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***SULH* IN THE MALAYSIAN SYARIAH COURTS**

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SULH IN THE MALAYSIAN SYARIAH COURTS

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Introduction

Islam encourages parties in conflict to resolve their disputes through amicable settlement (al sulh) as litigation not always result in decision accepted by both parties. This can be seen in verses of Al Quran and Prophetic traditions amongst others:-

“If a woman feareth ill treatment from her husband, or desertion, it is no sin for them to twain if they make terms of settlement between themselves. Such settlement is the best. But greed hath been made present in the minds (of men). If ye do well and keep from evil, lo! Allah is ever informed of what ye do.”

The Prophet SAW was reported as saying:

‘sulh among the Muslim parties is encouraged save and except that forbidding a permitted thing or permitting a forbidden thing’²

Caliph Umar RA was reported to have said:

‘ Order the disputing parties to negotiate (and settle amicably). If a Judge adjudicate they will hate each other.’

¹ Al Quran. Surah Al Nisa : 128

² Reported by Tirmizi, subul al salaam.

Sulh is an alternative mode of resolving conflicts between disputing parties. It is not only through mediation but also involves principles of counseling, advising and arbitration. Sulh is considered as an act which will be rewarded by Allah.

Al-Sulh from the Islamic Legal Perspective in brief

From the Islamic legal point of view, the practice of al sulh between human beings is considered as commendable action. Thus, it is not wrong for a judge to make a recommendation to the disputing parties to resort to sulh. The judge may encourage them to settle their dispute by way of sulh if one of the parties involved has no knowledge about the true issue and rights in question. Sulh is encouraged by virtue of Quranic verses, Prophetic tradition as well as Ijma' (unanimous opinion).

It is stated in the Holy Quran verse 128 chapter An-Nisa' which means : "...and such settlement is best..."

This verse originates from a long verse pertaining to legalization of sulh or domestic settlement between husband and wives. The translation of the said verse is as follows :-

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

Meanwhile based on the Prophet's tradition, Rasulullah (peace be upon him) has been reported to have said:

"Peaceful settlement (sulh) or compromising is a recommended among the Muslims, except sulh practice which enables the forbidden or prohibits the lawful."

By virtue of Ijma', the Muslim scholars have agreed upon the legalization of sulh based on the fact that almost all contracts are deemed benefiting in which among others settle the marital disputes and domestic clashes between husband and wife.

Implementation of sulh proceedings in the Syariah Courts

The Selangor Islamic Judiciary Department defines sulh as “ a meeting between two disputing parties involving one or more claims in the Syariah Court which is chaired by a Sulh Officer. In the event a voluntary agreement is achieved by both parties, such agreement will be recorded before a Judge as an order of the Court without having to go through a trial. Sulh can only be implemented after divorce or after the Court granted a leave for polygamous marriage.’

Selangor Civil Procedures 2001 (Sulh Regulation) were formulated in 2001. However at that time no officers were appointed to be the sulh officers.

In 2002, eleven Sulh Officers have been appointed (8 male and 3 female). However these officers have no formal training to conduct the sulh session. The first workshop these officers attended were held in 2002³ where the Sulh Manual were drafted.

From December 2006 the sulh officers attended trainings conducted by Accord Group to enhance their skills in mediation.

Sulh proceedings implemented in the syariah courts is not merely mediation. It is broader than mediation as it may also covers hakam who have the authority to confirm a divorce. This is possible by virtue of the laws enacted in the Islamic Family Law in various states. Nevertheless the principles of mediation are applied throughout the process of sulh.

Types of sulh implemented in the Syariah Courts

The application of sulh in the syariah courts transcends beyond the principle of mediation. Sulh in the syariah court aimed at encouraging parties to settled their disputes amicable and as far as possible to avoid divorce. In Islam divorce is a permitted thing which Allah abhors most. Sulh is more equivalent to alternative dispute resolution which encompasses arbitration, counseling and other modes of alternative disputes resolution. However mediation is one of the paramount element in sulh procedures.

³ 22-24 April 2002

Sulh is done in several instances depending on the type of disputes between the parties. The mode of resolution varies depending on the types of disputes in the syariah courts. There are few types of sulh conducted formally and informally in the syariah courts amongst others are:

1. Sulh for the dissolution of marriages through counseling, conciliatory body or arbitration;
2. Sulh conducted by Legal Aid Department officers;
3. Sulh conducted voluntarily by parties either directly or through their Syariah Counsel;
4. Sulh conducted by the Sulh Officers.
5. Sulh conducted by Family Support Authority

1. SULH FOR DISSOLUTION OF MARRIAGE

The law requires parties intending to dissolve their marriage to try to mediate their dispute before the judge could grant a divorce. This is evident in various sections in the Islamic Family Law Act.

Section 47 Islamic family Law Act (Federal Territories) read as follows:-

...

(3) If the other party consents to the divorce and the Court is satisfied after due inquiry and investigation that the marriage has irretrievably broken down, the Court shall advise the husband to pronounce one talaq before the Court.

(4) The Court shall record the fact of the pronouncement of one talaq, and shall send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for Registration.

(5) Where the other party does not consent to the divorce or it appears to the Court that there is reasonable possibility of a reconciliation between the parties, the Court shall as soon as possible appoint a conciliatory committee consisting of a Religious Officer as Chairman and two other persons, one to act for the husband and the other for the wife, and refer the case to the committee.

(6) In appointing the two persons under subsection (5), the Court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case;

(7) The Court may give directions to the conciliatory committee as to the conduct of the conciliation and it shall conduct it in accordance with such directions.

(8) If the committee is unable to agree or if the Court is not satisfied with its conduct of the conciliation, the Court may remove the committee and appoint another committee in its place.

(9) The committee shall endeavour to effect reconciliation within a period of six months from the date of its being constituted or such further period as may be allowed by the Court.

(10) The committee shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it thinks fit and may, if it considers it necessary, adjourn its proceedings from time to time.

(11) If the conciliatory committee is unable to effect reconciliation and is unable to persuade the parties to resume their conjugal relationship, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit regarding maintenance and custody of the minor children of the marriage, if any, regarding division of property, and regarding other matters related to the marriage.

(12) No Peguam Syarie shall appear or act for any party in any proceedings before a conciliatory committee and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory committee.

(13) Where the committee reports to the Court that reconciliation has been effected and the parties have resumed their conjugal relationship, the Court shall dismiss the application for divorce.

(14) Where the committee submits to the Court a certificate that it is unable to effect reconciliation and to persuade the parties to resume the conjugal relationship, the Court shall advise the husband to pronounce one talaq before the Court, and where the Court is unable to procure the presence of the husband before the Court to pronounce one talaq or where the husband refuses to pronounce one talaq, the Court shall then refer to the Hakam for action according to section 48.

(15) The requirement of subsection (5) as to reference to a conciliatory committee shall not apply in any case-

(a) where the applicant alleges that he or she has been deserted by and does not know the whereabouts of the other party;

(b) where the other party is residing outside West Malaysia and it is unlikely that he or she will be within the jurisdiction of the Court within six months after the date of the application;

(c) where the other party is imprisoned for a term of three years or more;

(d) where the applicant alleges that the other party is suffering from incurable mental illness; or

(e) where the Court is satisfied that there are exceptional circumstances which make reference to a conciliatory committee impracticable.

(16) A talaq raj'i pronounced by a husband unless revoked earlier, either expressly or constructively, or by an order of the Court, shall not operate to dissolve the marriage until the expiry of the 'iddah period.

(17) If the wife is pregnant at the time the talaq is pronounced or the order is made, the talaq or the order shall not be effective to dissolve the marriage until the pregnancy ends.

Therefore, section 47 clearly encourages in the event that one party does not consent to a dispute a solution through a third parties should be sought after. This committee is chaired a an officer from the religious department. However, these officers as well as the representatives representing the parties are not trained in mediation or sulh. Sometimes the process may take as long as six month to be concluded.

Failure in settling the disputes by this Committee normally will result in the parties proceeding under section 48 of the same act. The principle of sulh will again be applied in arbitration by Hakam under section 48.

Section 48 Arbitration by Hakam states:-

(1) If satisfied that there are constant quarrels (shiqaq) between the parties to a marriage, the Court may appoint in accordance with Hukum Syara' two arbitrators or Hakam to act for the husband and wife respectively.

(2) In appointing the Hakam under subsection (1), the Court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.

(3) The Court may give directions to the Hakam as to the conduct of the arbitration and they shall conduct it in accordance with such directions and Hukum Syara'.

(4) If the Hakam are unable to agree, or if the Court is not satisfied with their conduct of the arbitration, the Court may remove them and appoint other Hakam in their place.

(5) The Hakam shall endeavour to obtain from their respective principals full authority, and may, if their authority extends so far, pronounce one talaq before the Court if so permitted by the Court, and in that event the Court shall record that pronouncement of one talaq, and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(6) If the Hakam are of the opinion that the parties should be divorced but are unable for any reason to order a divorce, the Court shall appoint other Hakam and shall confer on them authority to order a divorce and shall, if they do so, record the order and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(7) Unless he is a close member of the family of the parties, no person or Peguam Syarie shall be allowed to be present or represent any of the parties in the presence of the Hakam

In addition to section 48 the Department of Islamic Judiciary Malaysia has formulated Hakam Rules for the guidance of the Court and the Hakams. The Hakam has the authority to dissolve the marriage.

2. SULH IN THE LEGAL AID DEPARTMENT

The Legal Aid Department was established by the Government to cater for the need of legal representations for the needy people. The Eligibility of the applicants for legal aid services are persons as follows:-

- a) Income not more than RM 25,000.00 per annum with registration fee of RM 2.00 payable to the Legal Aid Department;
- b) Income more than RM 25,000.00 but less than RM 30,000.00 per annum with registration fee of RM 2.00 and a contribution of RM 300.00 payable to the Legal Aid Department;
- c) Income more than RM 30,000.00 with the permission of the Minister.

The Legal Aid Department in addition to offer services in the Civil Court also offer services with regards to proceedings in the Syariah Courts. The Legal Aid Department encourages the parties to settle their disputes through mediation including the syariah cases. Officers were assigned to mediate civil and syariah cases.

Normally the cases that undergo syariah mediation are maintenance of wife and children compensation (mutaah) and claim for joint acquired property.

3. SULH CONDUCTED BY SYARIAH LAWYERS

Until todate there are about 35 syariah lawyers trained by The Accord Group, Australia and other Mediation Facilitators. In Klang Valley mediation by lawyers are norms even not conducted by properly trained mediation facilitators. However these exercise is conducted voluntarily by the parties after the advice of their respective lawyers. Syariah Lawyers who have attended the mediation course we sought after to mediate the syariah cases.

However there are no guidelines and clear demarcation of roles of the syariah lawyers and the mediators. It is voluntarily conducted by the parties.

Upon reaching settlement, the parties will execution an agreement. Such agreement were then taken to the court to be endorsed as an order of the Court. Quite a number of the Judge will ensure and ask the parties whether the settlement reached were done voluntarily or otherwise. If the Judge is satisfied that it was done voluntarily the Judge will record the agreement as an order of the Court without meddling into the settlement. However there are judges who go further to ensure that the settlement reached are not in contravening the Islamic law and would not record the settlement if he find that the agreement not in

accordance with Islamic law. There are also judges who do not recognise the settlement by made through mediation done by syariah lawyers and on the surface instruct the parties to appear before the Sulh Officers to conduct the Sulh again.

This is actually a waste of time and resources because the parties have already come to an agreement.

The Syariah Lawyers Association of Malaysia did send a proposal to the Selangor Syariah Chief Justice to recognise the Sulh attempts by the Syariah Lawyers. For this purpose it was propose that a list of syariah lawyers professionally trained as mediators be displayed at the Syariah Courts so that the parties could choose whether they wish to undergo the sulh proceedings conducted by the court officers or the Syariah Lawyers. In case the chose the professionally trained syariah lawyers they should bear the fees for the mediator and the mediations may be conducted at odd hours or even on non-working day.

To date this proposal has not been implemented although the Chief Justice has verbally agreed to the proposal. I was informed that the minute details of the proposal has not been delivered by the Association to the Chief Justice.

4. SULH THROUGH SULH OFFICERS

Sulh Officers are officers appointed by the Court to conduct sulh proceedings. These officers normally hold the position of LS41 (newly appointed officers who do not posses necessary experience to become a syariah judge). They were juniors in rank and position. The Sulh Officers are governed by Sulh Officers Code of Ethics. (See Attachment A Page 10-12).

The Sulh proceedings normally commence after a party file a case in the syariah courts. It best summarised as follows:-

Sulh Work Process

POSITION	WORK PROCESS
Registration Process	
Registrar/ Senior Assistant Registrar	<ul style="list-style-type: none"> · Receives case file from Assistant Registrar · Fixes mention date/ sulh to the parties
Sulh Officer	<ul style="list-style-type: none"> · Sulh session will be conducted before the Sulh's Chairman. · If no agreement to implement sulh, hearing date will be fixed.
Assistant Registrar	<ul style="list-style-type: none"> · If there is any mutual agreement in whole or any part thereof, it will be recorded and presented before the judge to be heard.
Judge	<ul style="list-style-type: none"> · To make Judgment and Order in Term.
Process of Extracting Order	
Registrar/ Senior Assistant Registrar	<ul style="list-style-type: none"> · To prepare/ check draft order from parties · To refer to judge for endorsement · To present the draft order to the parties with or without amendments (by lawyer if any) · To receive fair order to be endorsed and signed (by lawyer if any)
Judge	<ul style="list-style-type: none"> · To sign and endorse the order.
Registrar/ Senior Assistant Registrar	<ul style="list-style-type: none"> · Service of order to the par

As guidance for the Sulh Officers a sulh manual was formulated by the Syariah Jusctice Department. The Sulh Officer will refer to this manual as their guidelines. The Sulh Manual is attached hereinbelow as Attachment B (See Page 13-14).

In order to ensure the sulh proceeding a success, the Islamic Judiciary Department has organised four mediation courses and one advance mediation court for officers of the court.

These courses were conducted by The Accord Group of Sydney Australia with cooperation of the Syariah Lawyers Association of Malaysia. This drastic step taken by the Department augur well to the participants as they have conducted the mediation more professionally and able to facilitate the parties into agreements.

At the initial stage language was the barrier for this course, however with the assistance of the Syariah Lawyers Association of Malaysia who provided the coaches and translators the success rate of the courses were very high. The participants were able the learned the skill and technic of mediation from the Australian trainers.

5. SULH CONDUCTED BY FAMILY SUPPORT AUTHORITIES (FSA)

Family Support Authorities (FSA) was established by The Syariah Judicial Department Malaysia with its objectives of settling the needs of single mothers to recover they maintenance from husband/ex husband for her and her children. The FSA will make an advance of maintenance to the single mother as per the order of the court. The FSA will then execute the order to recover the payment form the husband/ ex husband.

It is interesting to note that the FSA has also conducted mediation to the reluctant husband/father to pay the maintenance. From January until October 2010, fifteen single mothers in the Federal Territories has received the fund from the Islamic Religious Council of the Federal Territories totally RM 44,100.00. Out of the fifteen cases five judgement debtors has repaid to the FSA the judgement sum. This is made possible through mediation process conducted by the FSA officers.

6. CONCLUSION

Sulh in the syariah court has been practiced in various forms and stages of proceedings. The sulh proceedings have manifested the change of the syariah landscape in resolving conflicts and reduces backlog of cases. Study has shown that with the implementation of sulh more than 80 % of cases in the syariah courts were settled in less than one year. However, it is suggested that syarie lawyers be allowed to conduct sulh as an option to the sulh officers in the court.

Sulh proceedings were well accepted in the syariah court and as an act of ibadah the parties were encouraged by the judges and lawyers to attend the sulh session. The acceptance of syariah lawyers towards the sulh proceedings may be the key factor of the successful rate of sulh proceedings. The absence of support from lawyers will only hinder the settlement of dispute through sulh proceedings.

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SULH OFFICER CODE OF ETHIC

The Chief Syariah Judge makes the following code of ethics :

Name

This code of ethics shall be named as the Sulh Officers' Code of Ethics

Application

1. This code of ethics shall apply to Sulh Officer throughout his or her tenure of service.
2. Breach of any provision stated in the Code of Ethics may establish a ground of action stipulated under the Public Officers (Conduct and Discipline) Regulations 1993. [P.U (A) 395/93]

General responsibility

1. Sulh Officer shall not-
 - a. Behave in any manner that may give rise to reasonable doubt in which –
 - his or her personal interest will be in conflict with the official duties of a Sulh Officer; or
 - his or her position may be used to gain personal benefit and/or interest;
 - b. Behave dishonestly or in any manner that will tarnish the Syariah Court's image and reputation.

- c. Turn away from his or her duties for the sake of his or her personal interest.
- d. Associate or mingle with the public in such a way that his or her own professional conduct and capability is likely to be impugned.
- e. Receive any gift that is related in any way with the performance or execution of his or her duties.
- f. Do or cause or allow to be done, anything for the purpose of receiving a fee from any institution, company, firm or individual without prior leave of the Chief Syariah Judge.
- g. Give any opinion with regards to a matter or the state of the same that is still pending discussion or is likely to be raised as an issue in any Sulh Session since it may be used by a party to support his or her argument.
- h. Borrow money from any person or stand as a surety or guarantee for any borrower, or placing himself, in any way under pecuniary obligation upon any person -
 - Directly or indirectly subject to his Sulh duties; or
 - With whom he has or likely to have any official affair.
- 1. Take part or involve in any activities hold by any political party.
- 2. A Sulh Officer shall not, without any reasonable ground, delay the settlement of sulh cases and at all times observed the direction made by the Chief Syariah Judge from time to time.
- 3. A Sulh Officer shall, in discharging his or her duties, uphold justice as required by the Syariah law.
- 4. A Sulh Officer shall, from time to time, increase his knowledge and skills.

Specific responsibility

- 1. A Sulh Officer –
 - o Shall not conduct Sulh Session whenever he is agitated, angry, hungry, sleepy, exhausted and not well;
 - o Shall not omit a Sulh Session that has been scheduled without reasonable ground or prior permission from the Chief Syariah Judge;

- o Shall not conduct Sulh Session whereby one or both parties involved are his friends or foes that are likely to influence him;
- o Shall take certain action, uphold justice and not easily be influenced by the situation or presence of the people before him;
- o Shall behave openly, friendly and forbearing while conducting Sulh Session;
- o Shall ensure that the Sulh Session proceeds smoothly and orderly conforming to the Sulh's Work Manual;
- o Shall encourage the parties to settle their disputes and come into an amicable agreement without undue influence; and
- o Shall give equal and fair treatment to both parties.

2. Sulh Officer must :-

- o Act without bias
- o Always neutral
- o Keep all the matters revealed in a Sulh Session in private and confidential
- o Avoid conflict of interest
- o Ensure that he or she has the expertise and skills in the disputed subject matter
- o Not advertise his or her service
- o Decline any application to become a witness or advisor for parties in which the same have appeared before him in a Sulh Session
- o Ensure the safety of all parties in a Sulh Session.

Made

DATO' SHEIKH GHAZALI BIN HJ. AB. RAHMAN Chief Syariah Judge

CHAPTER 1 – INTRODUCTION

This Work Manual is intended to clarify and standardize the procedures required to be followed and observed by all Sulh Officers in conducting Sulh Session.

CHAPTER 2 – OBJECTIVE

The Sulh's Work Manual is hereunder formulated and prepared to be exercised and observed by the Sulh Officers by virtue of the Syariah Court Civil Procedure (Sulh) Rules 2002.

CHAPTER 3 – PRELIMINARY STATEMENT (ORIENTATION) BY SULH OFFICER

1. Sulh Officer acting as the Chairman of the Sulh Session shall ask the parties to take their respective and designated places.
2. The Sulh Officer then initiate the session by introducing himself or herself, reciting chapter al-Fatihah as well as reciting recommended prayers (please refer to Appendix 1).
3. After that, the Sulh Officer shall notify and inform the disputing parties on the procedure that will be used and at the same time convince and persuade the parties on the effectiveness of sulh process. As and when necessary, both parties are encouraged to ask questions and queries until and when the Sulh Officer believes that they have fully understood the process that will take place in the session.
4. d) Afterwards, the Sulh Officer shall state that the objective of sulh is to reach an amicable settlement to the parties' conflict based on their mutual agreement without any coercive force or compulsion of any kind. The Sulh Officer is required to explain the differences between Sulh process and other alternative dispute resolution methods i.e. negotiation, arbitration and trial.
5. In the meantime, the Sulh Officer shall outline the rule of sulh which need to be observed by the parties stated as follows:
 - All parties must speak according to their respective turns.
 - When one party is speaking, the other side must listen and give attention.

- The speaking party must always and at all times speak calmly and shall not raise his or her voice tone and vulgar words are strictly prohibited.
 - The parties must speak in a proper and appropriate manner plus to avoid making personal attack or accusation to the party at the other side.
 - The parties may not communicate directly among each other except in the presence of the Sulh Officer.
 - All parties must make a pledge to adhere and observe these rules.
6. Next, the Sulh Officer shall encourage the disputing parties to cooperate among themselves and to make their best efforts to achieve peaceful and harmonious settlement.
 7. Most importantly, the Sulh Officer shall remind all the parties that all matters discussed and negotiated in the Sulh Session are private and confidential and shall not be disclosed to any third parties.
 8. The Sulh Officer shall make known of his or her intention to take any notes or recording during Sulh Session to all parties.
 9. Last but not least, the Sulh Officer shall remind all the parties that he cannot be summoned in any court proceeding in relation to their case.

CHAPTER 4 – PRELIMINARY SUBMISSION BY PARTY IN DISPUTE

1. First and foremost, the Sulh Officer shall invite the Plaintiff/Applicant to submit with regards to matters in dispute, effects which have arose out of it and suggestions to settle the matter.
2. The Sulh Officer shall then ask the Defendant/Respondent to make his or her submission as per the above stated matters
3. After hearing both parties' submission, the Sulh Officer shall draw one conflict map to identify the scope of dispute between both parties. For this purpose, the Sulh Officer is advised to take ample and as much as necessary time and to avoid rushing the

matter. Apart from enlisting the matters in dispute by both parties in the conflict map, the Sulh Officer is also required to identify the reasons behind it, any existing barrier or reasons believed to exist which frustrate settlement as well as all necessary actions need to be done to reach to an amicable settlement.

4. The Sulh Officer shall maintain and manage the acquired information to classify : -
 - Issue or problem that need to be solved;
 - Position of parties in dispute;
 - Their interest; and
 - Alternative resolution (option).