



INCORPORATING MEDIATION IN THE CRIMINAL
PROCEDURE CODE OF MALAYSIA

BY

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ABSTRACT

Settlement out of court in criminal cases in Malaysia is allowed through the process of plea bargaining which is accepted officially after the amendment of the Criminal Procedure Code 2012 (Act 539) by the Criminal Procedure Code (Amendment) Act 2012. In the process of plea bargaining, the prosecution and the accused negotiate on the reduction of charge or sentence against the accused. In the case that attempts at plea bargaining fail, the Court at the case management stage will fix a date for trial. Nevertheless, the United Kingdom, Singapore and the State of Idaho have taken a proactive step which allows a judge to act as a mediator to facilitate the process of plea bargaining between the prosecutor and the accused to reach an agreement out of court known as criminal mediation. Islamic law also encourages parties to resolve criminal cases through mediation (*sulh*) if the criminal act has affected the victim personally. The present study analysed the law and practice concerning plea bargaining and case management in Malaysia. This study has identified the weaknesses and lacunas in the provisions governing plea bargaining and case management under the Criminal Procedure Code 2012 of Malaysia. These weaknesses and lacunas can be overcome through mediation if the attempts of plea bargaining fail as practised in the United Kingdom, Singapore and the State of Idaho. Incorporation of mediation in the Criminal Procedure Code 2012 (Act 539) is necessary to benefit the parties and judge, particularly to expedite the disposal of criminal cases, and reduce the number of pending and appeal cases.

ملخص البحث

تُعد تسوية بعض القضايا في المحاكم أمراً شبة سائداً. وكما هو معروف في ماليزيا تم السماح بتسوية القضية خارج إطار المحكمة في القضايا الجنائية من خلال عملية الالتماس بتقديم مناشدة القاضي بذلك وقبول الطرفين المتنازعين، وقد تمّ قبول هذه التسوية رسمياً بعد تعديل قانون الإجراءات الجنائية لعام 2012م (القانون 539) من قانون 2012. قانون الإجراءات الجنائية (المعدل) في عملية الالتماس من أجل التفاوض بين النيابة العامة والمتهم بسبب التفاوض على شطب أو الغاء التهمة أو الحكم الصادر ضد المتهم. في حالة فشل محاولات الالتماس هذه، فإن على إدارة المحكمة تحديد موعداً للمحاكمة لفترة زمنية أخرى. ومع ذلك، اتخذت المملكة المتحدة، وسنغافورة، وولاية ايداهو خطوة استباقية والتي تتمثل السماح للقاضي نفسه ليكون بمثابة وسيط لتسهيل عملية الالتماس القضائية بين المدعي العام والمتهم للتوصل إلى اتفاق خارج المحكمة والمعروفة باسم الوساطة الجنائية. إضافة إلى ذلك من وجهة النظر الإسلامي، فإن الشريعة الإسلامية تشجع أيضاً الأطراف لحل القضايا الجنائية من خلال وساطة (الصلح) إذا كان الفعل الإجرامي قد أثر على الضحية شخصياً. وحللت الدراسة القوانين والممارسات المتعلقة بالمساومة القضائية، وإدارة القضايا في ماليزيا. وقد حددت هذه الدراسة نقاط الضعف، والثغرات في الأحكام التي تنظم المساومة أو الالتماس القضائي لإدارة القضايا بموجب قانون الإجراءات الجنائية لعام 2012م بماليزيا. من أجل تحديد نقاط الضعف، والثغرات والتي يمكن التغلب عليها من خلال الوساطة وخاصة عند فشل محاولات الالتماس كما يمارس في المملكة المتحدة، وسنغافورة، وولاية ايداهو. لذلك فإن إدماج الوساطة في قانون الإجراءات الجنائية 2012م (القانون 539) ضروري من أجل عودة النفع على الطرفين المتنازعين والقاضي، وخاصة في حالة الإسراع في البت في القضايا الجنائية، وتقليل المدة الزمنية لانتظار القضايا المعلقة وقضايا الاستئناف.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declared that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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This thesis is especially dedicated to my parents and my family for their constant love, sacrifice, and continuous support.

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Supreme Court Act 1981 (United Kingdom)
Supreme Court of Judicature Act 1999 (Singapore)
Syariah Criminal Procedure (Federal Territories) Act 1997 (Act 560)
Subordinate Courts Act 1948 (Act 92)

LIST OF ABBREVIATIONS

i.e	that is
All ER	All England Law Reports
CLJ	Common Law Journal
Cr App R	Criminal Appeal Reports
et al	others
EWCA Crim	Court of Appeal Criminal Division
FSC	Federal Shariat Court
M.L.J.	Malayan Law Journal
MLJU	Malayan Law Journal Unreported
PCr.LJ	Pakistan Criminal Law Journal
P.L.D	All Pakistan Legal Decisions
SC	Supreme Court of Pakistan
SGCA	Singapore Court of Appeal (unreported judgments)
SGHC	Singapore High Court (unreported judgments).
SLR	Singapore Law Reports
v.	versus, against

TRANSLITERATIONS

ء	‘	خ	Kh	ش	Sh	غ	Gh	ن	N
ب	B	د	D	ص	ṣ	ف	F	هـ	H
ت	T	ذ	Dh	ض	ḍ	ق	Q	و	W
ث	Th	ر	R	ط	ṭ	ك	K	ي	y
ج	J	ز	Z	ظ	Ẓ	ل	L		
ح	Ḥ	س	S	ع	‘	م	M		

Short Vowels	
ـَ	a
ـِ	i
ـُ	u

Long Vowels	
ـَ + —	ā
ـِ + —	ī
ـُ + —	ū

CHAPTER ONE

INTRODUCTION

1.0 INTRODUCTION

Mediation as a form of alternative dispute resolution is commonly applied in almost all types of civil cases. Recently, the application of mediation extends to criminal cases and has recognition at the international level and in certain countries. Criminal mediation is not a new model of criminal dispute settlement. Initially, it is a traditional dispute resolution that is practised by traditional societies before the introduction of a litigation process in the court system.¹ This chapter discusses the background of research, summary of research, research objectives, research questions, hypothesis, scope and limitation of this research. This chapter also highlights the method and methodologies adopted throughout this study and the literature review to find the gap in the available literatures concerning criminal mediation.

1.1 BACKGROUND OF RESEARCH

Mediation, strictly speaking, is a voluntary process where disputing parties with the assistance of a neutral person attempt to reach an amicable solution to their disputes. Criminal mediation is not merely an alternative to the formal criminal justice system as it

¹ Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective*, (United Kingdom: Cavendish Publishing Limited, (2004), 2.

may integrate into the legal process. It may commence at the investigation stage or the prosecution stage before sentencing.²

Indeed, criminal mediation has been practised since the period of the Prophet Muhammad (s.'a.w.) and the companions. Islam encourages parties to criminal disputes to forgive and to reconcile.³ Instead of punishing the offender with the original punishment as stated in the Qur'an and Hadith of the Prophet Muhammad (s.'a.w.), through *ṣūlḥ*, the offender can be punished with a lesser punishment. However, *ṣūlḥ* is applicable for certain offences that violate the right of individuals. For instance, *ṣūlḥ* is allowed in *ḥudūd* crimes that involve individual's rights infringement such as theft, robbery and false accusation, *qiṣāṣ* that includes bodily injury and murder as well as some *ta'zir* such as threatening, cheating and defamation.⁴ The process of *ṣūlḥ* requires the accused person to plead guilty and the victim may forgive the offender and agree to compensation.⁵ Though the victim has forgiven the offender, it does not waive the right of the ruler to punish the offender with *ta'zir*.⁶

There are three models of criminal mediation namely victim-offender mediation, court based mediation and mediation in case management. Victim-offender mediation origins from restorative justice theory whereby the process involves the offender and victim

² Gabriel Halleuya, "Therapeutic Victim-Offender Mediation within the Criminal Justice Process- Sharpening the Evaluation of Personal Potential for Rehabilitation while Righting Wrongs under the ADR Philosophy", *Harvard Negotiation Law Review*, vol. 16, Spring (2011): 65.

³ Al-Qur'an: Ash-Shura: 40

⁴ Nasimah Hussin, "Mediation in Islamic Criminal Law" in *Mediation in Malaysia: The Law and Practice*, edited by Mohammad Naqib Ishan Jan & Ashgar Ali, (Selangor: Lexis Nexis, 2010), 355.

⁵ Sayed Sikandar Shah Haneef, *Homicide in Islam: Legal Structure and the Evidence Requirements*, (Kuala Lumpur: A.S.Noordeen, 2000), 130.

⁶ Nasimah Hussin, "Mediation in Islamic Criminal Law", in *Mediation in Malaysia: The Law and Practice*, 355.

of a crime with the help of a mediator to reach an agreement according to their needs and interests. The aim of such theory is to restore whatever damages which have been affected by the crime to the victim.⁷ The court based mediation is a referral order from the court or request by the parties to refer a case to mediation at the early resolution of disputes or at a pre-trial conference.⁸ The case-management mediation involves a third party to facilitate the parties after the parties' initial attempts at plea bargaining fails. Plea bargaining is a process where a defendant is induced to plead guilty for consideration (to a lesser offence or lesser charge), and waives his or her right to trial.⁹ Since there are various types of criminal mediation, the implementation of criminal mediation at international level and in some particular countries may differ from one another.

Criminal mediation has been accepted in international level since 1999. According to the Recommendation No. R (99) 19 of the Council of Europe Concerning Mediation in Penal Matters, criminal mediation is a process whereby the victim and the offender are actively involved in reaching a solution concerning crime with the help of an impartial third party.¹⁰ In 2002, the Council of Europe Concerning Mediation in Penal Matters had established the Framework Decision which provides that the member states must promote mediation in criminal cases based on the Recommendation No. R (99) 19.¹¹ The United Nation has recognised criminal mediation in the UN Resolution on Basic Principles on the

⁷ Margarita Zernova, *Restorative Justice: Ideals and Realities*, (England: Ashgate Publishing Limited, 2007), 9.

⁸ Ashgar Ali Mohamed, "Court Annexed Mediation with Reference to the Practice in Singapore", in *Mediation in Malaysia: The Law and Practice*, 453.

⁹ Maureen E. Laffin, "Remarks On Case-Management Criminal Mediation Idaho Law", *Idaho Law Review*, No 40 (2004): 571.

¹⁰ Article 1 of the Recommendation No. R (99) 19 on Mediation in Penal Matters (1999).

¹¹ Article 10 of the Framework Decision.