

COURT-ANNEXED MEDIATION IN RESOLVING DISPUTES  
RELATING TO FAMILY IN MALAYSIA: WHAT WE NEED TO  
KNOW BEFORE WE GO FORWARD

By:  
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ABSTRACT

*This article aims to, firstly, introduce court-annexed mediation in resolving family disputes in Malaysia. Secondly, it will attempt to identify the advantages and disadvantages of court-annexed mediation to resolve disputes relating to family matters, both in the Syariah and Civil Courts in Malaysia. Thirdly, it will provide recommendations to promote CAM. A study was made on the important aspects pertinent to the conduct of mediation in the form of sulh at the Syariah Courts in the State of Selangor which shares uniformed sulh processes used in other syariah courts from other states. Results of the study indicated that the current implementation of CAM in the Syariah Court is guided by a comprehensive set of statutory rules pertaining to sulh whereas the Civil Court is not guided even by a Mediation Act. In addition to that, the study also showed that there are similarities in terms of mediation process practiced in Majlis Sulh with the recommended practices of mediation.*

INTRODUCTION

Mediation<sup>1</sup>, being the least formal form of Alternative Dispute Resolution (ADR) is widely recognized today as a mechanism of dispute settlement. It has

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<sup>1</sup> Mediation is a process in which an impartial third-party mediator facilitates the resolution of a dispute by promoting voluntary agreement by the parties. The mediator facilitates communications, promotes understanding, focuses the parties on their

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attracted attention in many countries especially in the United States, Britain, Australia, New Zealand, Canada and Singapore, to name a few. In Malaysia, however, mediation as opposed to arbitration, may not be as widely accepted as an alternative dispute resolution (ADR) mechanism or an option that immediately comes to mind of even legal practitioners.

The usual emphasis in mediation is the needs and interests of the disputing parties rather than their legal rights alone. The use of mediation as a mechanism to resolve disputes relating to family is aim to facilitate the disputing parties to reach a consensual solution. In family mediation, the mediator is an impartial third party whose task is to assists couples considering divorce to reach mutual decisions. Such mutual decisions may concern divorce, custody and other arrangements relating to finance, children and property.

It is noted that mediation in the form of court-annexed mediation (CAM) is fast gaining confidence on a worldwide basis as an effective mechanism used in resolving family disputes. The CAM process is said to be therapeutic in nature (A. Vasanthi, 2000) for it allows disputing parties to confront the anger of their broken relationship (Andrew W. McThentia & Thomas L. Shaffer, 1985). CAM also benefited children when their parents agree on custodial arrangements (Mnookin & Korhhauser, 1979). In Malaysia, the *pegawai sulh* in the Syariah Court conducts the session by adhering to a standardized guide on ethical standards and work mannerism as specified under *Kod Etika*

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interests, and seeks creative problem solving to enable the parties to reach their own agreement. According to 'The Oxford English Dictionary, The Clarendon Press, Reprinted 1961, vol.VI, pp.291-292, mediation is said to originate from the Latin word '*mediate-us, mediare*, which is defined as 'to occupy an intermediate or middle place or position...' The dictionary also explains that to mediate is to act as 'an intermediary to intervene for the purpose of reconciling and to settle a dispute by mediation'. Kimberly K.Kovach in '*Mediation, Principles and Practice*', St. Paul, 1994, at p.16 defines mediation as "facilitated negotiation, a process by which a neutral party, the mediator, assists disputing parties in reaching a mutually satisfactory resolution". For other examples, see: Brown, Henry and Marriott, Arthur, *ADR Principles and Practice*, Sweet & Maxwell, London, 1977, pp.3-8; Moore, C, *The Mediation Process: Practical Strategies for Resolving Conflict*, Jossey-Bass, San Francisco, 1996 and McCrory, J. "Environment Mediation- Piece for the Puzzle" Vermont Law Review, 1981, vol.6 no.1, p.56.

*Pegawai Sulh* and *Manual Kerja Sulh* (work manual on *Sulh*) (Su'aida, 2008). In contrast, the civil courts judges may adjourn the hearing of a divorce petition to allow parties to explore the avenues for reconciliation. In the civil courts, mediation is not court-directed as yet especially as a mechanism to resolve dispute relating to family. Hence, there arise a need to study the effectiveness of CAM in the Syariah Court in an effort to promote CAM in the civil courts.

#### COURT-ANNEXED MEDIATION

Litigation is generally known as a costly dispute mechanism incapable of delivering a fair result especially if the matters in dispute can be protracted via appeals at one or two appellate level (s) for a couple of years. No doubt, ADR will be an option, however, it will not supersede litigation, for in some cases, the latter will remain the only appropriate method of resolution of dispute. Apart from arbitration, mediation is known to have been embedded in the court's justice system in many developed countries. These court-annexed ADR mechanisms literally avoid disputes filed in the courts from being disposed off outside the judicial system.

CAM has gradually established itself as one of the methods to solve family disputes in many countries including Malaysia. It signifies a situation when a judge refers a family dispute to a mediator, with or without the consent of the parties involved in a case. This is perceived as an attempt to provide an alternative mode to the disposal of cases. In fact, CAM has gained recognition in many developed countries such as the United States, United Kingdom, Australia and New Zealand. In Malaysia, CAM is practiced in the syariah courts under the name of *Al-Sulh* (الصلح).<sup>2</sup> The *Majlis Sulh* is a forum to hear

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<sup>2</sup> *Al-Sulh* is a well known term in Islamic law which means reconciliation, discontinuance or stoppage of dispute or dissension and contention. Legally, *al-sulh* is termination or avoidance of dispute or law suit between two parties. See further explanation by Su'aida Binti Safei. 2008. "*Majlis Sulh* (Islamic Mediation) In the Selangor Syariah Court and Malaysian Mediation Centre of The Bar Council: A Comparative Study". *International Seminar on Comparative Law 2008 (ISCOM2008)*. Marriot Hotel, Putrajaya. 18-20 November. p. 227.

suitable Shariah matters.<sup>3</sup> Family mediation involves an impartial third person, i.e. the mediator who assists troubled couples considering either separation or divorce to make arrangements tailored according to an agreed mutual decision. The process itself aims to facilitate consensual solutions by the parties in dispute. Parties are facilitated by the mediator along the process where they are guided to view each other not as adversaries. In the civil family courts, issues to be decided may concern separation, divorce, custody and other arrangements relating to children and property. The mediator stands as a neutral party with no power to impose a settlement on the respondents, who retain the authority to make their own mutual decision. Frequently, mediation begins with a "general caucus". In a general caucus, the parties and the mediator meet in the same room. The mediator establishes the ground rules in an "agreement to mediate." In court-mandated mediation, the court order will often contain or refer to the "rules of mediation."

According to former Bar Council Arbitration and ADR Committee chairman Datuk Kuthubul Zaman Bukhari: "Court-annexed mediation is hugely successful in California. There, 97 per cent of cases are settled by ADR. Only three per cent go to hearing."<sup>3</sup> However, in Malaysia, CAM is yet to be implemented in the civil court dealing with disputes relating to family. Currently, proceedings regarding the welfare of children under the Guardianship of Infants Act 1961 or the Adoption Act 1952 are heard in the Sessions Court. Proceedings under the Domestic Violence Act 1994 are heard either in the Sessions Court or in the High Court. Be that as it may, an in-built 'conciliatory procedure' is designed to deal with matrimonial proceedings which are heard in the High Court. The in-built procedure is spelt out under the Law Reform (Marriage and Divorce) Act 1976 governing non-Muslim

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<sup>3</sup> *Majlis Sulh* takes place in the Shariah Lower Courts and is used as a forum to settle disputes relating to ancillary claims of divorcing couples such as maintenance of the children, *mutaah* and maintenance of a wife during *iddah* (waiting period imposed on a wife who is divorced by her husband, or whose husband has passed away. For the former, the waiting period lasts normally for three months and ten days reflecting three menstrual cycles if the woman is divorced by her husband. For the latter, the waiting period is four months and ten days).

<sup>3</sup> See Aniza Damis. *Go Mediate!: Mediation may be ordered to clear cases*. (Online posting). 18 June 2007. [http://www.malaysianbar.org.my/bar\\_news/berita\\_badan\\_peguam/go\\_mediate\\_mediation\\_may\\_be\\_ordered\\_to\\_clear\\_cases.html](http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/go_mediate_mediation_may_be_ordered_to_clear_cases.html).

marriages (“the LRA”).<sup>4</sup> Section 106(B) of the LRA specifically states the setting up of a “conciliatory body” as being either a council set up for purposes of reconciliation by appropriate authority of any religion, community, clan or association; or a marriage tribunal; or any other body approved by the Minister by notice in the gazette. Hence, referral to a conciliatory body is required under the LRA prior to the filing of divorce petition. It is noted that eventhough mediation is not made mandatory under the court’s direction, the civil court may at any stage of the proceedings adjourn the proceedings for such period as it thinks fit to enable attempts for reconciliation (Kamala Pillai, 2009). However, the civil court is not empowered under the law to compel disputing parties to refer to mediation. It also appears that the Malaysian Mediation Centre (MMC) which was established in 1999 under the auspices of the Bar Council of Malaysia is not part of the civil court system. Notwithstanding that, the respective counsels acting for the disputing parties may refer the dispute to the MMC provided that their respective client’s consent is obtained prior to the referral..

In contrast to conciliation under the LRA, Syariah courts in Peninsular Malaysia have provided the space for implementation of CAM namely *Sulh*. *Al-sulh* is well accepted by disputing parties from the muslim community as evidenced by the many matrimonial cases settled by way of mutual agreement of the parties (Sheikh Ghazali, 2000). Apart from matrimonial cases are cases relating to *‘eddah* maintenance, custody and child maintenance. Among the states that have implemented *sulh* are Selangor, Federal Territory of Kuala Lumpur, Malacca, Johor, Negeri Sembilan, Terengganu, Kelantan, Perlis and Penang. The Chief Registrar or Registrar as a Chairman of *Sulh* is empowered

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<sup>4</sup> See Sections 55 and 106 of the Act. Section 55(1) provides that the petitioner should before the presentation for divorce, sought the assistance and advice of such persons or bodies as are available for effecting a reconciliation. The reference to persons and/or bodies here is wide and in the case of *C v A* (1998) 4 CLJ 38, the High Court held that attempts by relatives to reconcile the parties would be considered acceptable for it falls under the definition of “persons and/or bodies”. S.106 also facilitates reconciliation whereby it specifically refers to a “conciliatory body” as opposed to Section 55 that refers to availabilities of persons or bodies. In contrast, the Family Court of Singapore provides mediation which is integrated into the litigation process, whereby court mediation and counseling are voluntary (see s.50(2) of the Women’s Charter); free of charge, and are fixed in a timely manner, confidential, mediators are trained and act as a neutral third party.

to determine whether a case filed into the court's registry is suitable to be heard by *sulh* or in a full trial. He would fix a date for the *Majlis Sulh* by issuing out a notice not later than two weeks before the mention date.<sup>5</sup> A contempt of court proceedings can be initiated against any party who fails to appear at the *Majlis Sulh*. The Chief Registrar or Registrar may also refer any *sulh* officer to act as chairman of the *Majlis sulh*.<sup>6</sup>

Mediation session is conducted by the court-appointed-mediator known as *pegawai sulh*. The *pegawai sulh* conducts the session by adhering to a standardized guide on ethical standards and work mannerism as specified under *Kod Etika Pegawai Sulh* and *Manual Kerja Sulh* (work manual on *Sulh*) (Su'aida, 2008). This is to ensure that the whole process is conducted in a well-defined manner leading to the successful drawing up of a mutual agreement of the parties in dispute which will be handed to the presiding judge for endorsement as an order of settlement.<sup>7</sup>

On the 'Work Manual of *Pegawai Sulh*',<sup>8</sup> Sheikh Ghazali (2002) states the duties of the *pegawai sulh* are as follows:

- i. not to conduct the *Majlis Sulh* when he is not calm, angry, hungry, thirsty, sleepy, tired and unhealthy. However, practically, it would be difficult to ensure that the *pegawai sulh* does not conduct the *sulh* session in violation of any rules as prescribed under the Work Manual of *pegawai sulh*.
- ii. to not to leave the *Majlis Sulh* as scheduled without any reasonable reason or without obtaining permission from the Chief Syarie Judges. Reasons for doing so are aplenty such as being unprepared, seeking opinion from fellow colleague or attending to personal matters.
- iii. not to conduct the *Majlis Sulh* when the parties in dispute are his enemy or friend who is capable of influencing him. There are

<sup>5</sup> *Akta Tatacara Mal Mahkamah Syariah and Arahan Amalan JKSM 8/2003.*

<sup>6</sup> n.a.. 21 February 2009. *Proses Pengendalian Majlis Sulh di Mahkamah Syariah.* <http://www.esyariah.gov.my>.

<sup>7</sup> n.a.. 21 February 2009. *Proses Pengendalian Majlis Sulh di Mahkamah Syariah.* <http://www.esyariah.gov.my>.

<sup>8</sup> See Sheikh Ghazali Hj. Ab. Rahman. 2002. *Manual Kerja Sulh Mahkamah Syariah / Jabatan Kehakiman Syariah Negeri-negeri Seluruh Malaysia.* pp. 12-14.

- potential dangers for the *pegawai sulh* to become the advocate for and protector of the weaker party or his friend and decreasing that of the stronger disputant who happens to be his enemy;
- iv. act firmly and fairly and not to be influenced by surrounding circumstances or by people who attend before him. The *pegawai sulh* should not be seen as taking sides with the weaker party or vice-versa;
  - v. be open, friendly and patient throughout the *Majlis Sulh*. In doing so, the *pegawai sulh* may propose courtesy rules apart from keeping the disputing parties out of a circle of criticism, defence and justification ;
  - vi. ensure the process of *Majlis Sulh* is conducted in line with *Manual Kerja Sulh*. In this regard, the whole session should be conducted professionally according to governing procedures under the *Manual Kerja Sulh* to ensure the session is not disrupted due to the 'misconduct' of the *pegawai sulh*. Breach of any provisions of the Code of Ethics for *pegawai sulh* will subject him to action being taken against him under the Selangor Public Officer Rules 1995; and
  - vii. to control the smooth operation of the *Majlis Sulh*. The *pegawai sulh* should adopt a positive approach when explaining his role. The *pegawai sulh* should also avoid asking the disputing parties's approval of the process in the course of making his opening statement. For example, the *pegawai sulh* should refrain from asking, " Is that acceptable for you?" at the stage of opening statement or even at other stages of the session. The reason is that the disputing parties expect the *pegawai sulh* to be in control throughout the whole session.

It is unfortunate to note that for matters listed under items iii to vii, any complaint against the conduct of the *pegawai sulh* can only be attended to based upon a formal complaint lodged by any one of both of the disputants against him/her.

## ADVANTAGES OF COURT-ANNEXED MEDIATION (CAM) IN FAMILY DISPUTES

Mediation was perceived to have value for the court system. The outlined benefits of having CAM are said to be unlimited. One main advantage of CAM is that it is a non-confrontational procedure which offers parties to maintain a further development of the family relationship. The CAM process allows the parties in dispute to confront the anger of their broken relationship rather than avoiding it (Andrew W. McThentia & Thomas L. Shaffer, 1985). CAM allows disputants to give each other a chance to achieve their own resolution without being tied down by formal legal arguments advanced in a trial. However, this view may be challenged if the disputants' relationship is 'irretrievably broken down' or if violence is involved.

For many disputants, the promise of mediation lay in empowerment of individuals to develop their own solutions in informal, convenient meetings with minimal involvement from the justice system (Shonholtz, 1993, p. 205). However, the success of this belief lies heavily on the skills and strategies employ by mediators (Charlton & Dewdney, 2004).

Another advantage of CAM is that it is guided by a well-designed procedure compared to the ordinary court procedures meant for trial. CAM, in general, begins in the following order: (i) pre-mediation process – where parties sign a mediation agreement indicating their submission to mediation; (ii) preliminaries - an introduction to mediation; (iii) mediator's opening – where ground rules are laid down by the mediator for the session; (iv) joint session – parties are invited to state their respective cases in each other's presence; (v) caucuses -optional but usually exercised to enable the parties to vent emotions and to speak freely; and (vi) settlement agreement- where parties sign a settlement agreement witnessed by the mediator. Similarly, the *Manual Kerja Sulh* shares quite similar rules as sets out in the following steps to be abided by the *pegawai sulh* in the following order: (i) introductory statement by *pegawai sulh* (*ta'arruf*); (ii) presentation of case by the parties in dispute; (iii) joint discussion; meeting of mediator with each of the parties in dispute (caucus); (v) joint consultation; and (vi) written agreement based on mutual agreement.

Mediation can also be regarded as a "therapeutic experience" (Boulle, 2001). Disputing parties are given a "therapeutic experience" when they learn



something about how better to handle conflicts that may arise in the future (A. Vasanthi, 2000). The mediator alters the dynamics of negotiation by encouraging disputing parties to exchange information in a less stressful environment and promote a productive sense of emotional expression (Stephen Golberg, Frank E.A Sanders and Nancy H. Rogers 1999). In this sense, disputing parties engage in a discussion with the assistance of the mediator as an impartial third party who imposes no binding decision upon them but facilitate them towards resolution of their disputes by using certain procedures, techniques and skills (Brown and Marriot, 1997).

It is common to note that most of the parties in the Syariah Subordinate Courts are not legally represented. In *Majlis Sulh*, the *pegawai sulh* acting in the capacity of *syariah* courts staff provides the parties in dispute with the relevant information on their legal rights and duties in order to empower them in negotiating their own terms of settlement, free from any power imbalance. The *sulh* process at the Syariah Court is handled by professionally trained mediators. The *pegawai sulh*, in general holds a first degree in Islamic studies from any local or foreign universities and a Diploma in Administration and Islamic Judiciary (DAIJ) either from Universiti Kebangsaan Malaysia (UKM) or International Islamic University, Malaysia (IIUM) and are accredited mediators with the Accord Group, Australia who had completed the 40- hour-training in mediation.

The parties in dispute are not put in a “win-lose situation” as the CAM focuses on a mutually beneficial outcome. Children benefit when parents agree on custodial arrangements (Mnookin & Korhhauser, 1979).

Private caucus (private meetings) held by the mediator enables the mediator to work with respondents to improve their attitudes towards and perceptions of the other. This allows him to guide the respondents towards settling the marital conflict.

A court-sponsored process requires a smaller operating budget than one that is operated by independent private mediators. CAM is a self-empowering process which allows parties to retain control over the procedures and the outcome (A.Vasanthi, 2000). Apart from that, disputing parties may be more motivated to attend a mediation session sanctioned by the court as the power of the court can be brought to bear against non-appearing parties such as in the form of contempt of court even though this is rarely done.

One of the most important mediation rules is the requirement for confidentiality. Typically, all matters disclosed or occurring during mediation, and any record made during the procedure, are confidential and generally may not be disclosed to anyone unless the parties agree to the disclosure (Charlton & Dewdney, 2004).

A mediation settlement can be reviewed immediately by a judge for correctness and evenhandedness and declared a formal order of the court. One reason why courts initially embraced mediation was to help relieve their vastly overloaded dockets. One “plus point” about mediation is the potential for a large number of cases to be processed in a relatively short amount of time. After a failed mediation, it might be possible for the parties in dispute to proceed immediately to adjudication without further delays.

The mediator plays the role of a neutral or impartial third party and shows no sign of biasness to any of the parties in dispute. In this sense, he is neither a representative nor an agent of the parties in dispute, nor an advocate who will fight for their interests. CAM is one way to help ease the backlog of family disputes in the courts.

#### DISADVANTAGES OF COURT-ANNEXED MEDIATION (CAM) IN FAMILY DISPUTES

The present state of relations between mediation and the justice system raises a number of concerns regarding the integrity and viability of CAM in the Syariah courts. This paper will now generally discuss the possible disadvantages of the current CAM, which is implemented in the Syariah Courts.

Mandatory nature of CAM denies the freedom of parties in dispute to ‘settle’ their disputes. If CAM is made mandatory to the parties in dispute, then the notion that parties in dispute are actually crafting their own mutual decisions is illusory. Parties in dispute are actually compelled to attend to the mediation session at a fixed time and on a fixed date even if they are not prepared to sit on the mediation table.

CAM is also not suitable if there exists power imbalances among the parties in dispute. There may be a dominating party (husband or wife) whose temperament cannot be changed drastically over a mediation session. There

may also be power imbalances in terms of knowledge, maturity, experience and negotiation ability. The dominant party (spouse) may be able to impose selfish decisions and induce compliance by the other.

There is no stringent guideline as yet to restrain manipulation of knowledge obtained in general caucus by mediator. Apart from that, a mediator might be inclined to shape or dictate the terms of settlement in accordance with what he thinks is right rather than allowing the parties to decide on their own.

CAM is also found to be not suitable if disputing parties have previously encountered marital violence. Prolonged abusive behaviour of a spouse may deter the other spouse to attend any meeting, whether formal or otherwise especially in a complaint regarding the commission of an offence under the Penal Code. s.3 Penal Code (Act 574) covers offences affecting the human body under the Penal Code (Act 574) in Chapter XVI (ss 299-377E). In proceedings heard in the civil family court involving domestic violence, the civil family court may also issue a protection order restraining the person against whom the order is made from using domestic violence against the complainant; the child; or the incapacitated adult. Domestic Violence Act, (s.5 (1)(a)-(c).

Basically, private caucuses are found within the sequence of stages in most of the *Manual Sulh* practiced by the Syariah Courts in Malaysia. For example, *Majlis Sulh* in the State of Selangor mentions of the stage of having private caucuses.<sup>9</sup> However, mediation preparation is often limited if there is insufficient information about the parties' strengths and weaknesses. There is also no research to show to what extent the *pegawai sulh* is capable of handling private caucuses.

There is also a constant fear that most *pegawai sulh* are not adequately trained and inexperienced. *Pegawai Sulh* is exposed more to "substantive-based seminars" rather than "skills-based workshops". Hands-on experience can be polished by undergoing mediation skills workshops instead of attending seminars alone. It is observed that whilst *pegawai sulh* is usually graduates of syariah degree, but this is not the case with mediators with the MMC. The MMC places stringent requirements for advocates and solicitors in Malaysia to

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<sup>9</sup> See *Manual Kerja Sulh Mahkamah Syariah; BAB 6 – PERTEMUAN SEBELAH PIHAK (KAUKUS)*.

undergo a 40 hour intensive training under experienced trainers before a final assessment to determine their suitability for admission as accredited mediators. Apart from that, the MMC's pool of accredited mediators does come from other professionals like academicians.

CAM is a high risk process for parties in dispute who do not strategize and depends highly upon the mediator who for example, may lack certain skills or ethical behaviour (Sheppard, 1993). The objective of mediation may not be achieved if the mediator lacks prior relevant experience in dealing with family disputes. The situation in Malaysia is unlike in England and Wales where family mediators generally are either in the legal or helping professions such as solicitors, judges, family therapists, probation officers and counsellors). Hence, the untrained mediator may not be aware of, or know how to recognize the presence of family violence in or to protect a family member who is involved in a family dispute.

Coerced mediation diminishes the freedom of parties to decide on the method to resolve their disputes. If mediation processes and their mediators are subject to bureaucratic pressures to keep cases moving through the docket via a written agreement, they will likely transfer that pressure on to the parties seated around the mediation table. Hence, the statement that the mediator is powerless and is in no position to impose a decision on the parties is questionable in CAM. "Coerced mediation", whether done directly or indirectly, to a greater or lesser extent, would destroy this basis of freedom to negotiate and mediate. Also mandatory mediation as part of every law suit in all or certain fields would degrade mediation to a step which parties had to get behind themselves in order to proceed to trial and by this diminish the chances of settlement by mediation.

It is also unfortunate for some disputing parties to treat CAM as an extension of the court system. Disputing parties sometimes agree to mediation nonetheless in the hope that it will impress the judge or because they feel that this is a required part of the whole court process. (Merry, 1989).

Neutrality is a fundamental element of mediation practice. However, neutrality is not easy to be demonstrated by mediators who practically fail to win the trust of both parties. Yet first impressions run deep, and the parties in dispute are naturally defensive when first called to mediation.

There is also a presumption that the court will decide in favour of the plaintiff may become explicit. Many cases are referred to mediation with the

contingency that if no agreement is reached, the case may proceed immediately to court (DeJong, 1983). If mediation becomes tightly connected to the court structure, the presumption that the court will decide in favour of the plaintiff may become explicit.

## METHOD

A study on CAM will be made upon the mediation process in the Syariah Court at the State of Selangor in order to find out whether its implementation is in line with the general guidelines recommended for the conduct of mediation.

## RESULTS

It is found that the implementation of *sulh* in the Syariah Courts at Selangor is prescribed under the following enactments, work manuals, circulars and rules:<sup>10</sup>

- a) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 1/2003.
- b) Enakmen Kanun Prosedur Mal Syariah Selangor No. 7/1991.
- c) Enakmen Tatacara Mal Mahkamah Syariah ( Negeri Selangor) 4/2003 (Kaedah Tatacara Mal (*Sulh*) Selangor 2001 belum diperbaharui mengikut enakmen 2003)
- d) Kaedah-kaedah Tatacara Mal (*Sulh*) Selangor.
- e) Manual Kerja *Sulh* Jabatan Kehakiman Syariah Malaysia dan Pekeliling Ketua Hakim MSS 1/2002 (Kod Etika Pegawai *Sulh* dan Manual Kerja *Sulh* MSS).
- f) Pekeliling Ketua Hakim MSS 9/2002 [Bidangkuasa Pegawai *Sulh* (Hakim)].
- g) Arahan Amalan Jabatan Kehakiman Syariah Malaysia 3/2003 (Pemakaian *Sulh*).
- h) Arahan Amalan Jabatan Kehakiman Syariah Malaysia 7/2003 (Cara menyimpan dan melupuskan Catatan Pegawai *Sulh*).

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<sup>10</sup> Sheikh Ghazali Haji Abdul Rahman. 1999. "*Sulh dan Hakam Dalam Undang-Undang Keluarga Islam*". *Undang-undang Keluarga Islam dan Wanita di Negara-negara ASEAN*. p. 88.

- i) Arahan Amalan Jabatan Kehakiman Syariah Malaysia 8/2003 (Prosedur Penyerahan Notis *Sulh*).

The study shows that the process of implementation of *sulh* is executed based on the *Manual Kerja Sulh* (Work Manual on *Sulh*). The *Manual Kerja Sulh* provides a guide to the standardized procedures which need to be followed by all *pegawai sulh* in conducting the *Majlis Sulh*. It is noted that the steps in conducting the *Majlis Sulh* especially relating to early statement by *pegawai sulh* (*ta'arruf*), early presentation by disputing parties, joint discussion and caucus<sup>11</sup> are a replication of the rules set out under the MMC mediation process as stated in the front page of the MMC 'Mediation Kit'.

It is also found that impartiality and fairness are important requirements expected to that of a *pegawai sulh* (see provisions in item 3(a), 3(c), 3 (h), item 5, item 7(iv), item 7 (viii), item 8(i), item 8(ii) and item 8(iv) of the Code of Ethics for *pegawai sulh* and *Manual Kerja Sulh* in Bab 6(f). Similar provisions are found under the MMC's governing Code of Conduct and also rule 6.1 and rule 6.2 of the MMC's Mediation Rules.

The element of honesty is another important requirement of the mediator (see item 3(b) of the Code of Ethics for *pegawai sulh*. Similar provisions are found under rule 19.2 of the MMC's Mediation Rules.

The conduct of mediation must be done expeditiously (see item 4 of the Code of Ethics for *pegawai sulh*. Similar provisions are found under term 1.1 of the MMC's Code of Conduct).

The conduct of mediation must be done in confidentiality (see item 8(iii) of the Code of Ethics for *pegawai sulh* and *Manual Sulh*; Bab 3 and Bab 10. Similar provisions are found under term 4 of the MMC's Code of Conduct, Rule 15 and Rule 16 of the MMC's Mediation Rules).

The mediator is to refrain from acting as a witness connected to the mediations which they had involved earlier (see item 8(vii) of the Code of Ethics for *pegawai sulh* and *Manual Sulh*; Bab 3(i). Similar provisions are found under MMC 's Mediation Rules; rule 15.3).

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<sup>11</sup> n.a.. 21 February 2009. "Proses Pengendalian Majlis *Sulh* di Mahkamah Syariah". Retrieved from <http://www.esyariah.gov.my>.

## CONCLUSION AND RECOMMENDATIONS

The demand for mediation in family disputes has increased rapidly in many developed countries. For CAM in family-related disputes, parties in dispute as well as court-appointed mediators need to appreciate the basic concept of mediation. While the courts help provide the support to many of the CAM processes, the same inefficient court system may also unduly influence the field's further development and in some instances even compromise its integrity.

In order to promote CAM, the writer suggests a few recommendations. Firstly, CAM must contain certain safeguards. To meet society's needs and expectations for family dispute resolution services, CAM processes must safeguard their neutrality, ensure freedom from coercion, and gently yet firmly turn back attempts at judicial control and oversight. Even where coercion and partiality do not result from close ties to the courts, the mere appearance of court control may damage CAM's credibility and viability.

Secondly, members of the public must be kept aware of the advantages of CAM.

Awareness and understanding of CAM's credibility and effectiveness in solving family disputes must come alongside with other social and legal services as an option of first resort, not an afterthought, particularly if the litigation process is prolonging sufferings of the parties in dispute. Thirdly, parties must be given the freedom to withdraw from CAM session. In CAM, the court should have powers to order parties to go for mediation but with freedom to withdraw from the mediation process at any time if the neutrality of the mediator is questionable. Finally, disputing parties must be able to assess the mediator in terms of neutrality, emotional stability and sensitivity. By interviewing the mediator, disputing parties can determine the suitability or style employ by a particular mediator. In the Syariah Court, the *pegawai sulh* must to have the right attitude in line with *Kod Etika Pegawai Sulh* and the courts must direct them to undergo continuous comprehensive training programmes to ensure that the mediation process is dealt with in a professional and efficient manner.

Last but not least, it can be safely opined that CAM is not a new mechanism in resolution of disputes relating to family. In Malaysia, the Syariah Courts deserved to be complemented for setting out a good example

for CAM whereas the current practice by the judiciary in the civil courts, in particular when the sitting judge assumes the role of a mediator i.e. CAM, is not appropriate and need to be further evaluated.

In line with the implementation of electronic courts in many developed countries such as United States of America, Australia, Canada and Singapore, it is high time for Malaysia to turn to online form of dispute resolution especially in the form of online mediation. A futuristic hope is that “eMediationroom” be introduced where the disputing parties and the mediator can interact online. The *eAlternative Dispute Resolution (e@dr)* practiced in Singapore can be used as a guideline where it provides a platform for disputants to resolve their disputes via internet. Apart from that Malaysian civil judges should be given the opportunity to obtain input from other members of the judiciary from other countries. The recent Singapore *eJustice Judges’s Corridor* is one excellent global forum whereby judges all around the world can discuss about the best practices of CAM apart from the usual judicial issues.

## REFERENCES

- Brown, H. and Marriott, A. 1977. *ADR Principles and Practice*, Sweet & Maxwell, London,
- Boulle, Laurence. 2001. *Mediation: Skills and Techniques*. Australia. Butterworths.
- Charlton & Dewdney. 2004. *The Mediator’s Handbook. Skills and Strategies for Practitioners*. Sydney. Thomson LawBook Co.p. 340
- DeJong, W. 1983. ‘*The Use of Mediation and Arbitration in Small Claims Disputes*’. Washington, DC: Department of Justice.
- Galaway, B. ‘*Mediation and Criminal Justice: Victim, Offenders, and Community*’. Newbury Park, California: Sage Press.
- Moore, C, 1996. *The Mediation Process: Practical Strategies for Resolving Conflict*, Jossey-Bass, San Francisco,
- McCrory, J. 1981. “*Environment Mediation- Piece for the Puzzle*’ Vermont Law Review, Vol.6 (No.1): p.56.
- Mnookin & Korhhauser, 1979. ‘*Bargaining in the Shadow of the Law: The Case of Divorce*’. *The Yale Law Journal*. Vol. 88. p.959.
- Pillai, Kamala. 2009. *Family Law in Malaysia*. Malaysia, LexisNexis Law Sdn. Bhd..



Su'aida Binti Safei. 2008. "Majlis Sulh (Islamic Mediation) In the Selangor Syariah Court and Malaysian Mediation Centre of the Bar Council: A Comparative Study".

*International Seminar on Comparative Law 2008 (ISCOM2008)*. Putrajaya: USIM. pp. 231-233.

Sheikh Ghazali Haji Abdul Rahman. 2000. "Sulh Dalam Perundangan Islam". *Jurnal Undang-undang IKIM*. Kuala Lumpur : Penerbit IKIM. Vol. 4. (No. 2); July-December. pp. 6-8.

Sheikh Ghazali Hj. Ab. Rahman & Others. 2002. *Manual Kerja Sulh Mahkamah Syariah / Jabatan Kehakiman Syariah Negeri-negeri Seluruh Malaysia*. pp. 12-14:

Sheppard *et.al.* 1979. *National Evaluation of the Neighborhood Justice Centers Field Test—Interim Report*. Washington, DC: Department of Justice.

Shonholtz, Raymond. 1993. *Justice from another perspective: The ideology and developmental history of the Community Boards Program* in Merry, Sally and Milner, Neal, eds. *The Possibility of Popular Justice*. Ann Arbor: University of Michigan.

Goldberg, S.B., Frank E.A. Sanders and Nancy H.Rogers (Ed). 1999. *Dispute Resolution: Negotiation, Mediation and other processes*. Aspine Law & Business, Gaithesburg and New York.

Vasanthi,A., 2000. *Mediation of Family Disputes. /NSAF, The Journal of the Malaysian Bar.*, Vol. XXX (No.4): pp.45

W. McThentia, A.W. & Thomas L. Shaffer, T.L.1985. *For reconciliation*. The Yale Law Journal, p.1664

#### **Statutes:**

Law Reform (Marriage and Divorce) Act 1976 (Act 164)

Domestic Violence Act 1994 (Act 521)

Adoption Act 1952 (Act 257)

Penal Code (Act 574)

Syariah Court Civil Procedure (State of Selangor) Enactment 2003

Syariah Court Civil Procedure (Sulh) Federal Territory Rules 2004

Syariah Court Civil Procedure (Sulh) Melaka Rules 2004.

Civil Procedure Rule (Sulh) Selangor 2001