

## FAITH-BASED MEDIATION: A COMPARATIVE PERSPECTIVE ON THE APPLICATION OF *SULH* AND HO'OPONOPONO

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### ABSTRACT

The application of mediation can be traced in many culture and tradition across the world. Closely related to the faith of the people, mediation has essential roles in resolving disputes among the members of the society. While the faith-based mediation of Ho'oponopono is famous in Hawaii, the faith-based mediation of *Sulh* is famous among Muslims in South East Asia. The dispute resolution strategies which are used in Ho'oponopono and *Sulh* are comparatively analysed in this research. The practices of *Sulh* are evaluated based on empirical findings collected from Pasir Mas (Kelantan, Malaysia) and Indragiri Hilir (Riau, Indonesia). Meanwhile, the qualitative findings on practices of Ho'oponopono are collected from earlier researches that utilised empirical investigations. By employing a qualitative doctrinal analysis, this research identifies similarities and differences of faith-based mediations of *Sulh* and Ho'oponopono. At the same time, the said faith-based mediations' potentials and challenges are explored. Focusing on an expeditious resolution, it is found that faith-based mediations are still applied among the members of the society in Malaysia, Indonesia and Hawaii.

**Keywords:** *Dispute Resolution, Mediation, Sulh and Ho'oponopono.*

### Introduction

Throughout the history of the world, traditional societies have their own unique nature of dispute resolution and dispute management. Such dispute resolution and dispute management in the traditional societies are influenced by their customs, cultures, morals, ethics and beliefs. Belief or faith plays an essential role in the process of dispute resolution and vital for its enforcement towards the individuals and society. One of the well-known processes of dispute resolutions is mediation. Riskin et. al. defined mediation as "an informal process in which an impartial process in which an impartial third party helps others resolve a dispute or plan a transaction but does not impose a solution" (Riskin and Westbrook, 1987). Based on their definition, significance characteristics of mediation can be traced. The process of mediation is basically voluntary in nature, where the disputing parties cannot be forced to mediate. It is an informal dispute resolution that can be conducted by a mediator or more than one mediator in helping the disputing parties to reach their resolution. Unlike the process of litigation or arbitration, the essential role of the mediator is to assist the disputing parties to arrive to the possible resolution. The mediator is not responsible to decide for them.

The modern practice of mediation is depended heavily on the conclusion of agreement concluded between the parties after they reached a resolution through the mediation process. The entire decision making is left totally on the hands of the parties. By doing so, the disputing parties have a high degree of participation in reaching the resolution. This may influence the said parties to have more inclination to fulfil the resolution from the mediation process based on their personal urges and capacity (which subject to their moral values and ethics). The resolution from the mediation process is approved

through (i) personal practices; (ii) the principles of Contract Law which accordingly bind the parties upon the conclusion of valid agreement; (iii) the recognition from the courts; and (iv) the legislated Act or statute. Some countries such as United Kingdom and Malaysia choose to enact a specific Act in governing mediation process, such as Mediation Act 2012. This practice is considered as an effort in making mediation process to be accepted as a formal process and not just merely an informal process without any legal consequences. Without any valid resolution concluded between the parties, the mediation process and its content are safe and kept in confidentiality. This is contributed from the setting of the mediation that must be done in private. It is also a part of modern trend of judiciary in annexing the mediation process into the court system. This is usually effective in reducing backlog cases or overly crowded queue of legal cases. Such practice can be seen in Malaysia through the establishment of Kuala Lumpur Court Mediation Centre or KLCMC. There is a rapid effort done by Malaysian judiciary in expanding such centres throughout Malaysia.

When a faith-based mediation is mentioned here, it refers to the practice of mediation that has influence from a religious belief or faith and traditionally applied among the members of society. The mediator or mediators are usually those persons who are highly respected by the members of the society. Such process of mediation is not specifically bound by a legislated statute or act or an institution. It is engraved and developed throughout generations based on their respective faith and belief. In this research, two faith-based mediation processes are identified. They are: (i) Ho'oponopono which is famous in Hawaii, United State of America and (ii) *Sulh* which is famous among Muslims in South East Asia. The data obtained for this research are derived from the practices of *Sulh* as evaluated from the empirical findings collected from Pasir Mas (Kelantan, Malaysia) and Indragiri Hilir (Riau, Indonesia). Meanwhile, the qualitative findings on practices of Ho'oponopono are collected from earlier researches that depended on empirical investigations.

In exploring the existence of faith-based mediation in the modern time, this research is aimed: (i) to comparatively evaluate the faith-based mediation practices of Ho'oponopono and *Sulh*; (ii) to appreciate the dispute resolution strategies which are used in both of the said faith-based mediation processes; (iii) to identify the positions of the faith-based mediation of *Sulh* and Ho'oponopono in the current legal practice.

The presentation of this research is arranged as follows. After the introductory section, the second section presents the literature review from the available previous researches. The third section presents the comparative evaluation on the faith-based mediation practices of Ho'oponopono and *Sulh*. The fourth section provides the discussion on the positions of the faith-based mediation of *Sulh* and Ho'oponopono in the current legal practice. The fifth section is arranged for the recommendations from the researchers in relation to the faith-based mediation. The sixth section is the final section that provides the conclusion of the research.

## Literature Review

Since 1960s, the movement of Alternative Dispute Resolution (ADR) marks the modern practice of dispute resolution processes globally. According to Horowitz and Boardman (1994), the theories and practices are dominantly focused on Western perspective. This situation somewhat tends to neglect the existence of non-Western perspective of dispute resolution. Based on researches done by Mohd. Zain and Ahmadi (2016), Castro and Nielsen (2001), and Callister and Wall (1995), they found that there are unique perspectives of dispute resolutions that can be found in other parts of the world such as in China, South Korea, Japan and South East Asia. Such unique perspectives can be attributed to these countries' long history of civilisations. The aim for mediation process is not only to resolve the dispute, but it is also to maintain the societal harmony, peaceful function of the society, respecting their leader and acknowledging each other's duties and rights.

Long before the introduction of common law based legal system through the colonization of Tanah Melayu, Sabah and Sarawak by British. ADR is already in existence and practiced by the people. Just

like other Asian civilizations (Pryles, 2006), the traces of ADR mechanisms have their basis from the belief of the people and religious traditions which heavily influenced the cultural practices of the society. Abdul Wahab (2013) noted that alternative mechanisms in settlement of disputes such as mediation is already been practiced since 1600s in Malaysia. Bastin and Winks (1966) believed that such practices have always been applied prior to such date in South East Asia, including Indonesia. Hickling (1987) observed that ADR which are identical to mediation and conciliation processes can be considered naturally practiced in resolving disputes. They are applied throughout generations among Malays, Chinese, Tamil, Dayaks and Bidayuhs (Hickling, 1987). Abraham (2006) found that the Penghulus also play the role as mediators in resolving disputes. Syed Hassan and Cederroth (1997) identified that the practices of conciliation through the concept of *Sulh* are rampantly applied to settle disputes in family law among Malays. Ramli (2010) finds that an expert determination or *fatwa* of a *Mufti* which is a recognized form of dispute resolution under Islamic law was also used by the Malays in settlement of dispute. Wan Muhammad (2011) observes that before the intervention of British to Tanah Melayu, the Sultan also played a role in resolving disputes among his highness subjects. In matter of religion, the advice from the *Mufti* or *Kadi* was sought. Moreover, she acknowledges that there was in existence a certain system of courts which is based on Islamic law where the highest positions of the courts' hierarchy were hold by the Sultans. However, the existence of the Islamic law-based courts' system does not prevent the application of other types of dispute resolution. The modern application of *Sulh* still can be traced in the Shariah courts in Malaysia, especially in resolving disputes between spouses.

*Sulh* derives its root from the divine revelation of Qur'an and it received recognition from the Sunnah of Prophet Muhammad (BPUH). It is continued to be practiced by the companions of Prophet Muhammad (BPUH). Islam is believed to arrive to the South East Asia around 13<sup>th</sup> century (Suarez, 1999) and it may have arrived as early as 7<sup>th</sup> century. Islam is majorly professed by the Malays who are the majority population. Alongside the expansion of Islam, the practice of *Sulh* is adopted and has been fused to the Malay custom. According to Mohd. Zain and Ahmadi (2016), *Sulh* is still continued to be practiced by the Malays, especially in Malaysia and Indonesia. Such practice is closely related to the functions of Penghulu (chief of the village) in keeping the harmony among the villagers. As found by Muhamad Hisyam, even before the independence of Indonesia, the Penghulu was empowered by the Dutch administration to resolve disputes among the villagers (Muhammad Hisyam, 2005). The Penghulu has the role just like a judge and *kiai* (religious chief).

Meanwhile, Ho'oponopono practice is rooted back to the ancient culture of Polynesians. According to Wall and Callister (1995), the Polynesians are "believed to migrated from Central Asia, through the islands east of China into Polynesia. They migrated to the Tonga-Samoa region where the roots of the Polynesian culture emerged". Based on the opinion of Kirch (1989), they migrated through the Marquesas and may have landed in Hawaii between 100 and 750 A.D. The Polynesians are skillful island explorers, as well as fishermen, hunters, navigators (Emory, 1965) and sailors (Buck, 1965). Interestingly, these demographic characteristics are similar to the early Malays who are also skillful fishermen, traders, and navigators. As a proof, there is one island called the Cocos (Keeling) Islands located 2000km from the West Australian coast (The Guardian, 2017). This island is already been settled with the locals when Captain William Keeling of the East India Company arrived there in 1609 (The Guardian, 2017).

Based on the indigenous Hawaiian social organization, they give high emphasis on the blood kinship and high status to the elders or chiefs and also the priests in Ho'oponopono. Originally, Ho'oponopono is closely related to animistic belief as the Polynesians believed so. After the arrival of Westerners in 1778 through the first contact made by Captain Cook, they introduced Christian to the Polynesians. Through active Christian missionaries, many Hawaiian are converted to Christianity between 1820s to 1830s (Wall and Callister, 1995). Even though they are converted to Christian, according to Wall and Callister (1995), their faith is basically semi-Christian. This means their faith is a blend of Christianity, animistic belief and Hawaiian custom. Before the arrival of westerners, according to

Boggs and Chun (1990), Polynesians depended on the oratory in recording their history and it is used to resolve disputes.

### **Faith-based mediation practices of Ho'oponopono and *Sulh***

This section is provided to discuss the faith-based mediation process of Ho'oponopono and *Sulh*. The dispute resolution strategies of both of the faith-based mediations are accordingly identified.

#### **Faith-based mediation practice of Ho'oponopono**

Under the mediation practice of Ho'oponopono, Wall and Callister identified that there are 12 important steps (Wall and Callister, 1995) in reaching the resolution. The said steps are generally used in the Ho'oponopono process in resolving disputes. These steps begin with:

- (i) The gathering of the disputing parties. They are gathered by a family member who knows both of the parties. The family member usually has a high status and respected person. The Ho'oponopono process will be led by the chief or priest or any high-status family member who eventually become the mediator.
- (ii) There is opening prayer to the Gods or God. By the coming of Christianity to Hawaii, the trinity concept is also embedded in their opening prayer. According to Kamhis (1992), all those who are present in the Ho'oponopono process are directly or indirectly be reminded that the power of Gods or God is mightier. They believed that the real truth cannot be sealed from God.
- (iii) A brief statement of problem that needs to be solved or prevented from getting worse is presented before the chief or priest.
- (iv) The mediator (who is also known as the Ho'oponopono leader) initiates the questioning process involving the disputing parties.
- (v) The disputing parties give their replies to the mediator. A discussion between the disputing parties takes place and channels thorough to the mediator.
- (vi) A period of silence is provided where the disputing parties do their self-reflection; contemplate on their deeds and cooling of their tempers to each other.
- (vii) After the period of silence, the disputing parties must make honest confessions to the Gods or God. They may also confess to each of other. By having this step, the grudges between the disputing parties are released. The wrongdoing or offence is admitted. Forgiveness is sought and given. According to Boggs and Chun (1990), the honest confession eliminates the wrongdoing. However, this does not eliminate the penalty from such wrongdoing.
- (viii) A restitution is suggested to the disputing parties. Since the Ho'oponopono process concerns about harmonious social resolution, the disputing parties are suggested by the mediator with a suitable restitution.
- (ix) Any related problem between the disputing parties that become apparent in Ho'oponopono process will be resolved. The previous steps are repeated. This is considered necessary to eliminate any entanglement between the disputing parties that may offend God.

- (x) Mutual forgiveness from the offended party is sought. The disputing parties may also ask forgiveness from each other. This is necessary to release negative feelings such as guilt, grudge, anger and etc.
- (xi) The Ho'oponopono process is closed with a closing prayer to God or Gods. It is to give pressures to the disputing parties to abide the agreement as agreed through the Ho'oponopono process. It is also believed "to close the door to evil and to keep the evil from returning" (Wall and Callister, 1995).
- (xii) The Ho'oponopono process is ended with a meal or feast. This is functioned as thanking the God or Gods for their assistances in dispelling evil and resolving dispute. Alcoholic drinks are prohibited. According to Pukui, Haertig and Lee (1972), such drinks are prohibited because there is a belief among Hawaiians that people do not have adequate control over their feelings under the influence of alcohol. Any release of negative feelings will destroy the entire process of Ho'oponopono.

### Faith-Based Mediation Practice Of *Sulh*

Based on the findings from the practices of *Sulh* that are carried out by the Penghulus, specifically from the province of Pasir Mas, Kelantan (Malaysia) and the province of Indragiri Hilir, Riau (Indonesia), there is no specific steps that need to be followed. The *Sulh* practice remains flexible and subject to the suitability of the situation that is faced by the mediator or Penghulu in resolving the dispute between the disputing parties. The main objective of the *Sulh* practice is to end the dispute. This is necessary to maintain the peaceful order of the society or the village. However, the dispute resolution strategies can be detected in general from the practice of *Sulh* by the Penghulus. Based on the observation of the researchers, the strategies can be divided into three main steps:

- (i) The beginning of *Sulh* process: it starts with a request from the member of the village to resolve the existing dispute. The member of the village can be either one of the disputing parties themselves or the family relative of the disputing parties or a concerned neighbor of the disputing parties. Upon receiving the request, the Penghulu will arrange the time and place where both of the disputing parties can be present. This is done based on the agreement of all the parties, including the Penghulu.
- (ii) The *Sulh* process: the Penghulu will begin the *Sulh* process with *Salam*, an Islamic salutation that prays Allah the Exalted to provide peace upon the people. Sometimes, the recitation of *Al-Fatihah* is announced. *Al-Fatihah* is the first chapter of the holy Qur'an, a divinely revealed book to all mankind. The Penghulu will initiate an introductory remark where the disputing parties are reminded about the purpose of the gathering is to end any dispute between the parties and to find the suitable resolutions. The *Sulh* process is flexible in nature, where the Penghulu can either use advice, negotiation, conciliation, reconciliation or the combination of such dispute resolution processes for the sake of mediating the disputing parties. The Penghulu is highly respected by the disputing parties. Due to such high respects, the disputing parties are more inclined to behave themselves, instead of quarreling before the Penghulu. In finding the suitable resolution between the disputing parties, the Penghulu has the role to facilitate them or at least to suggest them a suitable resolution. This discussion which is led by the Penghulu between the disputing parties is better known as *Musyawah*. During the *Sulh* process, the disputing parties are reminded constantly that they are Muslims and reconciliation is encouraged in Islam. Moreover, Muslims are brothers to each other in Islam. Therefore, the disputing parties are advised to maintain their good relationship or *Silaturahmi*.
- (iii) The conclusion of the *Sulh* process: in situation where the disputing parties reach a suitable resolution, the Penghulu will advise them to fulfill the resolution which usually

taken as an oral agreement between the disputing parties themselves. Again, they are advised and encouraged to live in harmony and remember their obligations as Muslims towards Allah the Exalted. The Penghulu may end the *Sulh* process with a recitation of prayer (*do'a*), the closing prayer (*Tasbih Kafarah*), and *Surah Al-Asr* i.e. verses from the holy Qur'an that emphasis on the importance of time. In situation where the disputing parties fail to reach a suitable resolution, they are advised by the Penghulu to decide for themselves. They can either resolve the dispute based on the suitable suggestion for resolution or they can go for other channels of dispute resolution processes, such as through court process. Since the *Sulh* process by the Penghulu is informal, the Penghulu cannot be called as a witness before the court to testify for either of the disputing parties (Mohd. Zain and Ahmadi, 2016).

Based on the dispute resolution strategies from *Sulh* and Ho'oponopono, there is an apparent dependency on religious beliefs of the people in resolving the dispute. The beliefs of the people can become an influential factor for them to mediate and resolve the dispute. In comparison to Ho'oponopono, the *Sulh* process is more flexible in nature and the Penghulu as the mediator can choose to apply any of suitable dispute resolution methods in mediating the disputing parties.

### **Faith-based Mediation of Sulh and Ho'oponopono in Current Legal Practice**

This section is provided to discuss the positions of faith-based mediation process of Ho'oponopono and *Sulh* in the current legal practice. This is done by referring to the existing laws of Malaysia, Indonesia and Hawaii.

#### **Faith-based mediation practice of Ho'oponopono**

The faith-based mediation practice of Ho'oponopono remains close to the society since it is a part of the Hawaiian custom. Naturally as a mediation process, it is an informal process. In the practice of Ho'oponopono, according to Hosmanek (2005), there are three main institutions that actively applying Ho'oponopono in the modern Hawaii. They are:

- (i) Native Hawaiian Bar Association (NHBA): under them, the Ho'oponopono is developed as "an alternative culturally sensitive means in resolving disputes" (NHBA, 2018). Under their initiative, a Ho'oponopono project is introduced and coordinated by a retired Judge, Melvin Soong. The resolution of the Ho'oponopono can be enforced through the court system. It is actively used for family law matters (NHBA, 2018).
- (ii) Legal Aid Society of Hawaii (LASH): In 2001, LASH was granted USD250,000 by the United States Department of Justice to actively apply Ho'oponopono to family law matters. The sponsored project is well known as Navigator Project (LASH, 2018).
- (iii) Family Law Organisations: they are various organisations that actively promote for family welfare and family law justice. Ho'oponopono process is actively used as an informal process of dispute resolution. This can be traced such as in Hawaii's Child Protective Services, family mediation and battered spouse cases.

Even though there is potential of Ho'oponopono process to be used in criminal matters, the existing criminal law of Hawaii is still applicable. Moreover, it is difficult to obtain full cooperation of the victim and the offender in using the Ho'oponopono process. The step of Ho'oponopono process in making honest confession by the accused can cause self-jeopardy and may mislead the mediator if the accused lies in his confession.

### Faith-based mediation practice of *Sulh*

Faith-based mediation practice of *Sulh* is also considered as an informal process of dispute resolution. According to Mohd. Zain and Ahmadi (2016), the Penghulus themselves do not consider the *Sulh* process that they applied in resolving dispute as a part of formal legal system. At the local level, the resolution that is achieved between the disputing parties is morally and religiously bound to be followed. They are not subjected to any penalty by the Penghulu if they failed to follow or apply the resolution. If the same dispute occurs between the disputing parties again, the Penghulu may or may not accept to resolve the dispute. In Malaysia, the process of *Sulh* forms as a part of annexed mediation process within the Shariah courts that involves family disputes, especially to reconcile the spouses that are seeking for divorces.

In Indonesia, the authority of the Penghulus in resolving disputes is acknowledged through a specific law. It is found that there is Law No.6/2014 in Indragiri Hilir, Riau, Indonesia that acknowledges the authority of the Penghulus to resolve any dispute between the members of the villages. Unfortunately, there is no such law acknowledges the authority of Penghulu for mediating dispute in Malaysia. However, there is a special situation where the resolution by the Penghulus may be accepted by the legal enforcement agencies such as the Police authority. This can happen when the disputing parties choose to resolve their dispute based on *Sulh* process by the Penghulus. The Penghulus may issue a letter with their formal seal acknowledging such resolution. However, such situation can only happen for petty and local matters. The resolution made by the Penghulus will not negate the legislated authority of Police or Court based on the existing laws such as the Penal Code. In Malaysia, the *Sulh* process of Penghulus is not governed under the Mediation Act 2012.

### Recommendations

By viewing the faith-based mediations of *Sulh* and Ho'oponopono, it is recommended that:

- (i) The faith-based mediations of *Sulh* and Ho'oponopono are closely related to the local society. Therefore, such mediation processes should be properly acknowledged and respected. This can be done by establishing a specific law at the state level such as the Law No.6/2014 of Indragiri, Riau, Indonesia.
- (ii) A bridging program should be encouraged between the legal enforcement authority and the Penghulus in the villages or the Chiefs of Hawaiians. This is necessary since they know better about their members of villages. It is not only important to prevent disputes but also to prevent existence of crimes. By having such program, the Penghulus or Chiefs are able to give better advice to their people.

### Conclusion

The faith-based mediation processes of *Sulh* and Ho'oponopono have all the characteristics of modern mediation as applied today. *Sulh* and Ho'oponopono are informal processes of mediations that appreciate confidentiality and privacy. The roles of the Penghulus and the leaders of Ho'oponopono are to facilitate the disputing parties to reach a win-win and suitable resolutions. Both of the said processes are free without any cost or fee. They must be attended voluntarily by the disputing parties, without any force, fear or favor.

Modern dispute tends to be legalistic. Instead of depending too much on the legal remedies, the religiosity of the people must not be ignored. The religiosity does not only define the person but also influences his or her ideology in viewing and handling the dispute. When the emphasis on one's faith is done, it does not symbolized weaknesses but it is a motivational strength that has potentials in achieving peace and harmony. Moreover, there is no religion in the world encourages dispute and confrontation.

While the Hawaiians believe the existence of peaceful and harmony through Ho'oponopono process, the Muslims are thought to be committed in doing good deeds and resolving disputes. A wisdom from Qur'an, Surah An-Nisa, verse 114 should be considered where Allah the Exalted said: "No good there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between people. And whoever does that seeking means to the approval of Allah – then We are going to give him a great reward".

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