

*Mediation In Islamic Family Law Disputes: An Overview & Experience Of The
UKM Legal Aid And Mediation Centre*

(Mediasi Dalam Pertikaian Kekeluargaan Islam: Sorotan Dan Pengalaman Klinik
Bantuan Guaman Dan Mediasi UKM)

ASMA HAKIMAH AB HALIM
SITI NAAISHAH HAMBALI
FATIMAH YUSRO HASHIM
NAZURA ABDUL MANAP

ABSTRAK

Klinik Bantuan Guaman dan Mediasi, UKM (yang sekarang dikenali sebagai KBGM) pertama kali memulakan khidmat mediasi dalam pertikaian undang-undang keluarga Islam pada bulan Jun 2015. Keperluan untuk inisiatif tersebut jelas didorong oleh pengalaman masa lalu KBGM dalam menangani pelbagai kes yang melibatkan pertikaian keluarga Islam. Kajian ini bertujuan mengenalpasti kaedah Mediasi sebagai medium penyelesaian yang berpotensi untuk diadaptasikan sebagai medium penyelesaian pertikaian bagi konflik melibatkan keluarga. Kaedah kajian ini adalah secara kualitatif dengan merujuk kepada sumber-sumber penulisan yang relevan mengenai mediasi, pemerhatian serta analisis kes-kes yang telah dijalankan di KBGM. Mediasi sebagai penyelesaian pertikaian alternatif adalah pilihan yang dapat dilaksanakan memandangkan keberkesanan kos, prosedur yang cepat dan ada elemen kerahsiaan. Kaedah ini memudahkan mereka yang tidak berkemampuan untuk mendapatkan akses kepada keadilan. Pengalaman KGBM menunjukkan bahawa sebilangan besar pertikaian undang-undang keluarga Islam dapat diselesaikan melalui mediasi dan bukannya proses pengadilan. Penyelesaian melalui mediasi ini juga dapat memelihara hubungan kekeluargaan kerana pihak-pihak sendiri yang akan memilih dan mencapai persetujuan ke arah penyelesaian pertikaian mereka secara harmoni. Hal ini penting kerana sekiranya sesuatu kes itu dibawa ke mahkamah, kebiasaannya pihak-pihak akan terus bersengketa kerana proses di mahkamah bersifat 'adversarial' berbanding penyelesaian secara alternatif melalui mediasi. Pertikaian yang berkaitan dengan perceraian, hadhanah, pewarisan dan harta bersama adalah beberapa kes yang boleh dimediasi. Sepanjang keterlibatan tersebut, KGBM juga menemui beberapa aspek yang perlu dipertingkatkan dan diperbaiki bagi memastikan kaedah ini boleh terus dilestarikan. Oleh itu, penulisan ini adalah merupakan perkongsian pengalaman KGBM dalam mediasi dan seterusnya mencadangkan beberapa penambahbaikan bagi meningkatkan perkhidmatan mediasi ini.

Kata kunci: Mediasi, undang-undang keluarga Islam, penyelesaian pertikaian

ABSTRACT

Legal Aid and Mediation Clinic, UKM (now known as KBGM) first started mediation services in Islamic family law disputes in June 2015. The need for such initiatives is clearly driven by KBGM's past experience in dealing with various cases involving family disputes Islam. This study aims to identify the Mediation method as a potential solution medium to be adapted as a dispute resolution medium for conflicts involving the family. The method of this study is qualitative with reference to relevant writing sources on mediation, observation and analysis of cases that have been conducted in KBGM. Mediation as an alternative dispute resolution is an option that can be implemented given the cost effectiveness, fast procedures and there is an element of confidentiality. This method makes it easier for those who are not able to get access to justice. The KGBM experience shows that a large number of Islamic family law disputes can be resolved through mediation rather than a court process. The settlement through this mediation can also preserve family ties as the parties themselves will choose and reach an agreement towards resolving their dispute harmoniously. This is important because if a case is brought to court, usually the parties will continue to dispute

because the process in court is 'adversarial' compared to the alternative solution through mediation. Disputes related to divorce, *hadhanah*, inheritance and common property are some of the cases that can be mediated. During the engagement, KGBM also found some aspects that need to be improved and improved to ensure that this method can continue to be preserved. Therefore, this writing is a sharing of KGBM experience in mediation and further suggests some improvements to improve this mediation service.

Keywords: Mediation, Islamic family law, dispute resolution

INTRODUCTION

Originally, a legal aid clinic, KGBM was established in 2011. Cases handled ranged from those pertaining to contracts, lands and family laws. Since its establishment in 2011 until 2015, about 656 cases were recorded. Out of 656 cases, about 70 cases involved Islamic family law disputes. From 32 cases investigated, about 11 were identified for potential mediation. Cases involved were child custodies, marital properties (*harta sepencarian*), divorces and property distributions (*faraidh*). These cases were deemed resolvable through mediation process instead of court adjudication. Conveniently, such cases also can be mediated at the KGBM premise itself.

Specifically, this paper discusses the prospect of settlement through mediation in Islamic family law cases, taking into account the experience of *Sulh* practice in *Shariah* courts. Firstly, it deals with definitions of mediation and *sulh*. Secondly, the principles of family mediation. Then, practices of *sulh* in *Shariah* court to evidence its potential for resolving disputes in cases relating to Islamic family law. Finally, a proposal for enhancement of KGBM as a viable mediation centre for cases pertaining to Islamic Family laws.

SULH AND MEDIATION

Sulh literally means "resolving disputes" (*qat'u al-nizaa'*) (Al-Zuhayli 1996). This term means reconciliation, discontinuance or

stoppage of dispute or dissension and contention (Arifin et.al 2012).

The legality of *sulh* is evidenced in the Qur'an as stated in several verses, such as:

"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; even though human inner-selves are swayed by greed. But if ye do good and practise self restraint, Allah is well-acquainted with all that ye do" (An-Nisaa:128).

In other verse, Allah SWT Commanded:

"And if two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the Command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just). (Al-Hujurat: 9).

This *aayah* is an evidence that Islam promote settlement of dispute in a peaceful manner (Bouheraoua 2008). This encouragement is due to the importance of preserving the *ukhuwwah* or brotherhood among Muslims as stated in the second *aayah*. Besides, the Prophet also encouraged peaceful settlement as he says: "Conciliation between Muslims is permissible, except for a conciliation that makes lawful unlawful and unlawful lawful" (Bouheraoua 2008).

In emphasizing the importance of *Sulh*, Mahamad stated that:

“Under Islamic law, the purpose of *Sulh* (compromise, settlement or agreement between parties to a dispute) is to end conflict and hostility among believers so that they may conduct their relationships in peace and amity (Rashid 2000). In Islamic law, *Sulh* is a form of contract, legally binding on both at the individual and community levels (Gulam, 2003). Although the concepts of compromise, settlement, reconciliation, and agreement as encapsulated in *Sulh* are not unknown to the modern Western intellect, the process through which *Sulh* is reached may differ in Western and Islamic systems (Walid, 2001). In the Islamic tradition, regular courts and ADR mechanisms are essentially intertwined and, historically, the legal systems that have relied on this traditional model have dispensed justice much more efficiently than those departing from the Islamic spirit (Walid, 2001).”

Based on this statement, is mediation considered as *sulh*? According to Zainul Rijal (2011), *sulh* is more comprehensive compared to mediation. In addition, Rihanah noted that the *sulh* agreement is made vide mediation. Hence, *sulh* and mediation have similarities in their application. Based on these opinions, mediation can be regarded as a branch of *sulh*.

The *sulh* process has similarity with mediation in terms of involvement of a third party to resolve the disputes. For example, Farlane (1997) explained mediation process as follows:

“...aims to facilitate the development of consensual solutions by the disputing parties. The mediation process is overseen by a non-partisan third party, the mediator, whose authority rests on the consent of the parties that she facilitates their negotiations. The mediator has no independent decision-making power, or legitimacy, beyond what the parties voluntarily afford her.”

Sulh can be applied in various dispute cases such as in transaction (Al-Zuhaily 1996), political disputes (Bouheraoua 2008) as well as family disputes as mentioned in the *aayah* aforementioned. However, this paper will only limit the discussion to family mediation to evaluate the prospect of applicability at the KBGM based on *sulh* successful application in Shariah Courts.

FAMILY MEDIATION

The nature of family mediation is delicate (Parkinson 1997). This is due to the close relationship between the families, and when it comes to dispute, it will deeply involve the emotional aspect. As Rafidah (2013) stated:

“Family mediation concentrates on preserving family institutions. The main focus of family mediation is a concern for children and their emotions and feelings, particularly their future wellbeing.”

To prepare the mediation, the family mediators need to equip themselves with a solid knowledge base and a wide range of skills which they can use both sensitively and competently (Rafidah 2013). Lisa (1997) highlights Taylor’s four pillars construction for family mediation as such:

“(a) Mediation, conflict resolution and negotiation skills; (b) Legal and financial knowledge and skills; (c) Knowledge of adult, child and family development; (d) Helping professional skills.”

She further adds, that construction of these pillars are needed for:

“(a) Core training in mediation concepts, principles, process and skills-core training should involve role-play and other practical exercises in small groups, focusing on

mediation skills and interpersonal dynamics;

(b) Modules to provide or extend contextual knowledge, with credit given for subjects covered in previous training;

(c) Modules on intake and assessment, client care, referrals to each services, case recording and statistics;

(d) Personal awareness training, to develop awareness of personal values, areas of personal strength and weaknesses, sensitivity to gender issues, ethical issues and ethnicity.”

These pillars need to be comprehensive to ensure the stability of family mediation.

Similarly, in the context of Islamic family mediation, the needs are not so much different. For Islamic family mediation, the mediators should be *faqih*; ones with deep understanding of Islamic family law and able to understand the situations of both parties (*waqi'iyah*). The appointment of mediators are encouraged from the internal parties. This is affirmed by Mahamad et.al. (2012) as follows:

“While Western mediators were expected to be formally certified professionals who provided their services as neutral, unaffiliated outsiders; in the Islamic approach, the preferred ‘third party’ was an unbiased insider with on-going connections to the disputants as well as a strong sense of the common good, and standing within the community, for example age, experience, status, and leadership (George, et. al., 2000).”

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These aspects should be taken into account as the family dispute should be resolved amicably. It may involve not only the disputant parties, but also the whole family

including the children. This is similar to Rafidah observation of family mediation as stated below:

“The fundamental principle of mediation emphasises the importance of keeping a healthy relationship between ex-spouses following a marital breakdown, especially when children are involved. A negotiation with the assistance of a mediator therefore aims at making the spouses understand the importance of co-parenting from both sides. This is done by affecting a joint mutual agreement for both the spouses and the children on matters such as finance and property and, ideally, parental responsibility. The success of this aim relies largely on the ability of the mediator to facilitate the mediation session and to provide a peaceful environment for them in which to negotiate. That is why much discussion has been paid to the profile of the mediator who must be equipped with all the required qualities, skills and characteristic to perform the role. Mediation also is built within a distinct framework, with specific safeguards to distinguish itself from other third party intervention methods. What is important is that mediation helps spouses through difficult periods and ensures that the marriage or relationship is ended on peaceful terms and that spouses are optimistic about rebuilding their own futures (Rafidah 2013).”

SULH IN SHARIAH COURT

There are many cases involving Islamic family law disputes that had been resolved in Shari’ah Courts. The courts could resolve backlog cases and the parties may reach amicable settlements. According to Rihanah, since May 2002 up to May 2003 when *sulh* were conducted in Selangor syari’ah Courts, the statistic report shows registration of up to 2555 cases. From this figure, 1748 cases or

about 68% managed to be resolved through *sulh* (Raihanah 2004). *Sulh* resolution of disputes in family matters evidenced that this practice can be applied at *Shari`ah* courts, provided the skills and the proper mechanism are observed. The skills developed for *Sulh* officer is obtained from the training conducted by Accord Group (Zainul 2011). One of the prerequisites to facilitate the process of *sulh*, is by having a well trained *sulh* officer to handle the cases.

ENHANCEMENT OF MEDIATION AT KBGM

The KBGM mediation process has been operational to resolve cases of Islamic family law disputes. The centre aimed to be an avenue that could be classified as an alternative medium for ‘out court settlement’. Rafidah (2013) described such service as follows:

“Out-of-court mediation is an independent service running outside the court system. The scheme operates either through self-referral by parties or referrals from a number of sources, particularly solicitors and courts, before applicants embark on court proceedings. The availability of the out-of-court scheme to parties is believed to be a great advantage for the court as well as the parties, and the chance of success is greater, especially because the parties are more likely to resort to it before they reach entrenched positions (Rafidah 2013).”

She further cited Roberts (2008) argument:

“... that the ‘chief advantage’ of the out-of-court service lies in its ‘independence of the court’, and the fact that lawyers and legal bureaucracy are not involved in the peace making process.”

However, there are still many aspects that could be enhanced and upgraded in KBGM to provide sufficient avenues and

services to ensure its success. Among others, are the expertise, the spaces, the guidelines and the procedural such as the preparation of relevant forms and training modules (Naaishah 2015). Presently, the KBGM has undertaken a research to enhance its viability funded by RM128800 grant. One of the outcomes of the research is development of mediation skills training module.

It is recommended that the number of expertise who could advice on this issue should be increased and empowered. Therefore, the human capital and expertise from other faculties for example, the Faculty of Islamic Studies also could be benefitted to advice on this issue. Besides, expertise from outside UKM also can also be invited. This mechanism also could enhance collaboration among the experts.

The mediation training itself also should be upgraded to empower the expertise to become a professional mediator. As Parkinson (1997) observed “...family mediation needs a soundly built structure of training and regulation to gain credibility and high standards of practice.” The training is important to develop the mediation skills; and the skills could be transferred not only to those aiming to become mediators, but also to interested public at large. This mechanism of transferring skills has been practiced in Scotland through training of various levels of people and sectors (Mc Donough 2015).

Besides, the avenues, mediation also require convenience of space. The mediation process need appropriate spaces for the smooth running of the process (Parkinson 1997). The space means provision of proper room for joint discussion and caucus (Naaishah 2015). The mediation process involve the parties who are in need of proper space and for sessions to be in privacy and confidentiality.

Mediation Kit as guideline to manage the dispute mediation should also be provided. Presently, the mediation kit is in the process of preparation as reference to conduct the mediation procedurally. The mediation kit may also function as a training guide for trainers who want to expand the training to outsiders to become accredited mediators (Naaishah 2015). Mediation should be structured properly. The facilities should be fully-equipped to ensure the process can be made to promote full benefits of mediation process.

CURRENT DEVELOPMENT AND WAY FORWARD

KBGM has expanded their wings to Putrajaya, but only operated for mediation cases. Mediation in Putrajaya operated under Pusat Mediasi Komuniti Putrajaya, while the KBG remain in UKM. However, the restructuring of KBG later bring the operation to Faculty of Law to allow more involvement of lecturers with the community. After a while the mediation centre also placed back under Mediasi Lestari to explore the prospect of mediation in environmental issues and to address contemporary various issues as well. The activities involve training, mediation session as well as consultation. Up to this time, the networking of Mediation is expanded to various states in Malaysia, the most significant is under Pusat Mediasi Tongkang Pechah in Johor, operated under Pusat Mediasi Komuniti Malaysia. There are many mediation cases especially community issues resolved by the mediators involved. They serve it on pro-bono basis, and the issues not only involve marriage, but also issues on succession.

CONCLUSION

The experience of KBGM as the UKM Legal Aid Mediation Centre highlighted the need for any legal aid centre to provide pro-bono mediation services as especially in cases of family disputes. Mediation proves to be more independent and more accessible by all parties. Mediation is also less bureaucratic as it is not procedural-driven. Its nature of offering cheaper and faster out-of-court settlement is attractive too. Past successful mediation processes achieved by KBGM in Islamic family cases should become the catalyst towards encouraging more similar alternative dispute resolutions in the future. It is simultaneously hoped that KBGM will, in time, turn into a popular destination of choice for Islamic couples seeking for family mediation. The established networking with Persatuan Mediator Malaysia should bridge the gap between mediators and the public towards providing quality and effective service. This, in turn, will facilitate future out-of-court settlements.

NOTES

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