāf gives a detailed commentary on the code of conduct of judges before and during the pendency of a case.[5] Though the thrust of the book majorly relates to the procedural rules in normal court adjudication, nevertheless, similar procedures with certain modifications where necessary may also be applicable in mediation and arbitral proceedings.

The duties of the judge in Islamic law are generally considered as part of the case management responsibility of the court. Court-annexed ADR is considered part and parcel of the Sharī'ah court; it cannot be bifurcated from the adjudicatory role of the judges. The court as a system has many other responsibilities placed on it by the Islamic State. The same thing is expected to be replicated in Muslim communities across the world since there is no longer an Islamic State similar to that during the flourishing era of Islam. In essence, ADR processes in Islamic law include *naṣīḥah* (counselling), *ṣulḥ* (mediation/conciliation or compromise of action),

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[3] Robert F. Peckham, "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution", 37 *Rutgers L. Rev.* (1984-1985): 253.

[4] Muslims in the West have repeatedly called for the introduction of Sharī'ah ADR processes within their local communities for their members. Many have taken giant steps to introduce Muslim Arbitration Panels in London and Canada. While the Muslim Arbitration Tribunal was established in London, the Islamic Institute for Civil Justice (IICJ) established Sharī'ah Arbitration in Canada. These initiatives are not free from legal and regulatory challenges. For instance, the Sharī'ah Arbitration introduced by the IICJ in Ontario was defeated by legislative amendments to the enforceability of awards emanating from such arbitral institutions. The amendments to the Arbitration Act render all arbitral proceedings that are not based on the Ontario law unenforceable in a court of law. See Ori Aronson, "Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization", 51 *Va. J. Int'l L.* (Winter 2011), 231, 240- 242; Michael C. Grossman, "Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process", 107 *Colum. L. Rev.* (2007), 169; Dieter Grimm, "Religion and Constitutional Adjudication: Conflicts Between General Laws and Religious Norms", 30 *Cardozo L. Rev.* (2009), 2369, 2377, 2381; Donald Brown, "A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-Based Arbitration", 32 *N.C.J. Int'l L. & Com. Reg.*(2007), 495; Jehan Aslam, "Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship", 38 *N.Y.U.J. Int'l L. & Pol.* (2006), 841; Trevor C. W. Farrow, "Re-Framing the Sharia Arbitration Debate", 15 *Const, Forum Constitutionnel*, (2006), 79; Caryn Litt Wolfe, "Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts", 75 *Fordham L. Rev.* (2006), 427, 441. Despite the non-recognition of the arbitral awards of the Sharī'ah arbitration, one soothing aspect of the whole issue is the willingness of many Muslims to accept the decision of the panel. Similar challenges have been experienced in Nigeria despite the fact that it has a large Muslim population.

[5] See generally, Ahmad ibn 'Umar Al-Khaṣṣāf, *Adab al-Qāḍī* (Commentary by 'Umar b. 'Abd al-Azīz). Edited by Farhat Ziyadeh. Cairo: American University in Cairo, 1978.

taḥkīm (arbitration), Med-Arb (combination of mediation and arbitration), *muḥtasib* (Ombudsman Judge), *fatwa* of *muftī* (Expert Determination), and *walī al-maẓālim* (Chancellor).[6]

While explaining the code of conduct for judicial officers, 'Umar ibn Al-Khaṭṭāb, the second rightly-guided Caliph, unequivocally restated the position of Islam regarding adjudication of disputes in Islamic courts. This is contained in a letter he sent to one of the assigned judges, Abū Mūsā Al-Ash'ārī, where he observed that part of the case management technique of a judge is to encourage the parties to compromise between each other by resolving the dispute amicably.[7] This is a pre-trial procedure which should be adhered to before proceeding for adjudication if such need still arises. Ibn Qayyim further emphasized, after reproducing Caliph 'Umar's historic letter, that judges and jurisconsults regard the letter as authoritative in judicial process while attempting to resolve a dispute.[8] A striking aspect of the letter which he emphasized upon is: "Compromise (through *ṣulḥ*) among the Muslims is lawful; except that which makes a lawful prohibited, and render the prohibited thing, lawful"[9]. As earlier accentuated, this is a clear indication to the fact that the foremost duty of the judges is case management by creating a propitious atmosphere for the amicable settlement of a dispute where applicable.

Therefore, the duty of a *qāḍī* is all-encompassing and should be treated as such when it comes to the issue of dispute management. One of the most important etiquettes of adjudication as widely pronounced in books on the Code of Conduct for Judges (*adab al-qāḍī*) in Islamic law is that even if the judge proceeds with the trail of the case, he should still consider the possibilities of reconciliation before giving the final decision.[10] The judge should strive to get the parties to reconcile their differences and resolve the dispute amicably based on certain terms of agreement.[11] This is considered as part of the case management role of the judge which should be given effect as a matter of procedure. The reason for this procedural prescription is that the human mind is unpredictable –parties may shift grounds anytime. This is why it is still expedient to negotiate even in a situation of power imbalance. The parties may abruptly decide to resolve the dispute themselves on their own volition and bury the hatchet. So, even in marginal cases

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[6] See generally, Syed Khalid Rashid, "Alternative Dispute Resolution in the Context of Islamic Law", *The Vindobona Journal of International Commercial Law and Arbitration* (2004) 8 VJ (1) 95-118.

[7] Ibn Qayyim Al-Jawziy, *I'lam al-Muwaqi'in 'an rabi al-'alamin*, Cairo: Dar al-Hadith, 2002, vol. 1. For the reforms made by Caliph 'Umar during his reign see generally Shadi Hamid, "An Islamic Alternative? Equality, Redistributive Justice, and the Welfare State in the Caliphate of Umar", *Renaissance: Monthly Islamic Journal* (August 2003) 13 (8). Also see Shibli Nu'mani, *'Umar the Great: the Second Caliph of Islam.* Trans. Muhammad Saleem. Lahore, Pakistan: Ashraf Press, 1957; M. Chapra *'Umar*, *The Islamic Welfare State and its Role in the Economy*. Leicester, U.K: The Islamic Foundation, 1979; Ahmad Ibn Jabir Al-Biladhuri*, Kitab Futuhu'l-Buldan*, trans. Philip Khuri Hitti. New York: AMS Press, 1969; Jalal ad-Din al-Suyuti, *The History of the Khalifahs who took the right way*, being a portion of as-Suyuti's *tarikh al-Khulafah*, translated by: A. Clarke, TaHa Publishers, London, 1995; Ghalib A.K. Al-Qarashi, *Awliyat al-Farooq fi al-Idara wal-Qada* (Firsts of the Faruq in Administration and Judicial affairs), being a Ph.D. thesis, Muasast al-Kutub al-Thaqafiyah, Beirut, 1990; D. S. Margolith, "Omar's Instuctions to the Qadi", *Journal of Royal Asiatic Society*, (1910), 307 at 311-312; A.A.A. Fyzee, *A Modern Approach to Islam*, Lahore: Universal Books, 1978, at 41-46.

[8] Abdul Karīm Zaidān, *Niẓām al-Qaḍā fi al-Sharī'ah al-Islāmiyyah*, 3rd edn. Beirut: Mu'asasat al-Risālah, 2007/1427, at 63. An aspect of this letter which deals with mediation as part of the case management apparatus of the court is the text of the hadith narrated by Amr bin Auf who narrated that the Prophet Muhammad (S.A.W.) said: "Conciliation is permissible among Muslims except the one which makes permissible what has been forbidden or forbids what has been permitted." This hadith was related by al-Tirmidhi, Abu Dawud, Ahmad and Ibn Majah.

[9] Ḥasan Mūsā al-Ḥāj Mūsā, *Al-Qaḍā' al-Shar'ī al-Sunnī Tanzīmihi wa Ikhtiṣāṣātihi: Dirāsah Muqāranah*, Beirut: Manshūrāt al-Ḥalabī al-Ḥuqūqiyah, 2008, at 27.

[10] Ahmad Ibrahim and Mahmud Saedon Awang, "Judges and Lawyers under the Shariah", in *Proceedings of the Conference on Islam and Justice*, organised by Institut Kefahaman Islam Malaysia (IKIM) (Institute of Islamic Understanding Malaysia), held from 3rd – 4th June 1993, Paper 9, at 9.

[11] This is based on the often-quoted verse of the Qur'an which provides: "Amicable settlement is the best". (Qur'an, *al-Nisā'*: 128).

such as domestic violence, *ṣulḥ* should first be employed to reach an amicable settlement and this may involve adequate compensation where applicable. It must be quickly added that the facilitative roles such as *ṣulḥ* and *taḥkīm* are sometimes delegated to some other court officials depending on the prevailing practice in a particular locality. Islamic law recognizes the unparalleled role of the court in social transformation, dispute management, and dispute avoidance. Jennings corroborated this point where he observed:

> *Muslihun* (those who help negotiate compromise and reconciliation) were regular features of the court. Often, litigants reported to the court that *Muslihun* had negotiated *ṣulḥ* between them, indicating that a compromise had been accomplished away from the Court.[12]

This was the nature of the Sharī'ah courts right from the period of the Prophet Muhammad and this golden trend was upheld during the Ottoman Empire.

The Islamic law processes of ADR have assumed significance relevance in the modern world. The thrust of case management and dispute resolution in Islamic law is premised on amicable resolution of disputes based on good faith negotiation or mediation. The unique factor here is the spiritual element which drives the parties towards an amicable settlement. A number of these processes were introduced over 1400 years ago with the advent of Islam. Unfortunately, with the passage of time, some of the processes disappeared into the thin air and the ones that were still in use were not developed to meet the challenges of the time. However, with the paradigm shift in the modern world towards amicable resolution of disputes, scholars have perked up these long forgotten processes which are deep-rooted in the prime sources of Islamic law – the Qur'an and Sunnah. The court in a Muslim society is a multipurpose centre for case management. Its role goes beyond court adjudication. As earlier observed, the case management role of the court includes appropriate court referral of a dispute to the relevant dispute resolution process.

2.2 Islamic Dispute Management – The Malaysian Judicial Milieu

Through different policies and succeeding legislative reforms, the Sharī'ah judiciary in Malaysia has consistently built and sustained a court-annexed ADR programme. Parties seem to have great confidence in the judges and *Sulh* Officers. There is no doubt that religion, and by extension, religious judges or *qadis* play an important role in dispute management. To this end, Said and Fund reveal that:

> One of the most important findings of cross-cultural conflict resolution research is that religion is a perennial and perhaps inevitable factor in both conflict and conflict resolution. Religion, after all, is a powerful constituent of cultural norms and values, and because it addresses the most profound existential issues of human life (e.g., freedom and inevitability, fear and faith, security and insecurity, right and wrong, sacred and profane), religion is deeply implicated in individual and social conceptions of peace.[13]

One cannot agree more with this view. Being a powerful constituent of Islamic cultural norms, litigants generally respect *qadis* and display the tendency to resolve a dispute amicably, particularly when the judge in a private settlement gives a preliminary assessment of the subject matter of the dispute. Such high regard the Muslim community has for the *qadis* is similar to the

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[12] Ronald C. Jennings, "Kadi, Court, and Legal Procedure in Seventeenth-century Ottoman Kayseri", 48 *Studia Islamica* (1978), 133.

[13] Abdul Aziz Said and Nathan C. Funk, "The Role of Faith in Cross-Cultural Conflict Resolution" (presented at the European Parliament for the European Centre for Common Ground, September 2001), 1.

way it respects the Imams or *mufti*s which is borne out of religious convictions and values associated with ideological leanings.

In Malaysia, Islamic law matters fall within the scope of the legislative powers of the states.[14] Art. 121 (1A) of the Federal Constitution of Malaysia provides that the Sharī'ah Courts have exclusive jurisdiction over Islamic law matters.[15] Hence, different states, including the Federal Territories, in Malaysia have their respective enactments on the jurisdiction of the Sharī'ah Courts. As a consequence of that, the Sharī'ah Courts of different States have their own respective Sharī'ah Court Rules made pursuant to the enabling enactments.

The *Ṣulḥ* Officers compliment the duties of the *qadis,* as they are given the former's mandate in the absence of the latter. This is considered as part of the case management role of Sharī'ah adjudication (*qaḍā*) in Islamic law.[16] Islamic law lays emphasis on amicable resolution of disputes, as *ṣulḥ* is considered the basis of other dispute resolution processes. Even though the term "Alternative Dispute Resolution" is predominately used nowadays, Islamic law does not consider amicable resolution of disputes as an alternative to court process; rather, it is considered as part of the case management role of the court. This is the reason why the basic dispute resolution process in Islamic law, *ṣulḥ*, is considered as an in-built mechanism within the court process and a *qāḍī* is required to adopt such process wherever applicable.

3. Nature of *Waqf, Hibah* and *Wasiyyah* Cases in Islamic Law

Rather than focusing only on family-related disputes and divorce cases in the application of *sulh* and *tahkim*, there is ample evidence in Islamic jurisprudence for the application of these dispute management processes to property cases. In fact, they are often the preferred processes for dispute resolution owing to the nature of property cases. In this section, *hibah* and *wasiyyah* are grouped together because most cases coming before the Sharī'ah Courts in Malaysia involving *hibah* are related to *wasiyyah*. So, it is most convenient to discuss them together while *waqf* is discussed separately.

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[14] Article 74, Federal Constitution and section 1, Second List, Ninth Schedule to the Federal Constitution. Section 1 of the Second List in the Ninth Schedule provides in relation to the exclusive powers of State Legislature: "Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs. Zakat, Fitrah and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over person professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom."
Also see the Malaysian Supreme Court decision in *Mamat bin Daud v. Government of Malaysia* [1988] 1 MLJ 119 (SC) where the apex court held in its majority decision that only the State Legislature will have the exclusive powers to enact laws on Islamic matters. Also, see Mohamed Ismail bin Mohamed Shariff, "The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law", [2005] 3 MLJ cv.

[15] See Farid Sufian Shuaib, "Constitutional Restatement of Parallel Jurisdiction Between Civil Courts and Syariah Courts in Malaysia: Twenty Years On (1988-2008)", [2008] 5 MLJ xxxiii; [2008] 5 MLJA 33.

[16] Ramizah Wan Muhammad, "*Sulh* (Mediation) in the Malaysian Syariah Courts", in Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed (eds.), *Mediation in Malaysia: The Law and Practice*, Malaysia: LexisNexis Malaysian Sdn Bhd, 2010, at 415-428.

3.1 *Hibah and Wasiyyah Cases*

The nature of cases involving gifts and bequest seems to be closely related; hence, the need to classify the two classes of property disposition under the same subheading. These two methods of disposing or transferring one's property *inter vivos* involves the transfer of property from one person to another in a unilateral contract, generally considered binding, without the beneficiary necessarily providing any form of consideration in the contract. Though a gift is generally made *inter vivos*, a bequest in most cases takes effect after the demise of the testator. But at the time of concluding the latter contract, the contract is *inter vivos* but its legal effect is delayed till the demise of the testator. While there are glaring differences in the jurisprudential rules applicable to gifts and bequest under Islamic law and common law as practiced in Malaysia, this study specifically focuses on the principles and practice under the former whose law is applied in the Sharī'ah Courts.

The nature of *hibah* cases in Malaysia generally involve steps to revoke a gift earlier given to someone or the questioning of the validity of a gift awarded to a third party after the donor's demise.[17] Usually, when there is no proper documentation of the transfer of a property from one person to another, there is always the tendency of someone from nowhere to challenge the validity of such disposition of property. There is no doubt that the Sharī'ah Court, in a country like Malaysia where Muslims prefer to subject themselves to the Islamic law in cases involving testamentary dispositions, hear and determine many cases involving *hibah* and some of the cases are not clear cut issues that can be disposed of easily. From the reading of a number of related law reports, the courts often apply *ijtihad* through the contextual application of Islamic legal rules in the contemporary Malaysian society.

Though cases of *harta sepencarian* (jointly acquired property) is beyond the scope of this study, such cases also constitute the bulk of the *hibah* cases going before the Sharī'ah Courts, especially in cases where the either of the spouse had promised to (or practically) transferred the matrimonial home or any other jointly acquire property to the other. In cases where there is no proper legal documentation to support such symbolic transfer of property, problems often arise in the event of a divorce. Apart from gifts made *inter vivos*, another dimension to the nature of such disputes is gifts made *inter vivos* by a testator who either intends the donee to immediately take the ownership of the property involved or delay the transfer until his or her demise. It is not uncommon for parents to intentionally bestow some gifts to some of their children to circumvent the Islamic law of inheritance by bridging the ratio 2:1 principle of male and female heirs. In some other cases, a person may decide to transfer some properties to the son or daughter through *hibah* with a view to enjoying a reciprocal care in old age. Given the fact that some people get disappointed in their wards later in life after initially transferring a large portion of their properties to them, they might decide to approach the Sharī'ah Court to revoke such gifts. So, whether revocation of gifts is allowed or not, depending on the juristic opinion adduced to support one's position, it suffices to observe that revocation of gifts is the main cause of *hibah* cases coming before the Sharī'ah Court.

On the other hand, *wasiyyah* cases are testamentary disposition of property, which ordinarily takes effect after the demise of the testator. When properties are bequeathed to another person, such disposition of property has its restrictions, as it must comply with the mandatory one-third limit of Islamic law of inheritance. This is meant to protect the rights of the legal heirs whose rights are generally protected by the operation of law.[18] The nature of *wasiyyah* cases comes in different dimensions. As a testamentary gift, *wasiyyah* cases have also appeared in the law

[17] See Appendix 1 for selected cases on *hibah* decided by the courts between 1994 and 2011 reported in Jurnal Hukum.

[18] See Akmal Hidayah Halim, "The Legality of a Living Trust as an Instrument for Islamic Wealth Management: A Malaysian Perspective", (2011) 19 IIUMLJ 35-50.

reports. There are situations where legal heirs challenge the validity of certain bequests made by their deceased relation. This means the legal heirs may insist that the bequest should be declared void and of no effect. It is also possible for legal heirs to challenge a bequest, which transcends the mandatory one-third limit by seeking the court to declare such excess null and void and of no effect.[19]

3.2 *Nature of Waqf Cases*

Though not common yet in the Malaysian courts, *waqf* disputes are always very controversial in countries that are proliferated with both family and general *awqaf* such as India. While there are pockets of individual *waqf* in Malaysia, the government (both at the state and national levels) seems to be at the forefront to create *waqf* for the people's benefit. However, one major thing that is lacking in the *awqaf* sector is the survey of existing *waqf*. Even though JAWHAR has strived to track the number of *awqaf* in the states across the country, since there has not been a proper survey of existing *waqf* properties, proper monitoring and consolidation for sustainable development might not be achieved as successfully carried out in Singapore. According to Syed Khalid Rashid "[f]or a sound *waqf* administration it is necessary to know the details of every *waqf*. This is possible only by conducting a survey of *awqaf* in the country."[20] Once a survey of all *awqaf* properties in all the Malaysian states is carried out, the stakeholders will be able to formulate an appropriate policy for the development of such properties to maximally benefit from their economic potentials.[21]

Table 1: Selected Waqf Cases Decided by the Courts Between 1994 and 2011

Name	Citation	Subject matter	Court	Judgment
Bakhtiar Adnan v. Mohd Fawzi Nahrawi & 6 Ors	[2006] XXI(I) JH 19	Interim Application on Waqf Land [Land]	Mahkamah Tinggi Syariah W.P.Kuala Lumpur	The Ex-parte Application is Rejected and MAIWP is supposed to be Present as Respondent.
Ismail Bin Wahab v. Majlis Agama Islam Melaka & 3 Ors	[2008] 25 (1) JH 123	Claim of Waqf Property [Property]	Mahkamah Tinggi Syariah Melaka	Court accepts and allows the Application to alter Waqf Order.
Majlis Agama Islam Dan Adat Melayu Terengganu v. Tis'ata 'Ashar Sdn. Bhd.	[2008] 27 (1) JH 137	Claim for Declaration of Waqf Land [Land]	Mahkamah Tinggi Syariah Negeri Terengganu	Court gives Judgment as agreed by the Parties – Consent Judgment
Tengku Abdul Kadir Bin Tengku Chik Dan Seorang Lagi v. Majlis Agama Islam, Kelantan	[1995] X (I) JH 34	Claim of Special Waqf/Conflict of Jurisdiction [Land]	Mahkamah Rayuan Negeri Kelantan	In 1956, an Originating Motion failed before Kelantan Civil High Court in which the High Court Judge made his Decision Concerning Waqf. In 1987, the Appellants brought the matter to Syariah Court. Court held the Syariah Court does not have

[19] See Appendix 2 for selected cases on *wasiyyah* decided by the courts between 1994 and 2011 reported in Jurnal Hukum.

[20] Syed Khalid Rashid, *Waqf Management in India: An Overview of the Past, Present and Future Administrative and Statutory Control on Awqaf*, New Delhi: Institute of Objective Studies, 2006, 80.

[21] Hajah Mustafa Mohd Hanefah, et al, "Financing the Development of Waqf Property: The Experience of Malaysia and Singapore", in Syed Khalid Rashid & Arif Hassan (eds.), *Waqf: Laws & Management with Special Reference to Malaysia*, New Delhi: Institute of Objective Studies, 2012, 299-313.

				jurisdiction to reverse the High Court Judgment made in 1956.
Isa Abdul Rahman Dan Lain-Lain v. Majlis Agama Islam Pulau Pinang	[1995] X (I) JH 222	Waqf/Objection on action to demolish a Mosque that was erected on a piece of Waqf Land (Since 1889)	Mahkamah Tinggi Pulau Pinang	Plaintiffs have a valid Locus Standi; Defendant ordered to re-consider the action to demolish the Mosque. Latest Fatwa From Majlis Fatwa Kebangsaan should be sought.
G. Rethinsamy v. Majlis Ugama Islam, Pulau Pinang & Ors	[1994] IX (I) JH 75	Waqf/Land Law-National Land Code	Mahkamah Tinggi Pulau Pinang	Plaintiff is not a bona fide Purchaser without notice. He is a bare Trustee for Defendant.
Tegas Sepakat Sdn. Bhd. v. Mohamed Faizal Tan	[1994] IX (I) JH 225	Waqf	Mahkamah Tinggi Johor Bharu	High Court must follow the decision of Federal Court based on Stare Decisis.

Source: Author's research. Data mined from Jurnal Hukum (1994-2011)

However, most *waqf* cases highlighted in Table 1 relate to management issues, demolition of property erected on a *waqf* land, declaration of *waqf* land, and payment of returns to the beneficiaries. Lack of proper management has been the bane of the *waqf* sector in India for so many years and this has led to series of amendments of the *Waqf* Act of India, the latest being the 1995 Act.[22] This is seen in a string of cases involving *waqf* in India. Apart from this, *waqf* properties, particularly land, have been the subject of litigated cases in issues involving title to the land itself. Ordinarily, the survey of *waqf* properties triggers numerous disputes involving title to the endowed land. Some of the lands, which have become the subject of litigation, were endowed so many decades or even centuries ago.

4. Case Studies: The Practical Side of Dispute Management

It might not practically possible, owing to the time and space limitation of this study, to re-examine virtually all relevant cases involving *waqf, hibah,* and *wasiyyah* already decided by the Sharī'ah Court previously. Hence, this study focuses on selected cases. More focus is placed on some cases involving *hibah* and *wasiyyah. Waqf* cases have not been so common in the Sharī'ah Courts to all intents and purposes for obvious reasons. In Malaysia, *waqf* remains an emerging concept, which is gradually creeping into the mainstream Islamic finance industry as well as the philanthropic sector of the Malaysian economy. In spite of the government's commitment in developing *waqf* properties and even create new *awqaf*, fortunately, the number of litigated cases involving related properties is yet to be ascertained because most of the *awaqf* are presumably created by the government –not private individuals. Unlike countries like Singapore who actively undertook what is generally called a planned *istibdal* for the development of *awqaf* properties, the Malaysian government at both the state and national levels, created numerous charitable endowments for the benefit of the masses.[23]

[22] Act No. 43 of 1995 of India. See Syed Khalid Rashid, "*Awqaf* Legislation in South Asia: A Comparative Study", in Syed Khalid Rashid (ed.), *Awqaf Experiences in South Asia,* New Delhi: Institute of Objective Studies, 2002, 70.

[23] For the case study of the development and management of *awqaf* properties in Singapore, see Shamsiah Bte Abdul Karim, "Contemporary Shari'a Compliance Structuring for the Development and Management of Waqf Assets in Singapore", *Kyoto Bulletin of Islamic Area Studies*, 3-2 (March 2010), pp. 143–164.

4.1 Managing *Hibah* and *Wasiyyah* Cases

A number of cases have come before the Sharī'ah Court involving *hibah*- and *wasiyyah*-related cases. Most of these cases involve family relations. The nature of the cases, which naturally involves family ties, makes them more amenable to amicable settlement. Family ties are highly revered in Islam and Muslims generally avoid dispositions that will severe such ties. This itself may form the basis of family dispute resolution, particularly in cases that do not fall under the general scope of divorce. Managing *hibah* and *wasiyyah* cases appears to be more sustainable than other forms of disputes. In fact, during the pendency of such cases before the court, the judge may refer the parties for out-of-court settlement which should begin with a psychotherapy procedure purposefully meant to remind the parties of their family ties and the ephemeral nature of properties and the worldly life in general. This should go a long way in getting into the heads of the disputants.

While psychotherapy involves the treatment of a sick person by influencing his or her mental life[24], it has a strong nexus with *sulh*. A preliminary step in the *sulh* process is the procedure of influencing the mental state or frame of mind of the parties and getting them to start talking. Sometime, this may be a Herculean task in serious matrimonial disputes but with some pre-settlement psychotherapeutic procedures, the mental state of the parties might have been greatly influenced which prepares their minds for fruitful discussions that will eventually lead to settlement. A spirit of compromise is instilled in the minds of the parties and when the conciliation phase of the process commences, they tend to adopt practical approach to the settlement of the dispute.

In practice, *nasihah* is a party-centred therapy which is used to reduce friction between two disputing parties. In Islamic law, counselling involves a wide range of psycho-spiritual processes which are primarily meant to facilitate the resolution of personal and interpersonal problems or disputes. As a dispute avoidance-cum- resolution process, *nasīhah* is both facilitative and advisory in nature. It lacks the determinative aura even if such is conducted by a highly-respectable person in the society. In some cases, the counsellor may engage in what may be referred to as Shuttle Counselling which involves facilitative resolution of a dispute by interacting with the parties separately without the need of bringing them together at a session. Shuttle Counselling may be relevant during the caucus sessions in mediation.

The Islamic law mechanism for mediation provides for psycho-spiritual methods in handling disputes. For this reason, mediators attached to the Sharī'ah Courts in Malaysia and Singapore are well-trained in this direction to offer appropriate palliative services to parties. This seemingly new dimension has been the kernel of dispute resolution in Islamic law since about 1,400 years ago. But there is ample room for improvement in the current practice.

It is apposite to examine some related cases. In *Eshah Bt Abdul Rahman v. Azuhar v. Ismail*[25] a person gave a gift to her adopted child and later wanted to repossess the gift. The court held that even though *hibah* given by a parent to a child, can be revoked, the circumstances of this case does not warrant such revocation of the gift since the gift has been developed and its nature has changed overtime and the donee is an adopted child.[26] Without the fear of being contradicted, this case would have been reasonably resolved through amicable settlement where the parties would arrive at a win-win settlement. The adopted child would have been able to reach a negotiated settlement with the mother by agreeing to compensate her for transferring and registering the land in his name. financial compensation will suffice in this situation, particularly if the plaintiff is really in need of such compensation. This could have been easily worked out. Though one may argue that this analysis is easily said than done when the Pandora's box is laid

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[24] Hugo Munsterberg, *Psychotherapy*, Montana, USA: Kessinger Publishing, 2010, at 1.
[25] [1997] 2 JH 219.
[26] Zulkifly bin Muda, "Flexibility of the Application of Various Islamic Schools of Thought in Some Issues Relating to *Hibah: Study on Provisions in Malaysian Law and Other Countries", Jurnal Fiqh:* No. 3 (2006), 96-97.

bare, it is still better to create an avenue for the parties to cool of and commence a meaning conversation which may result in a win-win settlement with the aid of a third party neutral.

4.2 Managing *Waqf* Cases: The Case Study of the Chenderong Concession Case

Throughout the ages, Muslim communities have resorted to *waqf* for delivering public goods. In some cases, Muslim governments have actively created *waqf* as an alternative means of ensuring social and economic security of the state. Though initially, most *awqaf* were privately created for certain purposes – religious or family welfare – the state later embraced this practice to bring public goods to the doors of the citizens.[27] Rather than focusing on the historical development of *waqf* in Malaysia, it is pertinent to examine a recent case which is still pending in the Terengganu Sharī'ah Court.

In *Tengku Zainal Akmal Tengku Besar and Tengku Hidayah Tengku Habib v. Majlis Agama Islam Dan Adat Melayu Terengganu*[28] there is a dispute over a *waqf* land in Chenderong between the royal family and the State Islamic Religious Council in Terengganu. The subject matter of the dispute, which is a land measuring 25,000 hectares, was granted to Tengku Nik Maimunah and Tengku Ngah Omar Abdul Rahim (her husband) by the former Ruler of Terengganu, Sultan Zainal Abidin III in 1906. The large expanse of land was later converted into a *waqf* land, which changed its nature from a private gift granted to an individual family to a family endowment of the descendants of Tengku Ngah Omar. This award of land is generally called the Chenderong Concession Endowments. Given the fact that *awqaf* properties are statutorily managed by the Terengganu Islamic and Malay Custom Council (State Religious Council), the descendants of Tengku Omar were unhappy about the administration of the land as well as the annual payout received by the 462 beneficiaries.

To this end, the two claimants, while acting in a representative capacity on behalf of 460 families who were the beneficiaries, filed an application on 14th December 2008 at the Syariah High Court in Terengganu. Since the bone of contention, according to the applicants, was the unilateral action taken by the State Religious Council to lease the land in an unfair manner that may result in a loss of income, they were seeking compensation for loss of income resulting from such lease and a court declaration that all leases in respect of the *waqf* land are null and void and of no effect since they were detrimental to the economic interest of the beneficiaries of the land. Finally, for the purpose of joint administration of the *waqf* land in a prudent manner, the applicants also sought that the court compels the State Religious Council to set up a body that is composed of both the State Religious Council and the representatives of family members who are the beneficiaries.

From the available records of proceedings, the court has had the opportunity to hear the parties and make some interlocutory rulings in about 40 court sessions from 14th December 2008 to 8th January 2012. Owing to the nature of the dispute and the parties involved, the presiding judge introduced some case management techniques through the persuasion of parties to consider amicable settlement of the dispute, which for all intents and purposes is most appropriate for the nature of the case. Precisely on the 27th July 2009, the court ordered the parties to proceed to *majlis al-sulh* for amicable settlement of the dispute to avoid unnecessary publicity, particularly on the part of the media, and the overall image of Islam in the country. Both parties agreed to

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[27] Timur Kuran, "The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the
Waqf System", *Law & Society Review*, Vol. 35, No. 4 (2001), pp. 841-898.

[28] Summons No: 11200-099-0400-2008 (Property Claim Relating to Waqf). Syariah High Court, Kuala Terengganu. The record of proceedings between 2008 and 2012 of this case is available at the court's portal at http://syariah.terengganu.gov.my/doc/harta%20wakaf.doc (accessed on 31st October 2012).

proceed for *sulh* while the case was adjourned for three months to give them ample time to resolve all the relevant issues in a more harmonious and private session.

On the next adjournment date, 4th October, 2009, though the applicants preferred to continue the *sulh* session in the overall interest of the parties as rightly advised by the court, the defendant objected. Since this initial attempt to mediate the dispute failed for whatever reason, the case had to proceed for hearing. But the presiding judge again cautioned the parties not to entertain unnecessary media publicity in respect of the case. Although the judge made this attempt to advice the parties to avoid media fuss about the case, any case heard in the open court is no longer a private dispute settlement session. Such proceedings are subject to public scrutiny and reportage.

There was another attempt to resolve the dispute amicably and this was at the instance of the plaintiffs. The court immediately agreed and ruled that the parties proceed for *sulh* for the next three months. While the parties agreed in principle to explore out-of-court settlement, negotiations were later on the rocks and the parties had to return to the open court after three months on 11th September 2011. It is pertinent to note that there was another interlocutory application brought by SPPT Development Sdn. Bhd. to be joined as parties to the suit since its interest is likely to be affected by the decision of the court as a legal entity that has concluded a number of legal contracts with the defendant in the past 20 years.

The presiding judge, in his wisdom, knew quite well that cases involving important personalities, particularly the royal family –an institution highly revered in Malaysia – should not be brought to the public domain with its attendant media publicity. Such disputes are better resolved through private negotiations presided over by third party neutrals in a mediation session. Cases involving the proper management of *awqaf* properties are better resolved through *sulh* rather than a formal court declaration. Though one may not be apprised of what transpired during the *sulh* session but the fact remains that the plaintiffs would have abandoned their initial application for the declaration that all leases in respect of the Chenderong Concession to be declared null and void if the State Religious Council have come forward with a proposal to henceforward constitute a special body composed of both representatives of the beneficiaries and the Council. Mediation in Islamic law involves compromise of action, which is a practical demonstration of give-and-take initiative. It is hoped the parties will again consider the option of *sulh* but it is always difficult when the circle keeps expanding, i.e. when joinder of parties takes place during the pendency of a case.

5. Proposed Reforms for Sharī'ah court-annexed Dispute Management

In the drive towards attaining the developed nation status in Year 2020, the Sharī'ah judiciary may provide necessary guidelines for enhancing the existing Sharī'ah-court annex dispute resolution mechanism. Some of the proposed reforms for enhancing the Sharī'ah court-annexed dispute management process include court referrals at the appellate Sharī'ah Courts, encouraging the parties to embrace dispute avoidance mechanisms such as proper legal documentation in *hibah* and *wasiyyah* deeds, and establishment of *waqf* dispute tribunals.

5.1 The Need to Encourage Court Referrals at the Appellate Sharī'ah Courts

The court must be proactive in this regard to encourage parties on the possibility of a negotiated settlement rather than engaging in litigious adversarial fireworks in the court. Before we examine the legality of court referrals at the appellate courts from the Islamic legal standpoint, it is important to consider the practice in other jurisdictions which one may consider as being Sharī'ah-compliant. To this end, Lord Woolf observed that "[w]here there is a satisfactory

alternative to the resolution of disputes in court, use for which would be an advantage to the litigants, then the courts should encourage the use of this alternative"[29].

As a consequence of the recommendations made by Lord Woolf in his final report on *Access to Justice*, some landmark amendments were introduced into the Civil Procedure Rules (CPR) in May 2000.[30] The CPR provides a wide support for ADR processes through court referrals. "The driving force behind the reforms was a combination of the lawyers involved in commercial litigation, a handful of academics, and the courts."[31] Rule 1.4 provides *inter alia*:

> (1) The court must further the overriding objective by actively managing cases.
> (2) Active case management includes —
> (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
> …
> (f) helping the parties to settle the whole or part of the case.[32]

This provision obliges the judge, as part of the case management role, to encourage the parties in a dispute to consider the use of an ADR process, and the court should facilitate the use of such procedure.[33] Rule 26.4 CPR also enables the judge, either of its own initiative or with the agreement of both parties, to stay proceedings where they consider the dispute to be better suited to solution by alternative dispute resolution or other means. It is therefore the duty of the claimant to inform the court when settlement is reached.[34] With this, ADR has been inducted into the courts in England as a procedural rule allowing the court to order parties to mediation.[35] When the court advises the parties that the case can be effectively settled through an alternative mechanism and such is brought to the attention of the parties, if one of the parties still insists that the case be brought before the court, such a party may be penalized through a reduction in cost or denial of cost should he win the case. Accordingly, if a party refuse to take to the court directions regarding ADR as the best mechanism for the resolution of a case, eventually there may be costs sanctions when ultimately accessing the costs.[36] It is important to reiterate the fact that the courts that are required to apply these mandatory rules include the appellate courts.

The far-reaching effects of these reforms in the civil justice system were felt in a long line of cases where the court actually gave effect to the overriding objective of the rules by making the necessary referrals to ADR options. In *Robert Alan Dyson v Leeds City Council*[37], the Court of Appeal practically invoked the provisions of Rule 1.4(2)(e) of the CPR by persuading the parties to adopt alternative dispute resolution to bring the protracted matter to the much desired end. Lord Justice Ward read the lead judgment, and in the concurring judgments of the other two learned justices (Lord Justice Laws and Lord Woolf, MR), both particular associated themselves with the remarks made by Lord Justice Ward as to the desirability of resolving the matter through

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[29] Id., at Recommendation No. 302.
[30] Civil Procedure (Amendment) Rules 2000 (SI 221 of 2000). It should be observed that the Civil Procedure Rules are the rules of civil procedure used by the Court of Appeal, High Court of Justice, and County Courts in civil cases in the whole of England and Wales. The new rules came into force on 26 April 1999. The Rules were actually made in 1998. So, reference to the rules may sometimes read "Civil Procedure Rules 1998 (L17 No. 3132 of 1998). Some amendments were incorporated into it in 2000.
[31] Loukas Mistelis, "ADR in England and Wales: a successful case of public private partnership', *ADR Bulletin,* Vol. 6, No. 3 [2003], Art. 6, at 1.
[32] Rule 1.4(1) and (2) (e) - (f) CPR.
[33] See Miryana Nesic, "Mediation –On the rise in the United Kingdom?", *Bond Law Review*, (2001), vol. 13, No. 2, 20 available at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1214&context=blr
[34] See Rule 26.4 (1)-(4) CPR.
[35] See generally, District Judge Trent "ADR and the new Civil Procedure Rules". *New Law Journal* (March 19, 1999) 410.
[36] Rule 44.5(3) CPR.
[37] C.A 22.11.99. 15; [1999] ADR.L.R. 11/22.

alternative dispute resolution. It seems this was the first case where the case management role of the court was actually implemented following the post-Woolf reforms. In a similar vein, in *R (Cowl) v. Plymouth City Council*[38], the Court of Appeal was again faced with another case where Lord Woolf, reading the lead judgment, observed that "[w]ithout the need for the vast costs which must have been incurred in this case already being incurred, the parties should have been able to come to a sensible conclusion as to how to dispose the issues which divided them."[39] He further added that if the parties could not resolve the issues, they should have recruited an independent mediator to assist. While dismissing the appeal from the Queens Bench Division, the Court of Appeal referred the parties to amicable settlement by scheduling the terms agreed by the parties as prepared by Buxton LJ which was appended to the judgment of the court.

Similarly, in *Dunnett v Railtrack*[40], the Court of Appeal penalized the successful litigant by refusing to award costs since it refused to mediate when the court proposed it at an early stage of the proceedings. Lord Justice Brooke, reading the lead judgment, emphatically observed:

> It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in Part 1 of the Rules and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence.[41]

The two other justices agreed with Lord Brooke's reasoning and no costs were awarded due to the failure of the successful litigant to initially agree to mediate as advised by the court.[42] This is first case in England where the court has utterly withheld costs from a successful litigant on account of the refusal to mediate when directed to do so.[43] Other cases where the court practically expressed its strong support for ADR and mediation in particular include *Hurst v Leeming*[44], *Cable & Wireless Plc v IBM United Kingdom Ltd.*[45], and *Shirayama Shokusan Co Ltd & Ors* v *Danovo Ltd (No.1)*[46].

The latest reforms in the civil justice system in England and Wales is the *Review of Civil Litigation Costs –Final Report* by the Right Honourable Lord Justice Jackson whose terms of reference include "to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost."[47]

From the Islamic legal perspective, the principle is in line with the rule in Qur'an: "Verily! Allah commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice...."[48] So, the judges are reminded by the Supreme Lawgiver to render back the trusts reposed in them by the general public by making mandatory court referrals where applicable even if a case is on appeal. If such referral is in the best interest of the parties and the public at large, the principle of Islamic public policy, *al-siyāsah al-shar'iyyah*, permits that under the law. This has been discussed in more detail in

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[38] [2001] EWCA Civ 1935; [2002] 1 WLR 803.
[39] Id., at para. 25.
[40] [2002] EWCA Civ 302; [2002] 2 All ER 850; [2002] 1 WLR 2434.
[41] Id., para 15.
[42] For an instance where the Court of Appeal dismissed an appeal of an unsuccessful party who claimed the successful party in the lower court refused to mediate when the court rightly directed them to do so, and therefore, no costs should be awarded to such a party, see *Halsey v Milton Keynes General NHS Trust; Steel v Joy and another* [2004] EWCA Civ 576, [2004] 4 All ER 920, [2004] 1 WLR 3002, 81 BMLR 108.
[43] Miryana Nesic, n. 97.
[44] [2001] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379.
[45] [2003] EWHC 316 (Comm.).
[46] [2003] EWHC 3306 (Ch).
[47] *Review of Civil Litigation Costs: Final Report* by the Right Honourable Lord Justice Jackson, Norwich: TSO with the permission of the Ministry of Justice on behalf of the Controller of Her Majesty's Stationery Office, 2010, at xvi.
[48] Qur'an, *al-Nisā'*: 58.

section 6.2 of this chapter where instances were given from the classical period of Islam. For the sake of emphasis, one may reiterate the fact that the famous letter written by 'Umar b. Al-Khaṭṭāb as the Caliph to Abū Mūsā al-Ash'ārī consists of express provisions on the need for judges to effectively manage cases before them. In the said letter, judges are advised to avoid rancorous litigation through possible amicable settlement of the disputes which should be adopted as a pre-trial procedure.

In fact, during the subsequent period, it has been indicated that *ṣulḥ* officers were regular features of the court who were actively engaged in out-of-court settlement[49]. This continued up to the flourishing era of the Ottoman Empire where available records show that *muṣliḥūn* (mediators or *Ṣulḥ* officers) worked with the Sharī'ah courts "who often intervened or were assigned to assist litigants in reconciling and arriving at mutual settlement. The mediators effectively assisted in resolving a large number of cases both civil and criminal in nature."[50] Apart from this, the *qāḍī* in administration of Islamic law "is endowed with multiple roles with a largely inquisitorial justice system, and the roles of mediator and conciliator are included amongst them."[51] In addition, provisions for recognition and enforcement of awards in Islamic law clearly require that for the purpose of enforcement, an award should be referred to the *qāḍī.* The implication of this is that the *qāḍī* is involved in the process.[52] It is either the *qāḍī* earlier referred such a case for arbitration or the disputing parties independently appointed a third party neutral as an arbitrator to resolve the matter. Therefore, there is no reason why the learned justices at the Court of Appeal and Supreme Court, who hear and determine appeals on Islamic personal law matters, will not invoke this inherent jurisdiction conferred on them by the principles of Islamic law to give effect to amicable resolution of disputes when the situation demands such.

It is interesting to observe that the reforms introduced in the United States of America through the enactment of the Alternative Dispute Resolution Act of 1998 and the 1998 post-Woolf reforms introduced in the CPR in England and Wales with regard to court referrals to alternative dispute resolution have been an essential part of the Sharī'ah adjudication since about 1,400 years ago. It is unfortunate that the wave of colonization which penetrated the legal systems of most Muslim countries across the world affected their legal systems, and consequently, the jurisdiction of the Sharī'ah courts in all the colonies was reduced to Islamic personal law, and the procedural rules, to a large extent, further drifted away from the Sharī'ah system to the English law. The principles of English common gradually replaced the substantive Islamic rules which tamed the practice and procedure of Islamic law in the country.[53]

From the foregoing discussion, it is clear that court referral at the appellate stage is a practice known to both the English law and Islamic law. It is definitely the best way to reduce backlog of cases at the appellate courts. It is argued that since the Islamic personal law panel in the superior courts apply the substantive aspects of Islamic law, the procedural aspects should also be applied to validate court referrals to the appropriate dispute resolution mechanisms. The out-of-court settlement does not, in any way, have effect on the jurisdiction of the superior courts, and this

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[49] Jennings, **n.** 7 at 133.

[50] Aida Othman, "And *Sulh* is Best: Amicable Settlement and Dispute Resolution in Islamic Law", Ph.D. Thesis: Harvard University, 2005, at 2-3. For this point, Aida Othman cited a number of studies on Ottoman court records and these include: R. C. Jennings, "Kadi, court and Legal procedure in 17th Century Kayseri," *Studia Islamica* xlviii (1978), at 133-172; R. C. Jennings, "Limitations of the Judicial Powers of the *Kadi* in 17th Century Ottoman Kayseri,", *Studia Islamica,* 50 (1979), at 157; Haim Gerber, "Sharia, Kanun and Custom in the Ottoman Law: The Court Records of 17th Century Bursa", *International Journal of Turkish Studies*, 2 (1981), pp.131-147 at 133.

[51] Aida Othman, n. 114 at 7.

[52] See Al-Khaṣṣāf, Ahmad b. 'Umar, *Adab al-Qādī.* Commentary by 'Umar b. 'Abdul-Aziz, edited by Abu al-Wafā' al-Afghānī and Abū Bakr Muhammad al-Hāshimī, Beirut, Lebanon: Dār al-Kutub al-'Ilmiyyah, 1414/1994, at 481-486.

[53] For a detailed account of how the English Common law was superimposed on the existing Sharī'ah legal system, particularly the aspect of the Sharī'ah adjudication in Nigeria, see Auwalu H. Yadudu, "Colonialism and the Transformation of Islamic Law", *Journal of Legal Pluralism,* (1992), nr. 32:103-139.

should not be taken as an erosion of powers of the justices of such courts because they still have the final say.[54] Once the parties reach a settlement outside the court, they must submit the terms of settlement to the court for endorsement and that will be regarded as a *res judicata* on the subject-matter of the dispute between the parties. Thus, amicable resolution of disputes through faster means of dispensation of justice is encouraged by the court. However, there are exceptions to this rule of court referral. When an appeal touches on issues that affect public interest and a policy judgement is required, there cannot be court referral. The appellate courts have to hear and determine such a case in accordance with Islamic law. But most Islamic personal law issues do not fall under this exception.

In a recent survey conducted by the researcher among Sharī'ah Court judges in Nigeria, all the judges in separate interviews agreed that their original duty as established under the Sharī'ah is principally that of case management. Meanwhile, it is argued that case management includes all forms of effective dispute resolution. It is not only limited to court adjudication.[55]

5.2 Ensuring Dispute Avoidance Through Proper Legal Documentation

In respect of cases involving *hibah* and *wasiyyah* cases, the Sharī'ah Court should provide standard documents for proper legal documentation to avoid cases of undocumented gift granted to certain persons. It is always difficult to deny the award of a gift or a bequeathed property when there is proper legal documentation signed by witnesses and notarized by a designated Sharī'ah Court officer. This process is more of dispute avoidance mechanisms as opposed to the often-pronounced dispute resolution. The Sharī'ah Courts, as a matter of practice, should embrace dispute avoidance mechanisms through such proactive measures to drastically reduce cases coming before them.

5.3 The Imperativeness of Waqf Dispute Tribunals

With the growing interest in *waqf,* the emerging incidences of *waqf* cases going before the Sharī'ah Court, and the likelihood of the proposed *waqf* survey triggering a plethora of cases involving title to *waqf* lands and other properties, one may propose the establishment of Waqf Dispute Tribunals. This body should be empowered to hear and determine *waqf*-related cases exclusively. The tribunal should be composed of judicial officers from the Sharī'ah judiciary and some learned members of the academia who should sit on ad hoc basis. The tribunal should be required to utilize all available dispute settlement processes such as *sulh* and *tahkim* and its decisions or awards should be enforceable by the Sharī'ah Court.

Moreover, it is more practicable to resolve *waqf* cases involving so many parties through mediation or arbitration, particularly when the parties concerned prefer to maintain their privacy to avoid unnecessary publicity.

6. Conclusion

The three classes of disputes briefly examined in this study relate to the family with the exception of *waqf*, which sometimes transcends the family net. Therefore, in order to avoid opening up family issues to public scrutiny, particularly in high profile cases, parties should be encouraged to adopt amicable settlement procedures through *sulh*. Being the representative of the state in charge of settling disputes, judges should go the extra mile to encourage litigants to settle out of

[54] The powers of court cannot be ousted in any situation whatsoever. This was the position in *Scott v. Avery* [1856] 5 HLC 811 (HL), where it was held that any agreement that entirely ousts the jurisdiction of the court on any issue is contrary to public policy and therefore void.

[55] Umar A. Oseni "The Legal Framework of Alternative Dispute Resolution in Courts with Sharī'ah Jurisdiction in Nigeria, Malaysia and Singapore", PhD Thesis: International Islamic University Malaysia, 2011.

court. This is part of the original value proposition of the administration of justice system in Islamic law and it replicates the practice of *maslahah*. To this end, one may rightly conclude that the duties of Sharī'ah court judges is more of dispute management than dispute resolution since they are required to actively engage in dispute avoidance as well.