The Development of Family Mediation in Malaysian Muslim Society

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Abstract
This article explains the development of the implementation of family mediation in the Malaysian Muslim society. The library methodology of data collection was used to collect information on the subject. This article concludes that family mediation in Malaysia began before the British colonisation of Malaysia. In fact, mediation was provided for in the Melaka Code of Laws, although there are no clear statements describing how mediation was implemented then. This article also shows that although courts of law had been established during the colonial era, mediation remained the preferred choice for resolving family disputes. During the post-independence era, mediation became part of the court process. In the initial stage of its implementation, mediation aimed at reconciling matrimonial disputes, to prevent divorce. In its current development, mediation is a precondition to litigation. Where a husband and wife have agreed to a divorce, mediation focuses on resolving claims related to maintenance during the period of ‘iddah, consolatory gifts (mut‘ah), jointly acquired property (harta sepencarian) and the custody of children.

Keywords: Family Mediation, Family Disputes, Dispute Resolution, Methods of Resolving Disputes

1. An Introduction
The resolution of disputes through consensus, without involving formal judicial institutions such as a court of law, is a traditional procedure, that has been widely practised by various peoples throughout the world (J.A. Cohen 1978). Historical records show that all religions and peoples in the world, be they Phoenicians, Romans, Greeks, Hindus, Jews, Christians, Chinese or Muslims, used religious and customary procedures, instead of a litigation process, to resolve civil disputes (Syed Khalid Rashid 2002). Litigation was resorted to only after the breakdown of informal resolutions and when justice could not be accomplished except through litigation.

All peoples and religions in the world have established their own methods and terminologies to regulate such informal practices. Among the people of China, for instance, mediation is considered "one of China’s fine traditions" (J.A. Cohen 1978). Mediation has been practised since the Zhou Dynasty almost 1,100 years ago. Justice Marjorie O. Rendell (2000) explains,

"China is a nation where mediation is deeply rooted in its culture because it emphasises the desirability of maintaining personal relationship"

The Chinese, who are followers of Confucianism, consider a dispute to be a disturbance to stability. They particularly value tolerance, harmony and peace. In their view, consensual resolution is the best way to restore harmony. They adhere to the principle that "peace is the best; lawsuit is the worse" (Shir Shing Huang 1996).
In China, the Ch'ing Code, a code of law inherited from the Ming Dynasty (1368 - 1644), provided that a village headman and the elders had the jurisdiction to mediate in petty domestic and community disputes (J.A. Cohen 1978).

Direct negotiation is also practised among the Chinese. Syed Khalid Rashid (2002) mentions that "traditionally, Chinese prefer non-litigious dispute resolution. The preferred mode of doing this is 'friendly consultation' (youhao xieshang) that is direct negotiation". Direct negotiation represents the initial step in resolving all commercial, industrial, family and community disputes.

Among the Japanese, who are also followers of Confucianism, the Shogun Tokugawa Code, which was enforced from 1603 to 1868, dictated that all civil disputes should first be referred for mediation to the village headman. This was a pre-condition for any dispute that was to be brought before the court of law for trial (Fred E. Jandt & Paul B. Pedersen 1996).

In Sri Lanka, mediation was in practice 425 years ago, before the arrival of Christianity, and was handled by the clan chiefs, who acted as mediators. In Pakistan and Nepal, a dispute between individuals is normally resolved by the elders, who are known as Panchayats. In Bangladesh, the Shalish, who are the elders of the community, act as mediators. They are arbitrators and their decisions are binding to the disputing parties (Fred E. Jandt & Paul B. Pedersen 1996).

In the Malay Archipelago, or Indonesia, the procedures in dispute resolution may be classified into two groups based on social affiliation (Christopher Moore & Mas Achmad Santosa 1995).

First in communities that practise customary laws, there is a formal adjudicator instituted as a third party. This adjudicator is the community's head of customary laws and is appointed to resolve any dispute. The head organises a meeting of the parties in dispute and assists them in resolving their dispute amicably. Sometimes, the head only renders advice to the parties to guide them towards a resolution and such advice is not binding to the disputing parties.

Second, the ethnic communities, such as the Bataks, Javanese, Minangkabaus, Bukats and Kerehos, have their individual terminologies, such as runggun and rapat, to describe their methods of resolving disputes through consensus. These words convey the same meaning as the Indonesian term musyawarah, or the process whereby decisions are made through consultation. Its aim is to reach a decision through consensus. This approach to resolving a dispute emphasises a holistic resolution and harmony between the parties in dispute and within the community. This approach does not determine which is the right or wrong party. The Javanese describe the decisions that arise from this consultation as "we are both happy" (Christopher Moore & Mas Achmad Santosa 1995).

2. Family Mediation: A Literature Review

Although family mediation, formal and informal, has long been practised in Malaysia, there is not much literature on the subject. Sharifah Zaleha Syed Hassan (1997), in her study, Managing Marital Disputes in Malaysia, focused on the methods practised by the Malays for resolving matrimonial disputes. She particularly studied the methods practised by the Islamic Religious Offices and the Syariah Courts in two districts of two different states in Malaysia. The study focused on the techniques, such as arbitration, mediation and consultation, used by counsellors, kathis and judges.

Hassan's (Sharifah Zaleha Syed Hassan 1997) study employed the 'participant observation' methodology to review cases at religious offices and the Syariah Courts. Hassan concluded that in principle, different functions are assigned to the mediation counsellors, kathis and judges counsellors handle consultations, kathis arbitrate and judges adjudicate. However, during consultations, counsellors only sometimes act as mediators. Similarly, kathis normally promote compromise and reconciliation rather than arbitration. Judges, who have the jurisdiction to make decisions, have the tendency to postpone trials to allow the parties to settle their disputes amicably. Hassan found that this overlapping of functions between the Islamic religious offices and the Syariah Courts arose from the following factors:
a) the tendency of mediators to ensure that the demands of the relevant Syariah laws reflect
the society perception of an ideal matrimonial relationship; or
b) the tendency of mediators to implement reconciliation to protect the Islamic family
institution from breaking up.

Thus, the study found that the application of dispute resolutions, whether at religious offices or
in the Syariah Courts, focused on reconciliation of the parties: it aimed at keeping the marriage intact
and avoiding a divorce. Matters arising from a divorce were settled through litigation. The study,
however, focused only on the techniques of dispute resolution used to achieve reconciliation in
matrimonial disputes. Moreover, the study was conducted before clear and comprehensive legal
procedures for dispute resolution were enacted.

Naim (2001), Mehrun (1965), Zurina (1998) and Sharifah Zubaidah (1996) focused on the
implementation of the conciliatory method in the Syariah Courts in Malaysia. However, their studies
referred to previous legal provisions that implicitly encouraged resolutions through consensus. These
studies found that mediation was practised in all Syariah Courts in Malaysia long before there were
specific provisions and procedures established for mediation. During these times, conciliation was
achieved through discussion by the parties and at the suggestion of judges and counsels.

Walls and Callister (1999) examined Malay community mediation in two districts in Malaysia.
The study applied a structured interview methodology and identified the two formal institutions, the
imam and the village headman, that were referred to resolve disputes within the community. The study
also identified the nature of the disputes and the methods applied to resolve them.

Nevertheless, the literature and studies on the development of family mediation in Malaysia are
limited. The present study, while benefiting from previous studies, directly focuses on the development
of family mediation in Malaysia using the library data methodology.

3. Dispute Resolution and Family Mediation in Malaysia

Malaysia, which comprises West Malaysia (formerly Malaya), known as Peninsular Malaysia and East
Malaysia, is located in Southeast Asia. Peninsular Malaysia is made up of 12 states; East Malaysia has
two states. In the north of Malaysia lies Thailand, and in the south lies Singapore. The Straits of
Melaka separate Malaysia and Indonesia, with East Malaysia lying to the north of Indonesia. Malaysia
practises a system of government known as constitutional monarchy. Historically, Malaysia, or a part
thereof, was colonised by the Portuguese, Dutch and British. Peninsular Malaysia (Malaya) achieved
her independence from the British in 1957. The population of Malaysia comprises various
communities, such as the Malays, Chinese, Indians and ethnic groups of East Malaysia, including the
Kadazans and Dusuns. The Malay Muslim community in Malaysia, besides being governed by Islamic
law, is also influenced by local customs. Malaysia practises two distinct but parallel judicial systems,
secular and Islamic; the latter being exercised through the Syariah Courts. The jurisdiction of the
Syariah Courts extends to cases involving Islamic law and applies only to Muslims. (Raihanah, 2005)

The development of family dispute resolution in Malaysia may be chronologically divided into
three phases: (1) the pre-colonial era, from the time of the Malay Sultanate of Melaka until 1786, when
the British established their first settlement in Malaya; (2) the colonial era, from 1786 to 1957, when
the British court system, which applied litigation, was in force; and (3) the post-colonial era, from 1957
to the present, when the courts and other formal institutions, such as the police and Islamic religious
authorities, became the primary referees in dispute resolutions. (Raihanah, 2005)

3.1. Pre-Colonial Era

During the pre-colonial era, informal dispute resolution through conciliation and mediation was a
traditional practice among the Malays. Islamic principles and customs were employed in both methods.
This finding is unsurprising: at the time, all aspects of the Malay society were influenced by Islam and
Malay customs (Mackeen, A.M.M. 1969).
In principle, provisions for mediation (known as *sulh*) existed in old Malay laws. For example, article 32 of the Melaka Code of Law set forth the procedures for mediation (Liaw Yock Fang 1976). This article provided that mediation (*sulh*) under oath (*iqrar*) might be practised and that the rules for mediation covered six areas, sale and purchase, debts, wages, discharges, hire and rental and loans. The same provisions were found in article 28 of the Pahang Code of Law. In the Pahang Code, however, *sulh*/*mediatio* is stated as *sileh*. The provisions for *sulh* in these codes were basically adaptations of the *fiqh* rules of the Syafi’i sect (*al-sulh*).

In the Malay Muslim social system, pressure is placed on disputing parties to resolve their dispute quickly. Malay Muslims are reluctant to involve outsiders out of desire to avoid publicity. An open resolution process, such as that done before a court of law, is something they try to avoid (Sharifah Zaleha 1997).

Besides the parties themselves engaging in consultation, a common method in dispute resolution is to refer to a third party. Usually, close members of the family, respected elders such as parents, or individuals who are close to the family take the initiative to act as mediators to resolve the dispute (Wan Halim Othman 1996).

In the traditional Malay social structure, the family represents the most important instrument in regulating individuals’ lifestyles. Therefore, in all actions, whether positive or negative, the family will be involved in contributing advice, caution and guidance (Wan Halim Othman 1996).

In Malay customary practices, divorces, similar to marriages, are not just a matter between husband and wife, they involve the entire family. Thus, when a dispute occurs, both families intervene and attempt to resolve it.

Members of the families do not normally expose the dispute to outsiders. They consider this necessary to save the honour of the families (E. Khoo 1993). This finding is corroborated by L.Y. Lim (1997): “Like the Chinese, face saving is important for the Malays.”

Besides referring disputes to those with family ties, the parties in dispute may also refer to the *imam*, village headman or *penghulu* (J.A. Wall Jr. & R.R. Callister 1999) who acts as a mediator in resolving disputes. This finding is explained by David C. Buxbaum (1968) as follows:

“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”.

Besides the village headman, *penghulu* or *imam*, the kathi is another third party who is often referred to resolve family disputes (Ahmad Ibrahim 1995). The kathi tends to resolve disputes through consensus rather than trial. Sharifah Zaleha (1997) observes that:

“During the pre-colonial era, the kathi interpreted and enforced Islamic laws, which was the basic law in the Malay states then. In addition, he acted as mediator in resolving all disputes, including matrimonial disputes, at the village level.”

For a society that practises customary law, such as *Adat Perpatih* (matrilineal customary law), a dispute is normally amicably resolved within the family. This practice is founded on the traditional saying (Abdullah Sidik 1975):

“Live according to rules
Confer on small matters
Follow the custom on bigger matters
Serious matters be brought before the customary head.”

Petty disputes are referred to respected elders for resolution through consensus (Joseph Minnatur 1968). Abdullah Sidik (1975) explains:

“In resolving disputes amicably, common understanding and the spirit of give and take to achieve a wholesome resolution is preferred to the rules of the western judicial system based on rights and duties”.

223
The tendency to resolve disputes through consensus is a common practice in Malay society, though there are laws that call for the establishment of courts with specific jurisdiction in dispute resolution. This fact is stated by Joseph Minnatur (1968), who explains:

“The Malay in general is not a litigious person, when he happens to be a litigant, he appears to be unhappy about it. It is said, victory – a defeat defeat – a bowed head agreement – a joining of hands.”

What is normally done in the face of a dispute is explained by these sayings:

"Restore the bad,
Sort out the muddle,
Clear the misunderstanding”.

Only when a resolution through consensus cannot be secured is the matter referred to the Adjudication Committee, which is the highest authority in the society's social hierarchy that practises customary law. By custom, every measure should be taken to avoid such a referral. The society believes that referring a dispute to the committee interferes with peace and harmony in the society because the person who so acts has rejected consensual resolutions. The culture of the society has such great influence that many disputes are not referred to the Adjudication Committee (Joseph Minnatur 1968, Abdullah Sidik 1975).

In matrilineal societies, divorce proceeding must follow predetermined customary rules and procedures. When a husband decides to divorce his spouse, he must undergo an arbitration session. He holds a simple feast and invites his own and his spouse’s siblings and informs them of his intention so that they can arbitrate in the matter. Such arbitration is known as bersuarang (Hj. Mohd. Din bin Ali 1968, Ahmad Ibrahim 1968). This process, which is mandatory to obtain divorce, is based on the following sayings (A. Coldecott 1908):

“The strength of society is in its consensus
The strength of the Prophet is in his miracles
Through cooperation comes consensus
Unity is strength”.

During the arbitration (bersuarang), the husband puts forward the causes of the dispute. The mediators try to resolve the dispute and reconcile the husband and wife. In most cases, the disputes can be resolved, thereby preventing a divorce.

Where the arbitration (bersuarang) process fails, all of the parties agree to allow the divorce. However, before the divorce takes effect, the distribution of matrimonial property is carried out. Such distribution is usually based on compromise and these generally accepted customary principles (A. Coldecott 1908):

“Jointly acquired properties are divided
Individually acquired properties are left untouched
Pre-nuptial properties remain with the acquirer
Through compromise, properties are divided
Through suarang properties are distributed”

Although there are some modifications, many aspects of the bersuarang are similar to the arbitration practices set forth in Islamic law (tahkim) and the mediation/conciliation processes of the West.

3.2. Colonial Era

Resolving disputes through an adversarial litigation process is a traditional British practice; they rely greatly on litigation to resolve all disputes. The parties in dispute bring their matter before a court of law, even when the dispute is petty. Legal historian Sir William Holdsworth (1982) notes:
“The English legal profession was already well developed during the time of Edward I (1272 – 1307) and by the time of the Tudors (1485 – 1603) the English society was already ‘litigious’.

Thus, when the British colonised third world countries, they would introduce English laws and their own court system into the new colonies. The British considered any other legal system to be “primitive”, disorderly and still in the evolutionary stage, unlike the English legal system, which they considered systematic, just and universal (Victor Purcell 1965).

In Malaysia, the application of the English legal and court system to the resolution of disputes began when the British introduced the Charter of Justice of 1807 in Penang. The charter established the Court of Judicature in Penang, which applied the English laws.

English laws were also introduced through the decisions of British judges. In Yeap Cheah Neo v. Ong Cheng Neo (1872) 1 Ky, Justice Sir Montague Smith, on behalf of the Privy Council, declared that Penang was an uninhabited, Newly Settled Territory, without a government and laws (Victor Purcell 1965). This allowed English law to be enforced in Penang as it was in India.

The British adopted the same policy when introducing English laws in other states that they had colonised (Norman Anderson 1976). By disseminating the doctrine of dispute resolution through litigation, the British believed that they were improving and updating the colonised countries “primitive” methods of dispute resolution (Victor Purcell 1965).

Despite the presence of the English system of justice and its implementation by English judges, the local communities diligently continued to practise Islamic law and local customs (H.P. Clodd 1948).

For instance, E.N. Taylor (1937) reported that when a dispute over property arose between a husband and wife, they would resort to friends and neighbours to mediate a settlement. Meanwhile, the village headman, penghulu or kathi would be referred to for advice and to resolve the dispute. The penghulu and kathi would scrutinise the evidence before them and would usually advise the parties to settle their dispute amicably. In many cases, couples were able to resolve disputes through consensus without having to resort to litigation. The property would then be divided in accordance with their consensus. The penghulu would then report to the District Officer that the matter had been amicably settled:

“In many cases, they succeed in arranging a settlement – the property is divided somehow – and with a sigh of relief the penghulu says: ‘Sudah selesai, Tuan’, (It was finish, sir) when the District Officer arrives in the village on his periodical visit.”

In Wan Nab v. Jasin (JMBRAS 1937), Justice Daly also admitted that it was the practice in Malay society to settle disputes by compromise when he said:

“I believe that in the F.M.S., cases of this nature are settled by compromise, the headman and kathis assisting in the settlement. I cannot at any note recall any cases of importance being brought in the higher Courts and no such cases are reported…”

The kathis, in their evidence given during trials involving jointly acquired property (harta sepencarian), also tended to settle disputes amicably and in the spirit of brotherhood by dividing the property as agreed by the parties. In Ramah v. Laton (FMSLR 6 1927), the kathi of Hulu Langat, Selangor, acting as a witness for the defence, gave evidence that the division of a small plot of land in the state had been made by the collector of land revenue on the basis of a certificate issued by the kathi’s office. In his 22 years of service, the kathi had settled between 500 and 600 cases involving shared property or jointly acquired property, which had been claimed five or six times over but had never been approved because of the absence of procedures or methodology acceptable to the collector of land revenue. During cross-examination, the kathi stated that he had mediated in a case where the wife, after her divorce, had claimed the joint property. The kathi, however, had proposed that the matter be amicably settled by dividing the property into two halves or three parts whichever best suited the parties.
The above account and statements indicate that, although there was clearly a system in place for obtaining justice through litigation, the tendency to resolve disputes by consensus through direct negotiations between the parties or mediators, who were typically family members, the village headman or a kathi, continued as a practice among the Malays during the Colonial Period.

Although there is clear evidence of the participation of close family members, village headmen, imam and kathis in the mediation of disputes, there is not much evidence as to the methodology for mediation employed during this time.

3.3. Post-Colonial Era

In 1957, Malaya became independent from the British. Nevertheless, these political changes did not affect the legal system of Malaysia. English laws continued to be applied in all areas except in family matters (Ahmad Ibrahim 1986). During the British administration of Malaya, courts other than the Syariah Courts had been established.

After the Second World War, attempts were made to improve the administration of Islamic law, and as a result, the Administration of Islamic Law (Selangor) Enactment was passed in 1952. This enactment then became the model for the Administration of Islamic Law Enactments instituted by the other states of Malaysia.

As has been previously explained, since the colonial era, district kathis were given the mandate to adjudicate disputes involving Muslims in the kathi's district of administration. This continued even after independence, when kathis were given extended jurisdiction beyond the exercise of administrative functions. Laws were enacted to provide judicial powers to district kathis, who were then authorised to act officially as mediators in Syariah Courts (Sharifah Zaleha 1997).

The above statements show that during the post-colonial era, dispute resolution through mediation was provided for in the court’s procedures. In the context of a matrimonial dispute, the procedures to be followed aimed at reconciliation, and court proceedings followed only when reconciliation failed. What is not available, however, is a clear indication of the methodology applied by the kathis in resolving matrimonial disputes. In most cases, it is said that the kathis relied on social pressure, not the power of the courts, to resolve disputes through conciliation rather than by making decisions as to which party is right or wrong.

Through mediation, efforts are made to restore communication between the husband and wife. In the process, the kathi lends an ear to the husband and wife and acts as a mediator. Sometimes, the kathi takes an active part by advising the parties to reconcile. His role is to guide the community to the ‘right’ path, not to impose his decisions on them. In other words, the kathi’s role is that of a counsellor, not a judge. Thus, the objective of dispute resolution is to foster responsibility in the minds of the disputing parties and to assist them to resolve their dispute amicably (Sharifah Zaleha Syed Hassan 1994).

Consultation is another technique that is normally employed by the kathi. This technique is employed where only one party (usually the wife) makes the complaint. In this case, the kathi advises the complainant to resolve the dispute that has arisen.

In the 1970s, the post of Women Counsellor was created. The idea was to assist the kathi in handling matrimonial disputes (especially in cases in which the wife is the complainant) and cases in which a member of the Muslim community has family problems. In other words, the kathis and the Women Counsellors are fully responsible for handling pre-trial processes (Sharifah Zaleha 1997).

When a Women Counsellor receives a complaint or an application for divorce from a married woman, the counsellor, as in the case of the kathi, tries to counsel the wife to withdraw the application for divorce. If the complainant has strong ground for divorce, the counsellor summons the husband for investigation or reconciliation. During the investigation, the counsellor attempts to reconcile the parties. The parties also also advised of their rights subsequent to a divorce. If reconciliation fails, the matter is referred to the kathi.
The above statements show that, at the present moment, mediation is mostly applied in matrimonial cases with the objective of reconciling the husband and wife (Sharifah Zaleha 1995). Mediation is seldom used to resolve post-divorce disputes, such as cases in which the husband fails to pay mut’ah (consolatory gift) and nafkah ‘iddah (maintenance during the period of ‘iddah). Thus, claims made after a divorce are usually settled through adjudication.

When reforms were made to the administration of Islamic Family Law during the period from 1980 to 1990, the jurisdiction of the Syariah Courts was extended to conclude provisions for the implementation of mediation. Besides the original provision requiring an application for divorce to be supported by certification stating that attempts at reconciliation had been made and additional provisions for hakam (arbitrators), all Islamic Family Law Enactments of the states of Malaysia now provide for the appointment of a Conciliatory Committee to resolve syiqaq (disputes). Nevertheless, the provisions in the enactments remain focused on mediation to avoid a divorce.

In the early 1990s, the administration of the Syariah Courts in Malaysia was criticised by the government, NGOs and society, in particular by women who had had dealings with the Syariah Courts. Among their criticisms was the inefficiency of the Syariah Courts in handling cases especially the delay in resolving cases, a process that sometimes took more than five years. This delay had caused a backlog of cases. To overcome the problem, it was proposed that mediation be implemented. Thus, mediation or sulh, was provided for in the Syariah Civil Procedure Codes of the states of Malaysia. Such provisions can be found in sections 87-93 of the Syariah Civil Procedure Code (Selangor) Enactment No. 7 of 1991; sections 87-93 of the Syariah Civil Procedure (Sarawak) Ordinance No. 7 of 1991; section 94 of the Syariah Courts Civil Procedure (Federal Territories) Act 1998 [Act 585]; sections 89-94 of the Syariah Civil Procedure (Kedah) Enactment 1979 No. 2 of 1984; sections 91-96 of the Syariah Civil Procedure (Kelantan) Enactment No. 5 of 1984; and sections 87-93 of the Syariah Civil Procedure Code (Melaka) Enactment No. 7 of 1991 (Raihanah Azahari 2005), among others.

The Rules on Civil Procedure (Sulh) were drafted by the National Technical Committee on Syariah and Civil Law to coordinate the implementation and ensure the effectiveness of the mediation process. The rules were made pursuant to the powers granted under section 247(1) of the Syariah Courts Civil Procedure (Federal Territories) Act 1998 [Act 585]. This draft is known as the Civil Procedure (Sulh)(Federal Territories) Rules 1998. Mediation began on a trial basis at the Kuala Lumpur Syariah Courts on 17 November 2001. The application of the mediation process was extended to the other states of Malaysia; vide Practice Directions No. 3 of 2002 from the Syariah Judiciary Department of Malaysia.

Currently, the mediation process focuses more on cases in which the parties have agreed to a divorce and have applied to resolve the claims arising there from, such as maintenance during the period of ‘iddah, consolatory gifts, jointly acquired property and custody of children. Mediation is now a pre-condition to the trial process.

4. Conclusion

Family mediation in Malaysia has undergone three phases of development: pre-colonial, British colonial and post independence. The above discussion shows that, during the pre-colonial and colonial eras and the early years after independence, there were two methods of mediation in family dispute resolution practised by the Malay Muslim society:

1) mediation by informal institutions, such as family members, neighbours, the village headman, penghulu and imam. The tendency to employ this approach continues, although there are studies indicating that it is declining as a result of the socio-economic changes taking place in Malay society.
2) mediation by the Syariah Courts when regulations require that such disputes be referred to the court. In these cases, the courts have clearly applied the mediation process in the following two circumstances:

a) mediation to reconcile the parties. The procedures are specifically provided for in the form of arbitrators (hakam) and the Conciliatory Committee.

b) mediation to achieve an amicable settlement in matters arising from a divorce. This is done through the suggestions of the judge or counsels representing the parties or even through the efforts of the parties in dispute.

With respect to (b) above, mediation is practised despite the absence of specific provisions that grant jurisdiction to mediate to the judge, counsels or the parties in dispute. It is done on the initiative of the disputing parties; the culture considers mediation the best way to resolve disputes, and it is therefore very much encouraged (Naim 2001). A consensus may be reached before a trial, in which case the parties appear in court only to record their consent. Such consent may be recorded at any stage of a trial or even during an appeal.

The latest developments indicate that mediation (sulh) has been provided for in the Civil Procedure Codes of the states of Malaysia. In this codes, mediation focuses on claims arising from a divorce. Usually, the parties have agreed to a divorce and have applied for resolution on matters of maintenance during the period of ’iddah, consolatory gifts, jointly acquired property and custody of the children. Mediation in such matters is a pre-condition to the trial process. When the parties have reached a consensus, such will be recorded, and the record is brought before a judge for his endorsement.

References


[42] 1 Ky [1872], p. 326