

## SULH: Its Application in Malaysia

Hanis Wahed<sup>1</sup>

<sup>1</sup>Postgraduate Student, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia

---

**Abstract:** *Sulh is one of the methods of dispute resolution which is available in Islam. It has been practiced since the period of the Malacca Sultanate to resolve dispute among the local communities in the Malay states. However, the practice has faded and the application is limited to certain matters, such as matrimonial and religious disputes. The main objective of the paper is to examine the concept and development of sulh in order to promote its application in Malaysia. The research adopts the doctrinal legal research, based on analysis of primary and secondary sources such as the Quran, hadith, statute, and journal articles.*

**Keywords -** *Alternative dispute resolution, Islamic Law, Malaysia, Mediation, Sulh.*

---

### I. Introduction

The concept of dispute resolutions is not new in Islam. However, many believe that the concept has emerged and originated from the West, whereas it has existed 1400 years ago as tools to resolve disputes. Islam encourages the use of sulh because of its ability to resolve dispute without affecting the existing relationship among parties. The approaches of dispute resolutions in Islam are as follows: (1) sulh (negotiation, mediation, conciliation and compromise); (2) nasihah (counseling); (3) qada' (court adjudication); (4) tahkim (arbitration); (5) muhtasib (ombudsman); (6) fatwa of mufti (expert determination); (7) wali al-mazalim (chancellor); and other hybrid mechanisms.<sup>1</sup> However, the scope of this paper is limited to the discussion on sulh, which include mediation as a tool to resolve dispute amicably. The paper illustrates the general concept of sulh, the history of the application of sulh during the period of the Prophet SAW and the companions and the development of sulh in Malaysia, starting from the period of the Malacca Sultanate until today.

### II. Definition Of Sulh

The word sulh literally means termination of a dispute.<sup>2</sup> It is derived from the word saluha or salaha, which means to be good, right, proper, suitable<sup>3</sup> or the process of restoring something.<sup>4</sup> It is a process of restoring justice amicably among disputants in order to attain the agreed settlement outside the court.<sup>5</sup> Under the Islamic Law, sulh is considered as complementary to court adjudication and highly recommended as compared to the other mechanisms.<sup>6</sup> For example, Al-Shafi'i encouraged a judge to command parties to attempt sulh. However, if parties disagree, the judge should proceed to adjudicate the case.<sup>7</sup>

The Shafi'i and Hanbali jurists were of the view that sulh is a kind of agreement between disputants to settle disputes amicably. Similarly, Article 1531 of The Majelle stated as follows, 'Sulh is a contract of removing a dispute by consent. And it becomes a concluded contract by offer and acceptance.'<sup>8</sup> According to the definition, sulh is regarded as a contract concluded by offer and acceptance, and consists of settling dispute by mutual consent. Ibn 'Irfah defined sulh as, 'a process which involves a transfer of ownership or allegation by way of accepting alternative or compensation offered in order to resolve or prevent dispute from happening.'<sup>9</sup> The Maliki perceived sulh as a way of resolving past and future disputes involving disputants. In contrary, other schools maintained that sulh can only be applicable in past disputes, not to future disputes.

---

<sup>1</sup> Syed Khalid Rashid, (2004). *Alternative Dispute Resolution in the Context of Islamic Law*. The Vindobona Journal of International Commercial Law and Arbitration, 8(1), at 105. doi:10.1515/9783110238235.661

<sup>2</sup> Mustafa al-Khin et al., *al-Fiqh al-Manhaji 'ala Madhhab al-Imam al-Shafi'i*, Dar al-Qalam, 1996, vol.3, at 149.

<sup>3</sup> Hans Wehr, *A Dictionary of Modern Written Arabic*, edited by J. Milton Cowan, London, MacDonal & Evans Ltd, (1974), at 521.

<sup>4</sup> Raihanah Hj. Azhari, *Sulh Dalam Perundangan Islam: Kajian di Jabatan Kehakiman Syariah, Selangor Darul Ehsan*, (Ph.D Thesis, Universiti Malaya, 2005) at 57.

<sup>5</sup> Aida Othman, *And Sulh is the Best: Amicable settlement and Dispute Resolution in Islamic Law*, (Ph.D Thesis, Harvard University, 2005)

<sup>6</sup> Ramizah Wan Muhammad, "The Theory and Practice of Sulh (Mediation) in the Malaysian Shariah Courts." (2008), 16, *IIUMLJ* 33, 35.

<sup>7</sup> Muhammad Ibn al-Shafi', *al-Umm*, Beirut, Dar al-Kutub al-Ilmiyya, (1993), 6:312. See also, Aseel Al-Ramahi. (2008). *Sulh: a crucial part of Islamic arbitration* (No. 08-45). New York. Retrieved from <<http://www.lse.ac.uk/collections/law/wps/wps1.htm>>

<sup>8</sup> Article 1531, *The Majelle*, C.R. Tyser, The Other Press, 2003, at 254.

<sup>9</sup> Salih 'Abd al-Sami' al-Abi al-Azhari, *Jawahir al-Iklil Syarh al' Allamah Khalil Fi Mazhab al-Imam Malik*, Dar al-Fikr, (n.d), vol. 2, at 102.

### III. Authorities For Sulh

The Quran and hadith of the Prophet SAW stated the need to resolve any disputes between conflicting parties, especially among Muslims with justice and fairness. Authorities supporting tahkim could also be used for sulh. Some of the verses in the Quran are as follows:

- a) And if two parties or groups among the believers fall to fighting, then make peace between them both, but if one of them rebels against the other, then fight you (all) against the one that which rebels till it complies with the command of Allah; Then if it complies, then make reconciliation between them justly, and be equitable. Verily! Allah loves those who are equitable. The believers are nothing else than brothers. So make reconciliation between your brothers, and fear Allah, that you may receive mercy.<sup>10</sup>
- b) There is no good in most of their secret talks save (in) him who orders sadaqa (charity in Allah's cause, or ma'aruf (good deeds), orconciliation between mankind, and he who does this seeking the good pleasure of Allah, We shall give him great a reward.<sup>11</sup>

According to Ibn Kathir, the first verse was revealed due to the long battle between the tribes of Aus and Khazraj.<sup>12</sup> The first verse highlighted the need to resort to sulh in settling dispute between two conflicting parties. Those who resort to sulh on equitable grounds receive blessings from Allah SWT. The same interpretation can be found in the second verse, which equalized sulh with a deed of charity, where those who apply it are entitled to a reward from Allah SWT.

The concept of sulh is also stated in the hadith of the Prophet SAW. For example, Kathir bin 'Abd Allah bin 'Amru bin 'Auf al-Muzani reported that the Prophet SAW said:

Sulh is permissible among the Muslims except the one which makes the unlawful as lawful and which makes the unlawful as lawful. Muslims are bind by their promises except promises that permit the unlawful as lawful and the lawful as unlawful.<sup>13</sup>

Based on the hadith, the hukm of sulh is permissible, provided that it is in accordance with the Islamic Law. Those who resort to sulh are considered as people who establish justice and will be rewarded. Abu Hurairah reported that the Prophet SAW said: There is a sadaqa to be given for every joint of the human body (which number 360); and for every day on which the sun rises, there is reward of a sadaqa for the one who establishes sulh and justice among people.<sup>14</sup>

The Prophet SAW says in another hadith: 'Should I inform you of something that is higher in virtue than fasting, praying and charity?' They said, 'Yes O Messenger of God.' Then the Prophet said, 'To make reconciliation between people that are in conflict: enmity and malice tear up heavenly rewards by the roots.'<sup>15</sup>

Rewards are given to those who resorted to sulh because reconciliation is regarded as a higher virtue than fasting, praying and giving charity as it recommending peaceful settlement of conflicts. The Prophet SAW even allowed the use of exaggeration or misstatement in order to ensure peace. The basis was the hadith narrated by Um Kulthum bint Uqba as follows, 'He who makes peace (sulh) between the people by inventing good information or saying good things, is not a liar.'<sup>16</sup>

Sulh is the method preferred by the Prophet SAW as compared to adjudication. Adjudication is not the ultimate truth finding mechanism since it can be tainted by others.<sup>17</sup> It was reported that the Prophet SAW himself had resorted to sulh in many accounts namely as follows:

- a) There was a dispute amongst the people of the tribe of Bani Amr bin 'Auf. The Prophet went to them ... in order to make sulh (peace) between them.<sup>18</sup>
- b) Once the people of Quba fought with each other till they drew stones on each other. When Allah's Apostle was informed about it, he said: 'Let us go to bring about reconciliation between them.'<sup>19</sup>

These authorities from the Quran and hadith of the Prophet SAW demonstrate that Islam encourages all means of peaceful settlement, including sulh. In fact, all approaches of peaceful settlement are recommended provided that the matter is not contravened to the Islamic Law. The Islamic Law even allows the application of mediation with non-muslims provided that the matter is in line with the Islamic teachings.

<sup>10</sup> Quran, al-Hujurat, (49):9-10.

<sup>11</sup> Quran, al-Nisa, (4):114.

<sup>12</sup> Nora Abdul Hak, Sa'odah Ahmad, & Umar A. Oseni. (2011). *Alternative Dispute Resolution (ADR) in Islam* (1st ed.). Kuala Lumpur: IIUM Press, at 24.

<sup>13</sup> Abu 'Isa Muhammad Bin 'Isa, Kitab al-Ahkam, in Al-Jam' e al-Sahih wahuwa Sunan al-Tirmidhi, Dar al-Fikr, (n.d), vol.3, hadith 1352.

<sup>14</sup> Sahih Al-Bukhari, vol.3, translation by Muhsin Khan, Dar Al-Arabia, Beirut, (nd), at 543.

<sup>15</sup> Nasiruddin al-Albani, Sahih Al-Ja'mi' al-Saghir, Hadith no. 436.

<sup>16</sup> Supra note 16, at 533.

<sup>17</sup> Aida Othman, (2007). "And Amicable Settlement Is Best": Sulh and Dispute Resolution in Islamic Law. *Arab Law Quarterly*, 21(1), at 64. doi:10.1163/026805507X197857

<sup>18</sup> Supra note 14, at 531

<sup>19</sup> Ibid, at 534

#### **IV. The Application Of Sulh In Islamic History**

Prior to the advent of Islam, disputes were solved by using different methods, with sulh and tahkim as the common modes used. The main purpose of sulh and tahkim during the time was for maintenance of the order in the case where disputants failed to achieve any agreement.<sup>20</sup> Parties resorted to sulh for amicable settlement once a dispute happened. In case of failure of the sulh, parties proceeded with tahkim or adjudication as the next mode to resolve the case.<sup>21</sup> During the period, the methods of dispute resolutions were mostly not in accordance with the Islamic Law. For example, a hakam (an arbitrator) was sometimes chosen from healers (kuhhan) and soothsayers, who were believed to have supernatural powers.<sup>22</sup> In the fragmented tribal society or pre-Islamic Arabia, tahkim unlike arbitration was not an alternative to an established judicial system. Rather it was the only means of dispute resolution short of war if direct negotiation and mediation failed to achieve settlement. Hakams, or arbitrators, were therefore persons of considerable importance, although they did not hold any political power as a rule. Most hakams were kahins, or soothsayers, whose opinions would invoke the appropriate deities and would be couched in terms indicating they were revelations from heaven. The general belief that hakams were divinely inspired was extremely important in bringing pressure to bear on the parties to submit disputes to tahkim and to abide by the awards rendered.<sup>23</sup>

After the coming of Islam, the Arabian Peninsula became the geographical base for the Islamic State. Disputes were resolved in accordance with the Quran and hadith of the Prophet SAW. The Prophet SAW rejected the appointment of healers and soothsayers, who at that time were considered as spiritual mediators. The rejection was based on the Quranic verse as follows:

O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful.<sup>24</sup>

##### **4.1 The Period of the Prophet SAW**

The Islamic practice of sulh and tahkim were introduced in accordance with the teaching of Islam and recognized as a method of resolving disputes.<sup>25</sup> The Prophet SAW used to act not only as the head of the state, but also as a mediator and arbitrator in few cases. For example, during the setting of Hajar al-Aswad (Black Stone). The dispute arose between leaders as to who shall place the Hajar al-Aswad back to its rightful place. The Prophet SAW was the one who mediated and resolved the dispute by putting the Hajar al-Aswad in the middle of a cloak and the disputants raised the cloak to the rightful place.<sup>26</sup> Another example was during the Treaty of Hudaibiyah. It was narrated by Al-Bara Bin Azid that during the making of the Treaty, 'Ali had written the word, 'Muhammad, Allah's Apostle.' The pagans rejected and asked the word to be deleted, which was refused by 'Ali. The Prophet SAW erased the word and made peace with the Pagans.<sup>27</sup>

The role of mediator and arbitrator were sometimes delegated to other officials due to the expansion of Islam to different localities. The appointment of Mu'adh bin Jabal and 'Ali bin Abi Talib as a qadi in Yemen were some of the examples of the delegation of roles from the Prophet SAW. Qadi, as it was known at that time acted not only as a judge, but also as a mediator and arbitrator because of no clear distinction between the functions of each role. Regardless of the lack of distinction, the qadi main role was to fairly judge the case according to the general principles stated in the Quran and hadith of the Prophet SAW.<sup>28</sup>

##### **4.2 The Period of Caliphate**

The period of Khulafa' al-Rasyidin (period of caliphate) began after the demise of the Prophet SAW. During the period, a qadi carried out not only the duty as a judge, but also as an arbitrator and mediator. Sulh was widely applied and recognized as a tool for resolving disputes. The first caliph, Abu Bakr, for example used mediation during the appointment of the successor of the Prophet SAW.<sup>29</sup> Caliph Umar, for example had written a letter to Abu Musa Al-Ash'ari after his appointment as a qadi. The letter contained rules regarding the administration of justice, including the rule on sulh. It was stated that, 'All types of compromise and conciliation among Muslims are permissible, except those which make haram anything which is halal, and a

<sup>20</sup> Muhammad Hamidullah, Administration of Justice in the Early Islam, vol. 11, (1937) Islamic Culture, at 163-71.

<sup>21</sup> R.C. Jennings, Kadi, Court and Legal Procedure in the 17th Century Ottoman Keyseri, Studia Islamica, 1978, at 133-172.

<sup>22</sup> Joseph Schacht, An Introduction to Islamic Law, Clarendon Press, 1984, at 7.

<sup>23</sup> Sayen, G. (2003). Arbitration, conciliation, and the Islamic legal tradition in Saudi Arabia. *U. Pa. J. Int'l Econ. L.*, 24, 905- 958.

<sup>24</sup> Quran, al-Ma'idah, (5):90.

<sup>25</sup> Supra note 12, at 2.

<sup>26</sup> Ibn Ishaq, Muhammad Bin Yasar, The Life of Muhammad, trans. A. Guillaume, London, Oxford University Press, (1955), at 85.

<sup>27</sup> Sahih al-Bukhari, Vol.3, para 858, English translation by Dr. Muhammad Muhsin Khan, Lahore: Kazi Publications, 1986, at 536.

<sup>28</sup> Supra note 12, at 4-8.

<sup>29</sup> Ibid, at 9.

halal as haram.<sup>30</sup> This was in accordance with another hadith, ‘If somebody innovates something which is not in harmony with the principles of our religion, that thing is rejected.’<sup>31</sup>

#### **4.3 The Period of Uthmaniyyah Caliphate**

Another example of the application of sulh was during the period of Uthmaniyyah Caliphate. The provision of sulh was provided in the Penal Code and The Majelle, which was the codified Islamic law based on Hanafi doctrine.<sup>32</sup> Sulh was divided to three types including: (1) cases which started as a lawsuit and ended with a sulh agreement in the court; (2) a sulh concluded out of court and brought to court for registration; and (3) a sulh concluded out of court that failed to end the dispute, for which reason one of the parties filed a lawsuit against the other party.<sup>33</sup> However, sulh was rarely being used as a result of the court litigation system and the influence of Western colonization.<sup>34</sup>

### **V. Sulh In Malaysia**

Malaysia is a multicultural country, consisting of different races including Malays, Chinese and Indian. Despite the differences, Islam has been given a special position under the Constitution of Malaysia. It is recognised as the religion of the Federation, securing its position and implementation in the country.<sup>35</sup> Islam was adopted in the Malay Peninsula during the twelfth and thirteenth century, when the Malay rulers embraced the religion. The Rulers then started to incorporate Islamic Laws and Malay custom to the law of the country. For examples, Undang-Undang Melaka (Malacca Laws) and Undang-Undang Laut Melaka (Malacca Maritime Laws), which later influenced other state laws, such as the Laws of Kedah (1605), the Laws of Johor (1789) and Ninety-Nine Laws of Perak (1878).<sup>36</sup>

#### **5.1 Brief History of the Application of Sulh in Malaysia**

The application of Sulh or dispute resolutions in Malaysia started since the period of the Malacca Sultanate. The Malacca Digest, which was a compilation of Islamic Law based on the Shafi’i school of jurisprudence and Malay customary law was the applicable law.<sup>37</sup> The law was very influential as it was later adapted and adopted to other state laws, such as the Law of Kedah and Ninety-Nine Laws of Perak. It promoted the application of sulh in most cases, especially involving personal and property law. For example, chapter 32.2 of the Malacca Digest stated as follows:

In a property (claim), an amicable settlement is lawful after (the claim) has been acknowledge (by the defendant); amicable settlement is not lawful, when one party denies the claim and in case of a person who is not certain (of his action).<sup>38</sup>

The Malacca Digest, as the governing law, influenced the practice of the Malay society at that time. The law influenced the application of sulh in the Malay states. Sulh, in the form of mediation and conciliation was widely applied as a tool to resolve disputes, usually in cases involving religion and matrimonial matters.<sup>39</sup> Conciliation was and remains a most significant aspect of legal procedure in Asia. The procedures for conciliation – which was often carried out by certain prestigious local leaders, gentry, tribal chieftains, clans or lineage heads, etc. – were and are delicate. Open conflict was to be avoided and the pride of each party to be maintained.<sup>40</sup>

During the sulh procedure, parties were assisted by a neutral third party who was called a mediator. In the Malay society, the mediator for the local community can either be the ketua kampung (head of village),

<sup>30</sup> Margolith, D.S., “Omar’s Instruction to the Qadi”, *Journal of Royal Asiatic Society*, 1910, at 307. See also, Al-Shafi’I, *Kitab al-Umm*, vol.3, p.226, Ibn Hazm, *Kitab al-Muhalla*, vol.8, p. 162, cited in Abdullah Alwi Haji Hassan, *Sales and Contracts in Early Islamic Commercial Law*, Islamabad (1993), p.180.

<sup>31</sup> *Supra* note 14, at 535.

<sup>32</sup> *Supra* note 12, at 17.

<sup>33</sup> Tamdoğan, I. (2008). Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana. *Islamic Law and Society*, 15(1), at 65. doi:10.1163/156851908X287307

<sup>34</sup> Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed V.L. Menage, Oxford University Press, 1973, at 137, 146. See also, Nora Abdul Hak, Sa’odah Ahmad, & Umar A. Oseni. (2011). *Alternative Dispute Resolution (ADR) in Islam* (1st ed.). Kuala Lumpur: IIUM Press, at 16-18.

<sup>35</sup> Article 3(1) Federal Constitution

<sup>36</sup> Ahmad Ibrahim & Ahilemah Joned, *The Malaysian Legal System*, Kuala Lumpur, Dewan Bahasa dan Pustaka, (1987). See also, Hassan, M. H. Bin. (2007). Explaining Islam’s special position and the politic of Islam in Malaysia. *Muslim World*, 97(2), at 287–288. doi:10.1111/j.1478-1913.2007.00174.x

<sup>37</sup> Sharifah Suhana Ahmad, *Malaysian Legal System*, Malayan Law Journal Sdn Bhd, (1999), at 3.

<sup>38</sup> Liaw Yock Fang, *The Laws of Melaka*, The Hague – Martinus Nijhoff, (1976), at 142-143.

<sup>39</sup> Farid Sufian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia*, 2<sup>nd</sup> Edn, Petaling Jaya: LexisNexis, 2008, at 16-17.

<sup>40</sup> Davis C. Buxbaum, *Family Law and Customary Law in Asia: A Contemporary Legal Perspective*, The Hague, at xxvi.

imam (the leader of prayer at the mosque), ulama' (religious scholars) or qadi (judges in the syari'ah court).<sup>41</sup> In practice, parties tend to refer to their family members and elders to settle the dispute, especially the one involving matrimonial matters due to the belief that problems should not be publicized to save the reputation and to preserve the family institution.<sup>42</sup>

The position changed when the colonialists, starting from the Portuguese, the Dutch, the British and the Japanese came to the country. Among the four foreign powers, the British left the most impact. English Law was inserted to the country, making the existing Islamic Law a secondary law that only governs trivial matters, including matrimonial disputes and personal law.<sup>43</sup> The inclusion of the English Law started with the introduction of the First Charter of Justice in Penang in 1807, followed by the Second Charter of Justice in 1826 which extended the application of English Law to Singapore and Malacca. The Third Charter of Justice in 1855 was introduced to recognise the existing courts in these states.<sup>44</sup> Despite of these laws, the British was not allowed to interfere in religious matters. However, there were many instances where the implementation of Islamic Law was restricted either by direct or indirect interference.<sup>45</sup>

Nevertheless, sulh and Malay adat were still being applied within the Malay communities. In most cases, the Ketua Kampung was the mediator between conflicting parties. The Ketua Kampung would analyse the case and evidence presented by parties and advice for a peaceful settlement.<sup>46</sup> Hence, it can be concluded that sulh is a part of the Malaysia Legal System and is not a foreign concept to the people, especially the Malays society in Malaysia.

## 5.2 The Current Position of Sulh in Malaysia

The position of the Islamic Law has improved after the establishment of the Syariah Courts by virtue of the Federal Constitution.<sup>47</sup> The Syariah Courts is governed and supervised by the Syariah Judiciary Department of Malaysia (JKSM) and currently under the Prime Minister's Department. It is headed by the Director General, who is also the Syariah Chief Justice. The main role of the JKSM is to standardize the law among different states and enhance the effectiveness of Syariah Courts in Malaysia.<sup>48</sup> For example, the JKSM Practice Direction No.3/2002 has extending the application of sulh to other states.<sup>49</sup>

It has been mentioned that the JKSM role is to enhance the effectiveness of Syariah Courts in Malaysia. The effectiveness of Syariah courts can be measured by some factors, including the number of settled cases in courts. The number of settled cases can be increased with the application of Sulh in courts. By virtue of the JKSM Practice Direction No.3/2002, all cases need to be referred to sulh before proceed to the court.<sup>50</sup> The Sulh Work Manual JKSM 2002 and the Sulh Officer Ethical Code JKSM 2002 were introduced as a guideline in conducting sulh and prescribes ethical rules that must be followed by the sulh officer.<sup>51</sup>

The JKSM has provides training for sulh officers to enhance their skills as a mediator. The training given is focusing on the mediation skills and the role of a mediator. For example, 24 sulh officers managed to receive the Certificate for Conducting Mediation after received the training from the Accord Group in 2007.<sup>52</sup> Another example was the training provided by the Jabatan Kehakiman Syariah Negeri Selangor (JAKESS), which was held on 24 until 26 April 2013 and attended by 9 sulh officers from JAKESS. The training was on the sulh procedures and the discussion on the frequent problems faced by the sulh officer.<sup>53</sup>

## 5.3 The Laws Relating to Sulh

The application of sulh in Malaysia is govern by rules such as the Syariah Court Civil Procedure (Sulh) (Selangor) Rules 2001, the Syariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004, the Syariah

<sup>41</sup> J.A. Wall & R.R. Callister, Malaysian Community Mediation, Vol. 43, No. 3, (1999), *Journal of Conflict Resolution*, at 344. See also, Nora Abdul Hak, Sa'odah Ahmad, & Umar A. Oseni. (2011). *Alternative Dispute Resolution (ADR) in Islam* (1st ed.). Kuala Lumpur: IIUM Press, at 102-105.

<sup>42</sup> Supra note 12, at 103.

<sup>43</sup> Farid Sufian Shuaib, Development of Syariah Courts in Malaysia: Waves of Reformation, [2008] 9, CLJ xli, at 2.

<sup>44</sup> Supra note 36, at 22-24.

<sup>45</sup> Hassan, M. H. Bin. (2007). Explaining Islam's special position and the politic of Islam in Malaysia. *Muslim World*, 97(2), at 288-289. doi:10.1111/j.1478-1913.2007.00174.x

<sup>46</sup> Supra note 41, 343-365.

<sup>47</sup> List II – State List, para 1 of the Federal Constitution of Malaysia.

<sup>48</sup> Azhar Abu Samah, Ismail Mat, "Perlantikan Pegawai Sulh Atasi Kes Tertanggung Mahkamah Syariah," Berita Harian, 27th April, 2003, at 15. See also, Nora Abdul Hak, Sa'odah Ahmad, & Umar A. Oseni. (2011). *Alternative Dispute Resolution (ADR) in Islam* (1st ed.). Kuala Lumpur: IIUM Press, at 137.

<sup>49</sup> JKSM, <<http://www.jksm.gov.my/jksmv2/aa/uploads/032002.pdf>> viewed 7 August 2014.

<sup>50</sup> Id.

<sup>51</sup> Supra note 12, at 151-154.

<sup>52</sup> Accord Group is an international organization which is based in Australia. It specializes in mediation, dispute resolution and training mediators.

<sup>53</sup> JAKESS, <[http://www.jakess.gov.my/index.php?option=com\\_content&view=article&id=129:kursus-intensif-pegawai-sulh&catid=7:berita&Itemid=62](http://www.jakess.gov.my/index.php?option=com_content&view=article&id=129:kursus-intensif-pegawai-sulh&catid=7:berita&Itemid=62)> viewed 7 August 2014.

Court Civil Procedure (Sulh) (Malacca) Rules 2004, the Syariah Court Civil Procedure (Sulh) (Johor) Rules 2004 and the Syariah Court Civil Procedure (Sulh) (Penang) Rules 2006.

The Syariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004 (the SCCPSR 2004)<sup>54</sup> was drafted by the National Technical Committee on Syariah and Civil Law for the purpose of ensuring uniformity in law and effectiveness of the procedures. This Rule is made pursuant to the Syariah Civil Procedure (Federal Territories) Act 1998<sup>55</sup> as follows:

The Syaria'h Court Rules Committee may make rules, which shall be published in the Gazette, for carrying out the provisions of this Act, and in particular but without prejudice to the generality of the foregoing, such rules may provide for (c) Procedure for sulh.<sup>56</sup>

The application of the Rule was extended to other states by virtue of the Practice Direction No. 3 of 2002 by the Department of Syariah Judiciary Malaysia.<sup>57</sup> The Rule applies to family disputes and ancillary matters, except application for divorce under IFLA 1984.<sup>58</sup>

Prior to the sulh proceeding, the court has to examine any possibility of settlement. If there is a possibility of settlement between parties, the Registrar shall: (a) not fix a date for the trial of the action within a period of three months from the receipt of the summons or the application; (b) fix a date, as soon as practicable, for the parties to hold sulh; and (c) serve the notice of the date fixed for sulh on the parties.<sup>59</sup> Failure to attend the sulh proceeding amounting to contempt of court.<sup>60</sup> Once the proceeding starts, the parties have to follow the procedure as stated in Rule 5 as follows:

- (1) Sulh shall be conducted in a majlis (hereinafter referred to as "Majlis Sulh" in the presence of the parties to the action.
- (2) Majlis Sulh shall be chaired by a Registrar or any public officer appointed for such purpose by the Chief Syariah Judge.
- (3) In a Majlis Sulh, every party shall appear in person and no Peguam Syarie may appear or act as such for any party and no party shall be represented by any person without the leave of the Chairman.
- (4) The Chairman shall, where possible, assist the parties to resolve the dispute concerning the subject matter of the sulh and shall give each party an opportunity to be heard.
- (5) In a Majlis Sulh, the Chairman may take evidence from the parties, accept any document submitted and may, if he thinks necessary, adjourn the Majlis Sulh from time to time.<sup>61</sup>

Once parties agree for a settlement, the chairman prepares the draft agreement which will be confirmed and signed by the parties. The draft agreement will be sent to the court for judgment by consent.<sup>62</sup> In contrary, if parties fail to achieve settlement, the chairman will write a report containing his recommendations for the case.<sup>63</sup> The report will be sent to the court, which will later fix a date for hearing to continue the proceeding.<sup>64</sup> Other than the SCCPSR 2004, guidelines are made to govern the sulh procedure. The Sulh Officer Ethical Code JKSM 2002 (the Code) is the guideline on roles and responsibilities of the sulh officers,<sup>65</sup> while the Sulh Work Manual JKSM 2002 (the Manual) is the complete guideline for the sulh procedures.<sup>66</sup>

## **VI. Mediation In Malaysia**

Malaysia's legal system consists of two systems: (1) Common law, which derives from its British colonial roots; and (2) Islamic law, which is administered by syariah courts. Islamic law is applicable in very limited type of cases, including family and religious matters. Most cases are brought to the common law courts, either at the federal or state court systems, which include civil courts and criminal courts.

However, the Malaysia's legal system faced difficulties in maintaining its reputation due to inadequacies of the current litigation system. One of the major problems is delay in delivery of decision. Delay causes loss and hardship to people, backlog of cases and affecting the administration of justice. There are thousands of cases pending in the court each year as stated in the Balance Carried Forward column in Table 1.

<sup>54</sup> (PU (A) 18/2004)

<sup>55</sup> Section 247(1)(c) Syariah Civil Procedure (Federal Territories) Rules 2004.

<sup>56</sup> Id.

<sup>57</sup> Supra note 53.

<sup>58</sup> Rule 1(3) Syariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004

<sup>59</sup> Syariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004, Rule 3.

<sup>60</sup> Ibid, Rule 4.

<sup>61</sup> Ibid, Rule 5.

<sup>62</sup> Ibid, Rule 6 and Section 131 Syariah Civil Procedure (Federal Territories) Rules 2004.

<sup>63</sup> Ibid, Rule 7.

<sup>64</sup> Ibid, Rule 8.

<sup>65</sup> Sulh Officers Code of Ethics, Department of Syariah Judiciary, Malaysia (JKSM) 2002, Released by Dato' Sheikh Ghazali bin Hj. Ab. Rahman, former Chief Syariah Judge.

<sup>66</sup> Sulh Work Manual, Department of Syariah Judiciary, Malaysia (JKSM) 2002.

**Table 1**  
**Statistic of Courts in Semenanjung Malaysia Year 2014 (as at 31 December 2014)<sup>67</sup>**

Courts	Type of Cases	Balance Forward	Carry	Number of Cases Registered	Number of Cases Disposed	Balance Forward	Carried
High Court	Civil	49,824		100,314	104,428	45,710	
	Criminal	2,927		4,648	4,450	3,125	
Sessions Court	Civil	15,949		42,877	44,145	14,681	
	Criminal	7,038		36,428	36,412	7,054	
Magistrate Court	Civil	48,762		260,136	261,607	47,291	
	Criminal	20,336		144,350	142,785	21,901	

Throughout 2014, the High Court of Malaya had 45,710 civil cases and 3,125 pending criminal cases. As for the Sessions Court, a total of 14,681 civil cases and 7,054 criminal cases were pending as at 31 December 2014. The number of pending cases was higher in the Magistrate Court with 47,291 civil cases and 21,901 criminal cases pending.<sup>68</sup>

Several reforms have been introduced to improve the judicial system in Malaysia, including the inclusion of rules that encourages mediation. As mentioned earlier, these changes are made with the aim of reducing backlog cases in courts by allowing faster settlement of cases, making the judicial system more efficient and accessible. However, there is no specific law that makes mediation mandatory, since it is merely an initiative and alternative to the litigation system. In fact, mediation is not part of the court procedure. Thus parties are allowed to refer the case for private mediation at any time, either before or during the court proceeding.

### VII. Sulh As A Method To Resolve Cases For Muslims In Malaysia

As have been mentioned, sulh is widely practiced in Malaysia, especially among the Muslims as a method to resolve disputes without having to bring the case to the court. Traditionally, the Ketua Kampung is the mediator between conflicting parties. The Ketua Kampung would analyse the case and advice for a peaceful settlement. In most cases, parties refer the dispute to their family members and elders. This practice is usually adopted in matrimonial disputes, which is not publicized to save the reputation and to preserve the family institution. However, as mentioned, the practice is limited to certain types of cases, mostly regarding matrimonial and religious matter. Therefore, it is suggested that sulh is used as a method to settle cases among the Muslims community in Malaysia. Currently, most cases are governed by the common law system. The system itself is proven to be quite lacking in resolving cases, due to its adversarial nature which requires time and high cost. As a result, mediation is used as an alternative to the current system. Generally, the application of mediation is a purely voluntary process. It can be either court mediation or mediation by non-judge mediator. It has been used as the other alternative to the current tort litigation system.

Similarly, sulh may be used as the alternative for Muslims in Malaysia. The concept of sulh is similar to mediation in the sense that it involves resolving dispute amicably with the assistance of a neutral third party. Unfortunately, not many Muslims in Malaysia have information about the concept of sulh. Many resort to the western litigation system or other alternative dispute resolution whenever a dispute occurs. Hence, the knowledge of sulh needs to be given in order to increase the awareness and revive its application by Muslims in Malaysia. The awareness and knowledge on sulh can be given by offering a specific subject of sulh at schools and academic institutions in Malaysia. The syllabus should include discussions of all types of sulh, especially mediation in general and briefly. It should include the general concept of sulh, its techniques, ethics and approaches in conducting the procedure. Aside from courses, training should be given to people who are interested in becoming a sulh officer. Programmes may be conducted to promote sulh as a method of dispute resolution in medical negligence cases.

### VIII. Conclusion

The concept of mediation is not new in Islamic law. It is known as sulh which comprises of negotiation, mediation, conciliation and the act of compromise. Sulh is a part and parcel of the Islamic legal system. This concept is supported in the Quran and the hadith of the Prophet SAW. It has been practiced from the pre-Islam period until today. It is an effective tool that provides amicable, speedy and inexpensive settlement to parties without having to resort to the litigation system. Thus, sulh should be promoted as the new alternative to settle cases among Muslims in Malaysia.

<sup>67</sup> YAA Tun Arifin Bin Zakaria. (2015). Speech by YAA Tun Arifin Bin Zakaria Chief Justice of Malaysia at the Opening of the Legal Year 2015, 10 January 2015 Main Hall, Ministry of Finance, Precint 3, Putrajaya. *MLJ*, 1, cxxxiii.

<sup>68</sup> Id.

## References

- [1]. Syed Khalid Rashid, (2004). Alternative Dispute Resolution in the Context of Islamic Law. *The Vindobona Journal of International Commercial Law and Arbitration*, 8(1), at 105. doi:10.1515/9783110238235.661
- [2]. Mustafa al-Khin et al., *al-Fiqh al Manhaji 'ala Madhhab al-Imam al-Shafi'i*, Dar al-Qalam, 1996, vol.3, at 149.
- [3]. Hans Wehr, *A Dictionary of Modern Written Arabic*, edited by J. Milton Cowan, London, MacDonal & Evans Ltd, (1974), at 521.
- [4]. Raihanah Hj. Azhari, *Sulh Dalam Perundangan Islam: Kajian di Jabatan Kehakiman Syariah, Selangor Darul Ehsan*, (Ph.D Thesis, Universiti Malaya, 2005) at 57.
- [5]. Aida Othman, *And Sulh is the Best: Amicable settlement and Dispute Resolution in Islamic Law*, (Ph.D Thesis, Harvard University, 2005)
- [6]. Ramizah Wan Muhammad, "The Theory and Practice of Sulh (Mediation) in the Malaysian Shariah Courts." (2008), 16, *IUMLJ* 33, 35.
- [7]. Muhammad Ibn al-Shafi'f, *al-Umm*, Beirut, Dar al-Kutub al-Ilmiyya, (1993), 6:312. See also, Aseel Al-Ramahi. (2008). Sulh: a crucial part of Islamic arbitration (No. 08-45). New York. Retrieved from <<http://www.lse.ac.uk/collections/law/wps/wps1.htm>>
- [8]. Article 1531, *The Majelle*, C.R. Tyser, The Other Press, 2003, at 254.
- [9]. Salih 'Abd al-Sami' al-Abi al-Azhari, *Jawahir al-Ikhlil Syarh al' Allamah Khalil Fi Mazhab al-Imam Malik*, Dar al-Fikr, (n.d), vol. 2, at 102.
- [10]. Quran, *al-Hujurat*, (49):9-10.
- [11]. Quran, *al-Nisa*, (4):114.
- [12]. Nora Abdul Hak, Sa'odah Ahmad, & Umar A. Oseni. (2011). *Alternative Dispute Resolution (ADR) in Islam* (1st ed.). Kuala Lumpur: IIUM Press, at 24.
- [13]. Abu 'Isa Muhammad Bin 'Isa, *Kitab al-Ahkam*, in *Al-Jam'e al-Sahih wahuwa Sunan al-Tirmidhi*, Dar al-Fikr, (n.d), vol.3, hadith 1352.
- [14]. *Sahih Al-Bukhari*, vol.3, translation by Muhsin Khan, Dar Al-Arabia, Beirut, (nd), at 543.
- [15]. Nasiruddin al-Albani, *Sahih Al-Ja'mi' al-Saghir*, Hadith no. 436.
- [16]. Aida Othman, (2007). "And Amicable Settlement Is Best": Sulh and Dispute Resolution in Islamic Law. *Arab Law Quarterly*, 21(1), at 64. doi:10.1163/026805507X197857
- [17]. Muhammad Hamidullah, *Administration of Justice in the Early Islam*, vol. 11, (1937) *Islamic Culture*, at 163-71.
- [18]. R.C. Jennings, *Kadi, Court and Legal Procedure in the 17th Century Ottoman Keyseri*, *Studia Islamica*, 1978, at 133-172.
- [19]. Joseph Schacht, *An Introduction to Islamic Law*, Clarendon Press, 1984, at 7.
- [20]. Sayen, G. (2003). Arbitration, conciliation, and the Islamic legal tradition in Saudi Arabia. *U. Pa. J. Int'l Econ. L.*, 24, 905- 958.
- [21]. Quran, *al-Ma'idah*, (5):90.
- [22]. Ibn Ishaq, *Muhammad Bin Yasar, The Life of Muhammad*, trans. A. Guillaume, London, Oxford University Press, (1955), at 85.
- [23]. *Sahih al-Bukhari*, Vol.3, para 858, English translation by Dr. Muhammad Muhsin Khan, Lahore: Kazi Publications, 1986, at 536.
- [24]. Margolith, D.S., "Omar's Instruction to the Qadi", *Journal of Royal Asiatic Society*, 1910, at 307. See also, Al-Shafi'i, *Kitab al-Umm*, vol.3, p.226, Ibn Hazm, *Kitab al-Muhalla*, vol.8, p. 162, cited in Abdullah Alwi Haji Hassan, *Sales and Contracts in Early Islamic Commercial Law*, Islamabad (1993), p.180.
- [25]. Tamdoğan, I. (2008). Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana. *Islamic Law and Society*, 15(1), at 65. doi:10.1163/156851908X287307
- [26]. Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed V.L. Menage, Oxford University Press, 1973, at 137, 146. See also, Nora Abdul Hak, Sa'odah Ahmad, & Umar A. Oseni. (2011). *Alternative Dispute Resolution (ADR) in Islam* (1st ed.). Kuala Lumpur: IIUM Press, at 16-18.
- [27]. Article 3(1) Federal Constitution
- [28]. Ahmad Ibrahim & Ahilemah Joned, *The Malaysian Legal System*, Kuala Lumpur, Dewan Bahasa dan Pustaka, (1987). See also, Hassan, M. H. Bin. (2007). Explaining Islam's special position and the politic of Islam in Malaysia. *Muslim World*, 97(2), at 287-288. doi:10.1111/j.1478-1913.2007.00174.x
- [29]. Sharifah Suhana Ahmad, *Malaysian Legal System*, *Malayan Law Journal Sdn Bhd*, (1999), at 3.
- [30]. Liaw Yock Fang, *The Laws of Melaka*, The Hague – Martinus Nijhoff, (1976), at 142-143.
- [31]. Farid Sufian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia*, 2<sup>nd</sup> Edn, Petaling Jaya: LexisNexis, 2008, at 16-17.
- [32]. Davis C. Buxbaum, *Family Law and Customary Law in Asia: A Contemporary Legal Perspective*, The Hague, at xxvi.
- [33]. J.A. Wall & R.R. Callister, *Malaysian Community Mediation*, Vol. 43, No. 3, (1999), *Journal of Conflict Resolution*, at 344. See also, Nora Abdul Hak, Sa'odah Ahmad, & Umar A. Oseni. (2011). *Alternative Dispute Resolution (ADR) in Islam* (1st ed.). Kuala Lumpur: IIUM Press, at 102-105.
- [34]. Farid Sufian Shuaib, *Development of Syariah Courts in Malaysia: Waves of Reformation*, [2008] 9, *CLJ xli*, at 2.
- [35]. Hassan, M. H. Bin. (2007). Explaining Islam's special position and the politic of Islam in Malaysia. *Muslim World*, 97(2), at 288-289. doi:10.1111/j.1478-1913.2007.00174.x
- [36]. List II – State List, para 1 of the Federal Constitution of Malaysia.
- [37]. Azhar Abu Samah, Ismail Mat, "Perlantikan Pegawai Sulh Atasi Kes Tertangguh Mahkamah Syariah," *Berita Harian*, 27th April, 2003, at 15. See also, Nora Abdul Hak, Sa'odah Ahmad, & Umar A. Oseni. (2011). *Alternative Dispute Resolution (ADR) in Islam* (1st ed.). Kuala Lumpur: IIUM Press, at 137.
- [38]. JKSM, <<http://www.jksm.gov.my/jksmv2/aa/uploads/032002.pdf>> viewed 7 August 2014.
- [39]. JAKESS, <[http://www.jakess.gov.my/index.php?option=com\\_content&view=article&id=129:kursus-intensif-pegawai-sulh&catid=7:berita&Itemid=62](http://www.jakess.gov.my/index.php?option=com_content&view=article&id=129:kursus-intensif-pegawai-sulh&catid=7:berita&Itemid=62)> viewed 7 August 2014.
- [40]. (PU (A) 18/2004)
- [41]. Section 247(1)(c) *Syariah Civil Procedure (Federal Territories) Rules 2004*.
- [42]. JAKESS, <[http://www.jakess.gov.my/index.php?option=com\\_content&view=article&id=129:kursus-intensif-pegawai-sulh&catid=7:berita&Itemid=62](http://www.jakess.gov.my/index.php?option=com_content&view=article&id=129:kursus-intensif-pegawai-sulh&catid=7:berita&Itemid=62)> viewed 7 August 2014.
- [43]. Rule 1(3) *Shariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004*
- [44]. *Shariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004*, Rule 3.
- [45]. *Ibid*, Rule 4.
- [46]. *Ibid*, Rule 5
- [47]. *Ibid*, Rule 6 and Section 131 *Syariah Civil Procedure (Federal Territories) Rules 2004*.
- [48]. *Ibid*, Rule 7.
- [49]. *Ibid*, Rule 8.



- [50]. Sulh Officers Code of Ethics, Department of Shariah Judiciary, Malaysia (JKSM) 2002, Released by Dato' Sheikh Ghazali bin Hj. Ab. Rahman, former Chief Shariah Judge.
- [51]. Sulh Work Manual, Department of Shariah Judiciary, Malaysia (JKSM) 2002.
- [52]. YAA Tun Arifin Bin Zakaria. (2015). Speech by YAA Tun Arifin Bin Zakaria Chief Justice of Malaysia at the Opening of the Legal Year 2015, 10 January 2015 Main Hall, Ministry of Finance, Precint 3, Putrajaya. MLJ, 1, cxxxiii.