

A STUDY OF SULH IN THE SYARIAH COURTS IN MALAYSIA

Mahathir Bin Mazizan
(Matric No. 1040333)

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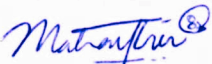
May 2007

AUTHOR DECLARATION

بسم الله الرحمن الرحيم

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

May 03rd, 2007

Signature : 
Name : Mahathir Bin Mazizan
Matric No : 1040333
Address : No 88, Jalan Seroja 13, 81100
Taman Johor Jaya, Johor Bahru,
Johor Darul Takzim

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allah, the Compassionate, the Merciful

Praise is to Allah Almighty, the Cherisher and Sustainer of the Universe. May the peace and blessing of Allah Almighty be upon Muhammad, the Seal of the Prophet s.a.w. In completing this academic project report I have contracted many debts. I am grateful to many people without whose sincere help and encouragement, I would not be able to complete this research.

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ABSTRAK

Kajian ini bertujuan untuk mengetahui dengan lebih mendalam tentang pelaksanaan Sulh di Mahkamah Syariah di Malaysia. Sulh adalah suatu kaedah penyelesaian konflik di dalam kekeluargaan yang mana ia merupakan suatu perkara yang penting dan ianya menjadi alasan kenapa tajuk ini dipilih. Kajian ini adalah merupakan kajian perpustakaan di mana penulis mendapatkan maklumat-maklumat dari banyak sumber dan juga melalui internet. Kajian ini juga menfokuskan tentang peranan Pegawai Sulh seterusnya latar belakang kewujudan, kelayakan dan etika. Secara ringkasnya terdapat empat bab yang secara progresif membincangkan tajuk kajian ini. Di samping itu juga, penulis juga membincangkan pelaksanaan Manual Kerja Sulh sebagai petunjuk kepada Pegawai Sulh dan juga mencadangkan agar Mahkamah Syariah di Malaysia melakukan perubahan selari dengan pembangunan Negara agar segala proses dan aktiviti di Mahkamah tersebut berjalan lancar. Secara kesimpulannya, melalui kaedah Sulh, konflik di dalam kekeluargaan dapat diatasi dan adalah menjadi tanggungjawab Pegawai Sulh dalam melaksanakan kaedah Sulh dengan lebih cekap dan amanah yang diberikan.

ABSTRACT

The aim of this research is to know deeply about the implementation of Sulh in the Syariah Court in Malaysia. Sulh is the one of the method to settle disputed in the marriage which is one of the important matters to discussed and reason by researcher to choose this topic. This research is library study and field study which is gathered relevant data from many sources and internet. Besides that, this research gives the explanation about the role of Sulh Officer, the background, the qualification and ethics of Sulh Officer. Briefly, there are four chapters, which progressively deal with the topic. Besides that, the researcher discussed about the implementation of the Manual Kerja Sulh as a guideline for Sulh Officer and also makes a suggestion to the Court to make reformation streamline to the development of this country to ensure that all of the processes and activities in Court become smoothly. As conclusion, the method of Sulh can settle such case and full responsibilities for Sulh Officer to implement this method efficiently and honestly.

ملخص البحث

تقوم هذه الدراسة على معرفة تطبيق الصلح في المحكمة الشرعية في ماليزيا. الصلح هو قاعدة لحل ومعالجة مشاكل الأسرة. وتصبح هذه المشكلة من أهم الموضوعات للنقاش حولها. ومعالجة هذه المسألة أمر مهم في المجتمعات والسبب لأختياري هذا الموضوع. ومنهج هذا البحث هو الدراسة المكتبية. وذلك يجمع المعلومات من المطبوعة على الكتب وشبكة المعلومات. يناقش هذا البحث فضلا عن مفهوم دور الصلح وموظفة في المحكمة بالإضافة إلى خلفياتهم ومؤهلاتهم وسلوك أعمالهم. ويحتوي هذا البحث على خمسة فصول. إضافة إلى ذلك، المؤلف أيضا يبحث عن التطبيق Manual Kerja Sulh لإرشاد إلى وظيفة الصلح ويقترح الباحث أن على المحكمة لابد من تغير وتطوير الوضع إلى الحالي وفقا لتطور وتقدم الدولة حتى تكون جميع الإجراءات سهلة وميسرة. وخلاصة القول، أن الصلح هو قاعدة ملائمة لحل المشكلة في الأسرة ومسؤولية إلى موظف الصلح لتنفيذ هذه قاعدة بالأمانة.

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GLOSSARY

adil	Virtuous.
Al-Quran	The Holy Book revealed by Allah to Prophet Muhammad S.A.W
Al-Sunnah	The tradition of Prophet Muhammad S.A.W including his deeds, saying and approval.
ayah	Signs.
ayah	Plural of ayah, verses of the Qur'an.
baligh	Of the age of majority.
Fatwa	Formal legal opinion issued by a Mufti.
Fiqh	Islamic Jurisprudence.
Halal	That which is untied or loosed. That which is lawful, as distinguishes from haram, or that which is unlawful.
Hadith	The tradition of the Prophet Muhammad S.A.W
Hakam	An arbitrator appointed by a Qadhi to settle disputes.
Haram	“Prohibited”. That which is unlawful. The word is used in both a good and a bad sense.
Harta Sepencarian	Property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions by Hukum Syara'.
Hukum	Ruling of Shari'ah.
Hukum syara'	Practical laws of Islam.
Iddah	Allah's prescribe waiting period a woman after divorce or death of her husband, after the expiry of which she can remarry another person.
Ijtihad	“Exertion”. The logical deduction on a legal or theological question by a Mujtahid or learned and enlightened doctor, as distinguish from Ijma', which is the collective opinion of a council of divines.
Ijma'	Consensus of the Ulama'.
Istihzar	The oath is administered by the judge without an application.

Khalifah	Caliph, a successor, an Islamic term used for the first four rulers after the death of the Prophet s.a.w.
Mut'ah	A temporary marriage which was allowed in the early period of Islam when one was away from his home, but later on it was cancelled (abrogated).
Peguam Syarie	A person who is given by rules enacted by any state to appear and represent his client in every Syariah Court case within the confines of such state or federal territories, respectively or Syarie Lawyer.
Qadhi	Judge.
r.a	Abbreviation of "Radhi Allahu 'An Hu" meaning "Upon him the Blessing of Allah".
s.a.w	Abbreviation of Sallallahu 'Alaihi Wa Sallam" meaning "Peace be upon him". It is compulsory for a Muslim to utter this blessing whenever he hears the Prophet Muhammad's name mentioned.
s.w.t	Abbreviation of "Subhanahu Wa Ta'ala" meaning The Almighty God.
Shari'ah	The collection name for all the laws ordained by Allah S.W.T for His servants through Prophet Muhammad S.A.W including the Islamic systems of 'aqidah, akhlaq, 'ibadah and mu'amalah.
Sulh	Compromise.
Ulama'	Sunni Men of knowledge refers to those who have been trained in religious sciences (Quran, Hadith, Fiqh, etc).

ABBREVIATION

AS	‘alayhi/ha/hima/him al-salām
etc.	et cetera/ and so on
ibid	ibidem: In the same place.
n.a.	no author
n.d.	no date/year
n.pb.	no publishser
n.pl.	no place
no.	number
p.	page
pp.	pages
P.B.U.H	Peace Be Upon Him
R.A	Raḍiallāhu ‘Anhu/ha/huma/hum
S.A.W	Ṣallallāh ‘Alaihi Wa Sallām
S.W.T	Subhānahu Wa Ta‘ālā
vol.	Volume

PROPOSAL

Research Background

Nowadays, Sulh has been practiced by public or Islamic communities, which was actually had been practiced during Prophet s.a.w lifetime. However, local communities or Islamic communities (divorce affair) have practiced Sulh in their life, such as in the case of the Divorce. Nevertheless, it is not practiced widely.

Hence, the issue has been discussed more often nowadays. Furthermore, there are a lot of divorce matters, which cannot be settled due to lack of marriage planning in the Muslim community. By the way, the knowledgeable public or Islamic communities (divorce affair) tried to implement or use the Sulh before divorce or to save their marriage through the right ways. Thus, the right ways are through court, which has its own jurisdiction to hear the case.

The Problem Statement

The purpose of this research is to examine the Success of Sulh in the Syariah Court in Malaysia. It is argued that some peoples including academicians and lay peoples alike assume that there is one of Sulh in the Syariah Court and some even that Success of Sulh in the Syariah Court only exist whether it has been registered or not . The issue being raised is whether the judgment of Sulh are carried out or done justly and not abused by any parties involved. So, could the court implement the Sulh exactly as a part of requirement and conditions? What is the explanation or illustration to support the fact, which will be faced by the public or Islamic communities? Besides that it is to ensure whether Sulh is practiced based on Syariah rules and the public or Islamic communities are satisfied on the actual jurisdiction of Syariah Court.

Aim of Research

The widely, the goal here is to inculcate the Islamic communities with understanding and knowledge about Sulh. Besides, the writer is responsible to develop her self and to achieve the aim research.

The scope of the research

This research will analyze the study of Sulh in the Syariah Court in Malaysia and Sulh Officer from historical and legal viewpoints, roles and functions, contributions to the development of the Islamic communities with reference to their resolutions so far. The researcher will also touch on how far and to what extent the Success of Sulh in the Syariah Court have been contributed to the decreasing the divorce among Islamic communities, the Success of Sulh in the Syariah Court as the chosen subject and the plenty of information regarding the internal the Sulh in Malaysia itself and the its relationship with the Success of Sulh in the Syariah Court in which state that used Sulh. Hence, the goal here is to inculcate the Islamic communities with understanding and knowledge about Sulh. Besides, the writer is responsible to develop her self and to achieve the aim research.

Objective

- a. To examine the historical, legal viewpoints and familiarize with the knowledge of Islamic procedure of Sulh in Malaysia.
- b. To explains the roles and functions of Sulh in Malaysia Syariah Court and to give an overview of the current application of the Sulh in which Syariah Court that used Sulh.
- c. To equip and educate student with knowledge on the Sulh procedural in Syariah procedural legislation in Malaysia.

- d. To examine the development of the Sulh in the Syariah Court in Malaysia and to expose include explanation on the parties to an action, the appointment, functions and duties of a *Sulh Officer*.
- e. To look at the issue on whether Sulh is practiced based on Hukum Syara' and to inform the community of Sulh as the best way to save the marriage from divorce among the Muslim community.

CHAPTER

1

CHAPTER ONE

INTRODUCTION

1.1 Definition of Sulh

During this stage, the parties are encouraged to hold Sulh for example, to settle the case. Before hearing, the court will advise the parties to settle the case. The settlement can be divided into two types: a) Settlement outside court (SULH), b) By withdrawal. Literally, Sulh is a settlement of dispute.

It gives opportunity to parties in a dispute to settle their dispute by way of negotiation regardless of the nature or degree of the case. It is laid down in the Qur'an, the Sunnah and the Enactment. Islam encourages the parties to a case to come to a settlement, so long as it does not legalise anything which is prohibited or prohibit anything which is lawful.

The meaning of Sulh is wide enough to include every mode of amicable settlement i.e. negotiation, mediation, compromise and conciliation, but does not include arbitration, because tahkim is the word for this and it is governed by a different set of rules. Literally Sulh is a settlement of dispute.¹ Technically Syara' it is an aqad or contracts to prevent a dispute between two disputing parties.² It also means a contract to reject the dispute. Therefore, it can be defined as a contract made to decide a dispute between two disputing parties by their consent.

¹ Zaleha Kamaruddin. 2004. *Islamic Family Law: New Challenges in the 21st Century*. Vol. 2. Kuala Lumpur: International Islamic University Malaysia (IIUM).p.169.

² Muhammad Al-Syarbini Al-Khatib. 2004. *Mughni Al-Muhtaj Jilid 2*, Beirut-Lubnan: Darul Ma'rifah.p. 230.

Article 1531 of Majallah Al-Ahkam Al-Adliyyalli defined Sulh as:

“Sulh is a contract removing a dispute by consent.”³

Sulh also is the counseling for court. That means inside the court and Sulh the counselor for the purpose in which the parties to a case abroad together in official meeting guided and arrange by the court and also following certain procedures if they are any resolution it will be come and order by the court and binding of both parties without hearing to follow the ordinary process of hearing in the court. Sulh Officer so importance to dispute a problem in Syariah Court and given benefits.

We can define Sulh as an agreement, which is concluded to take away all disputes and disagreement between the disputed parties by their consent and bring peace to the two waiting sides. Sulh is the counseling for the court, that means inside the court and Sulh counselor for the process in which the parties to a case abroad together in official meeting guided and arrange by the court, either the Sulh given a many benefit and less procedural but the Sulh is highly technical job and the Sulh Officer must have lot a preparation training and needs intellectuality. Allah says “There should be among you a group of people calling people to good, enjoying what is right and for bidding what is hateful they are the ones to attain success”.

According to the lecturer in Pusat Pemikiran dan Kefahaman Islam, Universiti Teknologi Mara (UiTM), Prof. Madya Noor Awang Hamat said, “The method by making Sulh to settle dispute among the parties is the best way and need to sincerely as basic approaches. Sulh cannot make bureaucracy to the court and the both parties because it can be settle with honestly. Justice can reach if the parties know their right on that matter dispute.⁴

³ Zaleha Kamaruddin. 2004. *Islamic Family Law: New Challenges in the 21st Century*. Vol. 2. Kuala Lumpur: International Islamic University Malaysia (IIUM).p.169.

⁴ n.a. 2004. “Kaedah Sulh mampu elak birokrasi mahkamah” (Paper). Berita Harian. 30 November .p.13.

In the term of Mediation, it comes from Latin word *medius* (middle) and may be described as being halfway between conciliation and arbitration. It refers to a process whereby a third party, as in conciliation cases, listens to the grievances of the disputing parties and tries to be supportive. In addition, a third party may, formulate constructive proposals or suggests solutions to the conflict, without imposing any decisions.

Mediation is an alternative to violence, self-help or obligation and it differs from the process of counselling, negotiation and arbitration. It can be defined as the process by which the participants, together with the assistance of a neutral person or persons, consider alternative and reach a consensual settlement that will accommodate their needs.

Mediation is a process that emphasizes the participants' own responsibility for making decisions that affect their live. It is therefore a self-empowering process. Both parties in dispute will have to agree. If one does not (agree), the negotiation is considered failed and the case will be taken to court to be solved through the litigation process.⁵ The term mediation is used where the practitioner has no advisory role, if the practitioner does have an advisory role then the term conciliation should be used.⁶

Various forms of arbitration have been practiced throughout history and have traditionally been applied to, among other things, family disputes. Mediation is becoming increasingly popular because of the many advantages inherent in it. It lists eighteen of these popular features:

- It tries to reach to the roots of a problem,
- It does not allow a breakdown of communication between the parties,
- It maintains a friendly atmosphere between the parties and the mediator(s),
- It is non-coercive,

⁵ n.a. 2006. "Mediation to be adopted, Bureau seeks amicable solution for cases" (Paper), The Star, 1 March. p.23.

⁶ n.a. <http://iama.org.au/conciliation.html> / [http://www.ag.gov.au/agd/ WWW/disputeresolution](http://www.ag.gov.au/agd/WWW/disputeresolution) Home. nsf/Page/Publications_All_Publications_ Boulle, L. (2005). Mediation: Principles Processes Practices. Lexis Nexis Butterworths. p 348. (08/01/2007).

- It allows parties themselves to solve their problems,
- It provides an easy access to justice,
- It is clearly preferable to litigation,
- It is, in a sense, a 'community' resolution of disputes,
- It provide the community, represented by the parties and the mediator, a means to resolve its own dispute,
- It reduces tension in the community,
- It dispenses informal injustice,
- It is non-bureaucratic in nature (flexible),
- It may resolve a wide range of civil disputes,
- It is very quick,
- It is inexpensive,
- It is fairer and more equitable,
- It helps to reduce congestion in courts, and
- It produces more stable and acceptable settlements.⁷

Divorce Mediation (Sulh) is a tested process for couples who have decided to dissolve their marriage and also is a process in which the parties to a divorce try to resolve their disputes outside of court with the help of a mediator. Both spouses meet with a neutral trained divorce mediator to negotiate the terms of their divorce agreement.⁸

Divorce Mediation promotes communication and cooperation, allows controlling the decisions that affect our life, it can benefit children by reducing the amount of conflict between spouses, it typically is less costly than litigation, it is confidential, thus avoiding public disclosure of personal problems and it can be completed in less time than litigation, so we can move ahead with our life more quickly. Divorce Mediation includes:

⁷ Noor Azmah Ibrahim. 2002. & "Sistem Sulh-Selesaikan perbalahan secara damai" (Paper), Utusan Malaysia, 16 September. n.p.

⁸ n.a. n.d. <http://www.mediate\divorce by mediation.html>. (13/02/2007).

- How they will share the cost of raising the children.
- How they will divide the family's assets between two new family units.
- What the future family living arrangements will be.
- How they will parent their children.

Divorce mediation is an active process in which the mediator helps to identify all the issues that need to be covered in separation agreement. Divorce by mediation is a *non adversarial* process helping people negotiate directly and dissolve marriages once the decision to divorce or separate is made.

He provides with the opportunity to negotiate mutually beneficial terms in total privacy. Divorce by mediation helps identify key issues concerning the division of personal and real property, support, parenting, and plans for the future. It helps eliminate the painful win-lose atmosphere that is part of all adversarial divorces.

The process is a mutual search for a reasonable solution; neither partner can win at the other's expense. Resolutions must emerge from the process with a settlement created and accepted by both. Mediation can also deal with specific limited issues such as times of access, what to do with the house, or other issues specified by you at the start.

Divorce by Mediation is not a legal service. The outcome of the mediation is a memorandum of understanding detailing all of your agreements that your divorce attorney will review and incorporate into the formal legal documents.⁹ Based on the Black's Law Dictionary, Mediation is a method of non binding dispute resolution involving a neutral third party who tries to help the disputing parties reach mutually agreeable solution.

⁹ n.a. n.d. <http://www.mediate\divorce by mediation.html>. (13/02/2007).

Mediator (Sulh Officer) is a neutral person who tries to help disputing parties reaches an agreement.¹⁰ It is sometimes referred to as Conciliation, or conciliated negotiation. It focuses more on the later stages of negotiation, exploring weaknesses in each party's position, investigating areas where the parties disagree but might be inclined to compromise, and suggesting possible mutually agreeable outcomes.¹¹

Mediation also is essentially a private and informal decision-making process, and that is its strength.¹² The government White Paper on divorce reform defines mediation as 'a process in which an impartial third person, the mediator, assists couples considering separation or divorce to meet together to deal with the arrangements which need to be made for the future'.¹³ Knowledge of Sulh Officer (Mediator) gives a benefits and Muslim should not judged by this spiritual piety towards Allah but also on his knowledge.

However, mediation is not suitable for addressing all conflicts. It should not be carried out under the following circumstances:

- There are broad matters of policy affecting many people or the whole society, such as human rights and constitutional issues.
- The dispute involves a purely legal question; for example the interpretation of a statute or a contract.
- The dispute cannot be resolved without making complicated findings of fact; for example, where a party's liability for damages depends on determining the accuracy of conflicting versions of an accident.

¹⁰ A. Garner, Bryan, Editor in Chief. 2004. *Black's Law Dictionary*. Thomson West, 8th Edition.

¹¹ Norman Zakiyy Chow Jen-T'chiang, 2006, "Resurrection of the Less-Emphasis Procedures within the Rubric of Alternative Dispute Resolution: Their Practically From Common Law and Islamic Law Perspective". (Paper). *International Seminar on Syariah & Common Law, Universiti Sains Islam Malaysia (USIM)*. Hotel Palace of the Golden Horses, Seri kembangan, Selangor Darul Ehsan. 20-21 September .p.2-3.

¹² Bond, Tina. 1999. *Blackstone's Guide To The Family Law Act 1996 Second Edition*, Blackstone Press Limited. p. 44.

¹³ Herring, Jonathan, 2004. *Family Law Second Edition*, Pearson Longman. p. 114.

- One or more of the parties is in a disturbed emotional or psychological state; for example anger and severe depression, or where one of the disputants does not want to take responsibility.
- Where there is a remedy which only a court could provide, such as an injunction or a protection order, or where something has to be achieved with great urgency.

A Mini-Trial most resembles a Mediation hearing, in that there is a presentation by each party of a summarized version of his or her case to a panel of persons for the purpose of resolving or settling the dispute. Also like mediation, the parties are generally not bound to an outcome, and may end the process at an impasse.

However, there is one important difference between a mediation and mini-trial. In mediation, the mediator is a neutral third party who does not take the side of either party, but instead tries to facilitate open communication between the parties themselves in order to achieve compromise and settlement.

Even in court-ordered mediations conducted by a panel of mediators, the focus is still on the parties: the mediators merely issue a recommendation to the parties for settlement consideration.¹⁴

Conversely, in a mini-trial the mediators themselves are agents and advocates for the parties, and they, rather than the parties, work out a settlement after hearing opposing sides to the controversy (each goes into the mini-trial with advance authorization to settle the matter for a certain dollar amount or under other conditions or criteria).

The parties present their cases (usually through their attorneys) but do not take active roles in the settlement negotiations nor generally do their attorneys. The decision makers

¹⁴ Norman Zakiyy Chow Jen-T'chiang, 2006, "Resurrection of the Less-Emphasis Procedures within the Rubric of Alternative Dispute Resolution: Their Practically From Common Law and Islamic Law Perspective". (Paper). *International Seminar on Syariah & Common Law, Universiti Sains Islam Malaysia (USIM)*. Hotel Palace of the Golden Horses, Seri kembangan, Selangor Darul Ehsan. 20-21 September .p.6.

LAMPIRAN 3

DALAM MAHKAMAH TINGGI SYARIAH/MAHKAMAH RENDAH SYARIAH

DI DALAM NEGERI JOHOR

KES MAL BIL.

ANTARA

..... (K/P:.....)

PLAINTIF

DAN

..... (K/P:.....)

DEFENDAN

Di hadapan

.....
Tuan Hakim

Di Mahkamah.....

Pada jam

DERAF PERINTAH PERSETUJUAN

SETELAH MENELITI PERAKUAN yang dibuat oleh Pegawai Sulh yang bersidang,
pada..... antara (K/P:.....)
yang beralamat di..... (selepas ini dikenali sebagai Plaintiff)
dan (K/P:.....) yang beralamat
di

..... (selepas ini dikenali sebagai Defendan).

SETELAH MENELITI PERJANJIAN PENYELESAIAN bertarikh pada.....
yang ditandatangani di hadapan pegawai Sulh.....

SETELAH BERPUASHATI BAHAWA PERSETUJUAN PENYELESAIAN ini adalah
tidak bercangah dengan Hukum Syarak,

MAKA DENGAN INI DIPERINTAHKAN dengan persetujuan bersama seperti berikut-

1.
2.
3.

Perintah ini dikeluarkan dengan tandatangan dan cop mohor mahkamah pada.....

.....
Hakim

Meteri