



The Institute of Ismaili Studies

**“Arbitration and Mediation in the Shi’a Imami Ismaili Muslim Community”
Paper presented at the 4th International Conference of the World Mediation Forum***

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Abstract

Tracing the development of conciliation, arbitration and mediation through the Qur’an, the *sunna* and examples from early Muslim history, the author illuminates the place of conflict resolution in early Muslim thought and elucidates the institutional expression of this practice in the Ismaili Muslim community. Providing an introduction and overview to the modern apparatus of the community in dealing with cases of conflict, the author highlights the writings of the Fatimid jurist Qadi Nu‘man (d. 969) and examines the ordination of a modern constitution that is concerned with, amongst other things, the social governance of the Ismaili community and the formalisation of a series of institutions dedicated to amicable resolution in cases of dispute. These bodies, known as the Conciliation and Arbitration Boards (CABs), operate today in Afghanistan, Canada, France, India, Iran, Kenya, Madagascar, Pakistan, Portugal, Syria, Tanzania, Uganda, the United Kingdom and the USA and in particular contexts are recognised as having jurisdiction over matters of Ismaili personal law.



This article is available on the website of The Institute of Ismaili Studies at http://www.iis.ac.uk/learning/life_long_learning/mediation/mediation.htm.

* The World Mediation Forum (WMF) is an international association of people, organisations and institutions interested in interpersonal, intergroup, community, transcultural and international mediation. It is committed to the use of mediation and other appropriate collaborative conflict management processes wherever conflict threatens the wellbeing of individuals, organizations, communities and local, state or national governments. Created in Dublin, Ireland in 1993, the WMF is the result of the First International Conference on Mediation and was formally constituted in El Escorial, Spain in 1995. For more information, see their website <http://www.mediate.com/world/>.

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Madam President,
Members of the Steering Committee,
Ladies and Gentlemen,

I would like to place on record that I consider it a great honour to be present in Buenos Aires today as a guest of the World Mediation Forum, and for this I would like to express my warm gratitude to the organisers of this conference.

In a century ridden by increasing conflict and the witnessing of a new world order, institutions such as the World Mediation Forum can do a great deal to foster greater understanding between, and among, nations, cultures, societies and peoples.

The purpose of my presentation today is to share with you the experiences of an international Muslim community which, throughout its history, has followed conciliation, mediation and arbitration as processes of dispute resolution. The community I speak about is the Shi'a Imami Ismaili Muslims, of which I am a member and with whose institutions I have been closely involved for the last forty years.

The Shi'a Imami Ismaili Muslims, generally known as the Ismailis, belong to the Shi'a branch of Islam of which the Sunnis comprise the other. The Ismailis live in over 30 countries of the world, mainly in South and Central Asia, Africa, Europe and North America.

Islam, like Judaism and Christianity, is a monotheistic faith whose most fundamental principle is the belief in the Supreme Being – God, or Allah in Arabic – who is unique and without equal or partners.

Ismailis affirm the fundamental Islamic Testimony of Truth, the *shahada*, that there is no deity but Allah and that Muhammad (Peace of Allah be upon him) is His Messenger. They believe that Muhammad was the last and final Prophet of Allah, and that the Holy Qur'an, Allah's final message to mankind, was revealed through him.

In common with other Shi'i Muslims, the Ismailis affirm that after the Prophet's death, 'Ali b. Abi Talib (d. 661), the Prophet's cousin and son-in-law, became the first *imam* – the spiritual leader of the Muslim community and that this spiritual leadership – known as *imamat* – continues thereafter by heredity through 'Ali and his wife Fatima, the Prophet's daughter. Succession to the *imamat*, according to Shi'i doctrine and tradition, is by way of *nass* or designation. It is the absolute prerogative of the *imam*-of-the-time to appoint his successor from amongst any of his male descendants, whether they be sons or remoter issue. His Highness Prince Karim, Aga Khan IV, is the hereditary 49th Imam of the Shi'a Imami Ismaili Muslims. Born on December 13th, 1936 in Geneva, Switzerland, he spent his early childhood years in Nairobi, Kenya. He attended Le Rosey School in Switzerland for nine years and graduated from Harvard University in 1959 with a BA Honours in Islamic History. He succeeded his grandfather, Sir Sultan Muhammad Shah Aga Khan, as *imam* of the Ismaili community on July 11 1957, at the age of 20.

Spiritual allegiance to the *imam* and adherence to the Shi'a Imami Ismaili persuasion of Islam, according to the guidance of the *imam*-of-the-time, have engendered in the Ismaili community an ethos of unity, self reliance and a common identity. In a number of countries where they



reside, the Ismailis have evolved a well-defined institutional framework through which they have, under the leadership and guidance of the *imam*, made far reaching progress in the educational, health, housing and economic spheres, establishing schools, hospitals, health centres, housing societies and a variety of social and economic development institutions for the common good of all citizens, regardless of their race or religion.

While I would like to give you a general background on the Ismaili community, more specifically, I would like to highlight the modern apparatus of the community's social governance worldwide. It was the present Aga Khan's grandfather, Sir Sultan Muhammad Shah Aga Khan (d. 1957), who laid the foundation of the community's institutional structures, building on the Muslim tradition of a communitarian ethic on the one hand, and responsible individual conscience, with freedom to negotiate one's own moral commitment and destiny, on the other in order to create new organisational structures as a way forward into the twentieth century.

In 1905, he ordained the first Ismaili Constitution for the social governance of the community in eastern Africa. This, itself, was a very important step among others, towards the modernisation of the Ismaili community. It gave the community a form of administration comprising a hierarchy of councils at local, national and regional levels. It also set out rules of personal law in such matters as marriage, divorce and inheritance as well as guidelines for mutual co-operation and support amongst the Ismailis and their interface with other communities. Similar constitutions were promulgated across the Indian subcontinent. All of them were periodically revised to address the community's emerging needs and circumstances.

This tradition has continued under the leadership of his successor, the present *imam*, His Highness Aga Khan IV, who from the 1970s extended the practice to other regions including the United States, Canada and several European countries as well as East and South Asia, the Gulf, Syria, Iran and Afghanistan after a process of consultations within each respective constituency. In 1986, he promulgated a single constitution that, for the first time, brought under one aegis, the social governance of the worldwide Ismaili community, with built-in flexibility to account for the diverse circumstances of different regions. Served by volunteers appointed by, and accountable to, the *imam*, the Constitution functions as an enabler to harness the best in individual creativity within an ethos of group responsibility in order to promote the common weal. Like its predecessors, the Constitution is founded on each Ismaili's spiritual allegiance to the *imam*-of-the-time, which is separate from the secular allegiance which they owe as individual citizens to their respective national entities. While the Constitution serves primarily the social governance needs of the Ismaili Community, its provisions for encouraging amicable resolution of disputes, through impartial conciliation, mediation and arbitration, are being increasingly used, in some countries, by non-Ismailis.

Before I dwell on the Conciliation and Arbitration Boards, known as CABs, under the global Ismaili Constitution, I would like to touch on the ethos underpinning the whole structure. The inspiration for this is in the revelation of Islam and practice in the early period of Islamic history. This inspiration was to sustain and strengthen the spirit of community through harmony and the spirit of brotherhood. The fountainhead of this is the Holy Qur'an which constitutes the guiding light for all Muslims. The Qur'an says:



If you fear a breach
Between them twain (i.e. husband and wife)
Appoint (two) arbiters,
One from his family,
And the other from hers;
If they wish for peace,
Allah will cause
Their conciliation:
For Allah hath full knowledge,
And is acquainted
With all things.

Qur'an 4:39

In another *ayat*, the Qur'an states:

Allah doth command you
To render back your Trusts
To those to whom they are due;
And when ye judge
Between man and man,
That ye judge with justice:
Verily how excellent
Is the teaching which He giveth you!
For Allah is He who heareth
And seeth all things.

Qur'an 4:31

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

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



In his 'Instrument of Instructions' to Malik b. Ashtar (d. 657), on his appointment as Governor of Egypt, 'Ali defined justice as: 'bringing to everyone what is his due'. Elaborating how this can be accomplished, he wrote: 'Do justice to Allah and do justice to the people, as against yourself, your near ones and those of your subjects for whom you have liking....'¹.

'Compassion,' says Imam 'Ali, to Malik, 'must be administered equitably for all without any prejudice whatsoever,' stressing thereby the principle of the unity of the human family.

Referring to the citizenry, Imam 'Ali said: 'For they are of two types: Either your brother in religion or your like, in creation'.

Caliph Umar's (d. 644) letter to Abu Musa al-Ashari (d. 638) on the eve of his appointment as the Qadi, is also very instructive. He said:

Try to understand the depositions that are made before you because it will be useless to consider a plea that is not valid. Consider all equal before you in the court and (consider them equal) in giving your attention to them so that the highly placed people may not expect you to be partial and the humble may not despair of justice from you. The claimant must produce evidence. An oath must be taken from the defendant. It is permissible to have compromise among Muslims but not an agreement through which *haram* (unlawful) would be turned to *halal* (lawful) and vice versa...

If you have given a judgement yesterday and today you may arrive to a correct opinion upon re-thinking, you must not feel prevented from retracting from your first judgement, because justice is primeval, and it is better to retract than to continue in error. Use your own individual judgement about matters that perplex and about which neither an answer is found in the Qur'an and the *sunna*. Know the similitude and weigh the issues accordingly (here Abu Musa is asked to use individual judgement and arrive to a logical conclusion through the use of *qiyas* and *ijtihad*). If one brings a claim, which he may or may not be able to prove, decide a time-limit for him. If he produces evidence within the time-limit set (by you), you should allow his claim, otherwise you are at liberty to give judgement against him...

According to a Shi'i tradition, Imam Husayn (d. 680), the son of Imam 'Ali, was once asked whether two persons, belonging to his community, who fall out over the issue of debt or inheritance should refer the dispute to a secular authority. The Imam replied that the parties should refer to a qualified person from among his followers. Similar advice occurs in the teachings of Imam Ja'far al-Sadiq (d. 765), another Shi'i *imam*, who, for instance, is reported to have said: 'the charity which Allah loves the most is the peace re-established between quarrelling parties.'

The same principles are found in Fatimid Law. The Fatimids, a Shi'a Ismaili dynasty, ruled Egypt from 969-1171. In his book *Compendium of Fatimid Law*, the noted Shi'i legal scholar, Dr A. A. A. Fyzee, quotes Imam 'Ali from the *Da'a'im al-Islam*, a work compiled by the foremost Fatimid jurist of the tenth century called al-Qadi al-Nu'man (d. 974). He says that

¹ See S. Irtiza Husain, 'Ali - A Great Scholar of Divine Law,' DAWN, Karachi, December 18, 2000. The article is also available at <http://www.dawn.com/2000/12/18/fea.htm>.



according to Imam ‘Ali, ‘The composing of differences between man is better than all manner of fasts and prayers.’

Referring to the conduct of a *qadi*, Dr Fyzee quotes from the Fatimid text:

The *qadi* should have patience; not show his displeasure to any party; give judgement only upon manifestly clear proof; know the law thoroughly; make no difference between layman and lawyer (in an argument in a suit); not accept any present from any party; not make any difference between high and low, the strong and the poor.

Fyzee further states: ‘The *qadi* should also not hold court and perform his functions while he is angry or hungry or sleepy.’

These principles of negotiated settlement, known as ‘*sulh*’ permeate the family law statutes of most Muslim countries, from Morocco to Bangladesh which provide that the judge must first establish a panel to explore the possibilities of a reconciliation. Though marriage in Islam is viewed as a contract and though divorce is allowed where the parties can no longer sustain a viable marriage, the dissolution of a marriage is not taken lightly.

As in other sectors of human endeavour, such as education and economics, so also in the sector of justice and dispute resolution, institutions and methodologies have evolved over time to serve the needs of successive generations of Muslims. In the case of the Ismaili Muslims, that evolution took place through the teachings of the Imam ‘Ali, successive *imams*, the juridical work of the Fatimids and in recent years, through the ongoing teachings of the hereditary *imams* and the work of respected elders in various Ismaili communities.

I will now dwell briefly on the modern infrastructure of dispute resolution in the Ismaili Muslim Community. Under the global Ismaili Constitution promulgated in 1986, provision is made for a National Conciliation and Arbitration Board (NCAB) for each of the territories specified in the constitution and to be known as ‘His Highness Prince Aga Khan Shi‘a Imami Ismaili National Conciliation and Arbitration Board’ for the territory for which it is formed. Submission to the jurisdiction of the Board is made on a *voluntary* basis and the Boards are made up of trusted individuals, mainly volunteers, from various fields of endeavour from within the Ismaili Community. The Boards’ main task is to assist in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters, domestic and family matters, including those relating to matrimony, children of a marriage, matrimonial property and testate and intestate succession.

The Boards also act as an arbitration and judicial body and accordingly hear and adjudicate upon commercial, business and other civil liability matters and; domestic and family matters including those relating to matrimony, children of a marriage, matrimonial property and testate and intestate succession.

The Ismaili Constitution outlines the composition of the Boards and stipulates their tasks which, *inter alia*, include providing rules of procedure and the authority to constitute Regional Conciliation and Arbitration Boards within their jurisdictions. The National Conciliation and Arbitration Board also functions as an appeal Board for any decision of any Regional Conciliation and Arbitration Board within its jurisdiction.



At the international level, the Constitution provides for an International Conciliation and Arbitration Board (ICAB), composed of a Chairperson and six other members. The present panel is made up of lawyers from Canada (1), India (1) and the United Kingdom (2) as well as non-lawyers from Kenya (1) and Pakistan (1).

The International Conciliation and Arbitration Board assists in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters, domestic and family matters, including those relating to matrimony, children of a marriage, matrimonial property, testate and intestate succession.

The ICAB also acts as an arbitration and judicial body and accordingly hears and adjudicates upon the above matters.

The International Conciliation and Arbitration Board hears disputes that are international in scope but also acts as an appeal Board for appeals from decisions of any National Conciliation and Arbitration Board worldwide. A decision by the International Conciliation and Arbitration Board is final, conclusive and binding upon all the parties, provided they have voluntarily submitted earlier to be so bound.

It is worth mentioning that in certain countries such as India, Kenya and Uganda, the law of the land recognises the Ismaili Community's jurisdiction over many aspects of Ismaili personal law. In these countries, the NCABs function as tribunals with the authority to grant divorces and make custody and other ancillary orders. The ICAB also hears appeals from these decisions.

The Ismaili Community's National Conciliation and Arbitration Boards are operative today in Afghanistan, Canada, France, India, Iran, Kenya, Madagascar, Pakistan, Portugal, Syria, Tanzania, Uganda, the United Kingdom and the USA. These Boards consist of outstanding volunteers ranging from judges and lawyers to other professionals, businesspeople and home engineers.

In keeping with the present *imam's* guidance, international training programmes were launched in England in 2000 with a view to upgrading the skills of the many volunteers comprising the network and thus strengthening the whole arbitration, mediation and conciliation system worldwide.

The Ismaili Community's training programmes, conducted by professionals from The Institute of Ismaili Studies in London, the School of Oriental and African Studies of London University and two leading British training organizations: National Family Mediation (NFM) and the Centre of Dispute Resolution (CEDR) with subsequent training programmes utilising professionals from Britain and the international Ismaili community have, to-date, trained over 400 mediators. In some countries, such as Portugal, the Ismaili NCAB training programme trained human resources in mediation for the Ministry of Justice.

These training programmes, based on a combination of an elicitive and prescriptive model, embody some of the best practices available in the field. New insights are being gained from them – particularly the need for greater understanding of cross-cultural sensibilities. Alternative Dispute Resolution (ADR), as formulated today in the Western world, has a great deal to teach, but at the same time it also has a great deal to learn from cultures that have a much greater relational approach to both the conceptualisation of conflict and its resolution.



An individualistic approach to a problem, based on an assumption that each human being is an island on its own, may not work in societies where human beings are more closely woven into a web of community relationships. Societies in Latin America, Africa, Asia and many parts of the Muslim world have traditional approaches to resolving disputes within a community setting which they have been using long before the formal judicial apparatus came into being. These approaches constitute natural pathways to dispute resolution. Reinvigorating them would lead to giving back to these societies the tools that they have always been used to using and which, in real life, will work in ensuring that the healing process that conflict resolution is supposed to engender, does, in fact, take place.

The Ismaili Conciliation and Arbitration system is rooted in tradition, yet its modern infrastructure interfaces comfortably with national legal systems which it fully respects and within whose boundaries the Ismailis live and work. These Boards, like the Ismaili Constitution, itself, are grounded, both in the ethics of the faith but also in the laws of the land where they operate. They aim to give expression to a deep social conscience which characterises the community wherever it lives. In the words of His Highness the Aga Khan

The Ismailis have always prided themselves on their highly developed social conscience. Our faith teaches us that we have obligations far beyond our own or even our family's interest. By the way you conduct your daily lives, by the compassion you show to your fellowmen and women, and above all, by your faith in God, you will ultimately be judged.²

² Speech of His Highness the Aga Khan, Installation Ceremony, Bombay, March 11, 1958.