



THE EFFECTIVENESS OF MEDIATION AND
ṢULḤ IN RESOLVING FAMILY DISPUTES: A
STUDY OF PARTIES' SATISFACTION WITH
ṢULḤ IN THE STATE OF SELANGOR

BY

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ABSTRACT

Family dispute, in particular divorce, has a traumatic effect and the legal system does not openly respond to the emotions and trauma experienced by parties in dispute. In order to preserve productive relationships for the future, Islam encourages negotiated settlements or settlements out of court in the form of *ṣulḥ* or mediation, conciliation and arbitration. The law and regulations pertaining to *ṣulḥ* have been enforced in Selangor since 2002. The present study examined the effectiveness of *ṣulḥ* in resolving family disputes in Selangor from the stakeholders' (parties of *ṣulḥ*) perspective. Effectiveness was measured by evaluating their satisfaction with *ṣulḥ*. Respondents of this study comprised of one hundred parties of *ṣulḥ*, selected through purposive sampling technique. The findings revealed that a large percentage of the respondents reported that they were highly satisfied and benefited from *ṣulḥ*; felt that *ṣulḥ* officers were impartial, knowledgeable and courteous; understood the issues involved; empathetic and were able to respect the right of the respondents to make decisions themselves on issues of dispute; and that they would recommend *ṣulḥ* to others. In addition, univariate analysis showed that male respondents were found to exhibit higher level of satisfaction compared to female respondents. Pertaining to the law on *ṣulḥ*, this study showed that there are loopholes that should be addressed in order to enhance the effective application of *ṣulḥ*. It can be concluded that *ṣulḥ* is a very viable alternative dispute resolution mechanism. Disputants were able to resolve their disputes amicably and the court also managed to decrease backlog cases. It is timely for other states in Malaysia to follow the example of Selangor in actively implementing *ṣulḥ* as the first step towards resolving dispute amicably.

ملخص البحث

والنزاع الأسري ولاسيما الطلاق غالبا ما ينتهي إلى نتيجة صادمة ومدمرة، فالنظام القانوني عادة لا يستجيب للعواطف والمشاعر أو الصدمات النفسية التي يمر فيها طرفا النزاع. لذا فإن الإسلام شجع وعمل على التوفيق وتسوية النزاعات بعيدا عن المحاكم وإجراءات التقاضي، وذلك بطرق الصلح والتوفيق والتحكيم. في ولاية سلانجور، تم تطبيق القانون واللوائح المتعلقة بالصلح منذ عام 2002م. وتبحث الدراسة الحالية عن مدى فعالية الصلح في حل النزاعات العائلية في ولاية سلانجور من خلال وجهة نظر أصحاب المصلحة (طرفي الصلح). وقد تم قياس هذه الفعالية طبقاً لتقييم طرفي الصلح ومدى ارتياحهم لنتيجة الصلح. وتتكون عينة هذه الدراسة من مائة من الأطراف الذين شاركوا في الصلح، وقد تم تحديد العينة بطريق تقنية الاختيار الهادف. وكشفت النتائج أن نسبة كبيرة من المشاركين ذكروا أنهم على درجة عالية من الرضى واستفادوا كثيرا من الصلح، كما شعروا بأن موظفي الصلح كانوا عادلين منصفين، ذوي علم ومعرفة، وتمتعوا بأدب وكياسة، كما كانوا على وعي تام بالقضايا المعنية، وامتازوا بالرفق والقدرة على احترام حق المستجيبين في اتخاذ القرارات بأنفسهم في القضايا المتنازع عليها، وأنهم (أي المستجيبين) يوصون الآخرين بالإقبال على الصلح. فضلا عن ذلك، فإن تحليل المتغيرات يدل على أن المستجيبين من الذكور أظهروا درجة أعلى من مستوى الرضى مقارنة بالمستجيبات من الإناث. وفيما يتصل بالقانون المتعلق بالصلح، فإن هذه الدراسة أشارت إلى أن هناك بعض الثغرات التي ينبغي النظر إليها لأجل تعزيز التطبيق الفعال للصلح. ويمكن أن نستنتج أن الصلح طريقة فاعلة وبديلة لفض النزاعات، حيث يمكن للمتنازعين حل النزاع بطريقة ودية ومرضية للطرفين، كما أنه من خلال الصلح يمكن تقليل عدد القضايا المتراكمة في المحاكم. وقد حان الوقت للولايات الأخرى في ماليزيا أن تحذو حذو ولاية سلانجور في تطبيق الصلح بفعالية باعتباره الخطوة الأولى التي يجب اتخاذها في حل النزاع وديا.

APPROVAL PAGE

The thesis of Sa'odah Binti Ahmad had been examined and approved by the following:

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DECLARATION

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

Sa'odah Binti Ahmad

Signature.....

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For my beloved husband, children and myself.

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Islamic Family Law Enactment 2003 (Selangor)
Law for Determination of Family Affairs (1947) (Japan)
Law Reform (Marriage and Divorce) Act 1976 (Malaysia)
Legal Aid (Amendment) Act 2003 (Malaysia)
Legal Aid (Mediation) Regulations 2006 (Malaysia)
Marriage Act (Finland)
Marriage Act 1991 (Norway)
Matrimonial Causes Act 1973 (United Kingdom)
Practice Direction JKSM 3/2002 (Application of Sulh)
Syariah Court Civil Procedure Enactment 2003 (Selangor)
Women's Charter (Amendment) Act 1996 (Singapore)

LIST OF ABBREVIATIONS

ACR	Association for Conflict Resolution
ADR	Alternative dispute resolution
AFLA	Family Law Act (Australia) 1975
AFLAA	Family Law Amendment (Shared Parental Responsibility Act) 2006
AFM	Academy of Family Mediators
All ER	All England Report
ARC	Law Reform Commission, Australia
CDR	Court Dispute Resolution
C.E	Common Era
CLJ	Current Law Journal
CMC	Court Mediation Centre
CREnet	Conflict Education Network
CST	Customer Satisfaction Theory
DMRP	Divorce Mediation Research Project
FCR	Federal Current Report
FLR	Federal Law Report
FLA	Family Law Act (England) 1996
FMA	Family Mediation Association
HKCMAC	Hong Kong Catholic Marriage Advisory Council
HKFWS	Hong Kong Family Welfare Society
IFLE 2003	Islamic Family Law Enactment (Selangor) 2003
JAIS	Islamic Religious Department of Selangor
JAKESS	Department of Syariah Judiciary of Selangor
JKSM	Department of Syariah Judiciary of Malaysia
MMC	Malaysia Mediation Centre
NADRAC	National Alternative Dispute Resolution Advisory Council of Australia
PDMC	Practice Direction on Matrimonial Conciliation
PDR	Primary dispute resolution
S.A.W	Peace be upon him
SCCPE 2003	Syariah Court Civil Procedure Enactment 2003
SCCPSR 2001	Syariah Court Civil Procedure (Sulh) Rule 2001
SMC	Singapore Mediation Centre
SPIDR	Society of Professionals in Dispute Resolution
WCA	Women's Charter (Amendment) (Singapore) 1996

TRANSLITERATION

Table of the system of transliteration of Arabic words and names
used by the International Islamic University Malaysia.

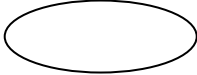
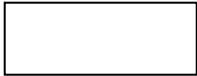
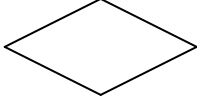

b = ب	z = ز	f = ف
t = ت	s = س	q = ق
th = ث	sh = ش	k = ك
j = ج	ṣ = ص	l = ل
ḥ = ح	ḍ = ض	m = م
kh = خ	ṭ = ط	n = ن
d = د	ẓ = ظ	h = ه
dh = ذ	‘ = ع	w = و
r = ر	gh = غ	y = ي

Short: a = اَ ; i = اِ ; u = اُ

Long: ā = آ ; ī = إ ; ū = أ

Diphthong: ay = آي ; aw = أَوْ

LIST OF FLOW CHART SYMBOLS

Symbol	Symbol Name	Description
	Terminal	The terminal symbol is used to mark the beginning and the end of every flow chart.
	Process	The process symbol is used to show an action involving the process.
	Decision	The decision symbol is used to change the flow of the process based upon different types of actions.
	Flow line	The flow line symbol is used to make the flow of connection.

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND

In the last few decades, there is a widespread trend in family law in the United States and other industrialized countries, towards informality in dispute resolution particularly for disputes involving custody and other issues about children.¹ Increased rates of divorce, general dissatisfaction with the procedural aspects of the law and the ineffectiveness of the provisions intended to encourage reconciliation, resulted in the introduction of an alternative mechanism for helping parties to deal with the consequences of their family disputes.² This alternative mechanism is known as family mediation which was claimed by its proponent to be more family friendly.³

Mediation is now the preferred means of resolution for all types of conflict (family, organizational, community, environmental and so on). According to Griffith, researches across a number of countries have emphasized that family lawyers tend to take a conciliatory and cooperative rather than adversarial approach to practice.⁴ The trend of using alternative dispute resolution is accompanied by growing policy interest in mediation. This may be based in part on the belief that

¹ J. Griffiths, "What Do Dutch Lawyers Actually Do in Divorce Cases?" 20 (1986) *Law and Society Rev.* 135; L. Mather et al., 'The Passenger Decides on the Destination and I Decide on the Route': Are Divorce Lawyers Expensive Cab Drivers? 9 (1995) *International J. Law and Family* 286; Rosemary Hunter, "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" 30 (2003) *Journal of Law and Society* 156-176.

² Sinead Conneely, *Family Mediation in Ireland*, Ashgate, 2002 at 10.

³ Ibid.

⁴ Hunter (2003), n. 1 at 157.

mediatory approaches and negotiated outcomes are less costly in economic and emotional terms than court-assisted outcomes, particularly where children are involved and provide better basis for continuing parental responsibility following divorce.⁵

In both Australia and New Zealand, the introduction of no-fault divorce was accompanied by the establishment of family courts with social components which offer supports and mediation services as first option.⁶ Parties to a divorce are actively encouraged to solve their problems with the help of mediators or counselors before they turn to court for solution.⁷ Most cases at the Singapore Family Court after the introduction of mediation and counseling in 1995, are settled through mediation and counseling. For contested divorce cases, less than 0.5% of cases have proceeded for trial.⁸ Litigation is therefore, used as a last resort after all attempts to settle the case amicably have failed.

The Government of Malaysia has agreed in principle to the establishment of a Family Court to deal with matrimonial and family matters as part of the Malaysian judicial system.⁹ The Malaysian Bar Council agrees that Family Court would promote specialization¹⁰ as well as to instill a more humanitarian and amicable aspects into the resolution of family and matrimonial matters.¹¹ The Malaysian Bar Council also believes that issues of divorce, judicial separation, matrimonial property, child custody and support, guardianship of infant, adoption and domestic

⁵ Ibid.

⁶ Sections 21 and 48 of the Family Law Act 1975 (Australia) and section 39 of the Family Proceedings Act 1980 (New Zealand).

⁷ Ibid.

⁸ The Singapore Mediation Centre at <<http://www.mediation.com.sg>> viewed on 5th July 2006.

⁹ The Malaysian Bar Council at <<http://www.malaysianbar.org>> viewed on 2nd February 2006.

¹⁰ Judges who preside in Family Court become specialized and this would promote efficiency. This will result in better judgments and faster disposal of cases. Speedy disposal of family cases is very important because it will prevent more hardship done to the parties' relationship; avoid strain on the children involved and reduce the backlog of cases.

¹¹ The Malaysian Bar Council, n. 9.

violence are highly sensitive and emotional human issues that may not be entirely appropriate to be resolved by the present court system which is mainly adjudicatory in nature.¹² Pending the setting up of the Family Court, the Women's Crisis Centre of Penang suggested reforms of current legal framework that includes among others mediation.¹³ They believe that even if mediation cannot solve all the disputes in the proceeding, the issues to be litigated may be narrowed down.¹⁴

Mediation in Islam is known as *ṣulḥ*. Islam advocates amicable settlement of every dispute to avoid antagonism between parties. In many instances, the Qur'ān refers to the principle of resolving disputes through negotiated settlement. Allah says to the effect:

If you fear a breach between them (husband and wife) appoint two arbiters, one from his family and the other from hers. If they wish for peace, Allah will cause their conciliation, for Allah hath full knowledge, and is acquainted with all things.¹⁵

Another example of the Qur'ānic injunction with the same effect:

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves, and such settlement is best.¹⁶

These injunctions clearly depict the preference of amicable settlement of disputes in Islam. It can be seen that the ethical principle in *ṣulḥ* is to forgive and to forgive is actually a very noble thing to do. Furthermore, negotiated settlements are encouraged in Islam for the purpose of fostering and preserving human relationship. Thus, it is acknowledged that resolving conflicts through *ṣulḥ* establishes a

¹² Ibid.

¹³ The Women's Crisis Centre, Penang at <<http://www.wccpenang.org>> viewed on 4th April 2006.

¹⁴ Ibid.

¹⁵ The Qur'ān, al-Nisā:35

¹⁶ The Qur'ān, al-Nisā:128

productive relationship for the future. In divorce for an example, an amicable settlement would generate in the parties concerned, a sense of respect for each other even though they have separated.

A national Seminar on Alternative Dispute Resolution was held on 4th and 5th February 2002 by Legal Division of the Prime Minister Department, Putrajaya.¹⁷ One of the resolutions of this seminar was to enhance the use of mediation in all matters. It was suggested that a law pertaining to mediation be enacted and mediation should be introduced at grassroots level.¹⁸ Responding to this resolution and in view of the importance of *ṣulḥ* as an alternative method in settling disputes amicably (particularly in family disputes), an effort has been taken by the Selangor Syariah Courts to introduce Majlis Ṣulḥ in 2002. According to the former Syariah Chief Justice, Sheikh Ghazali Abdul Rahman, Syariah Courts throughout the country will direct lawyers of disputing parties to first negotiate and mediate towards reaching an amicable solution before bringing up the matter in open court and for the purpose of mediation, one *ṣulḥ* officer will be placed in all Syariah Courts.¹⁹

Among the cases encouraged by the Syariah Courts to be settled through *ṣulḥ* process are divorces, disputes over inheritance of family wealth, custody of children, and alimony for ex-spouses (*mut'ah*).²⁰ The enforcement of *ṣulḥ* in Syariah Courts of Selangor is based on sections 94, 99 and 131 of the Selangor Syariah Court Civil

¹⁷ The functions of Legal Division of the Prime Minister Department includes:

- (a) Supervise the administration of Legal Aid Bureau.
- (b) Enact policy and amendment of law.
- (c) Register and supervise the Trustee Board under Trustee Act 1952.
- (d) Cooperate with national and international agencies on the matters of law.
- (e) Plan and enforce court development project under the Malaysian Plan.
- (f) Organize research and initiative for development of National Justice System.

¹⁸ Legal Division of the Prime Minister Department, Putrajaya at <<http://www.bheuu.gov.my>> viewed on 6th June 2006.

¹⁹ Azhar Abu Samah, Ismail Mat, "Perlantikan Pegawai Sulh Atasi Kes Tertangguh Mahkamah Syariah", *Berita Harian*, 27th April, 2003, 15.

²⁰ Ibid.