MEDIATION AS AN ALTERNATIVE MODE OF RESOLVING FAMILY DISPUTES IN MALAYSIA

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ABSTRACT

This dissertation attempts to explore the possibilities of introducing mediation to settle family disputes, as an alternative to litigation in the Malaysian High Court. Family matters are seen as sensitive that deserve to be treated in confidence and in a less formal manner. The special features of mediation are of paramount importance to disputes of family nature, namely; confidentiality, informality and flexibility of its processes. Delay in disposing civil cases including family cases should not be tolerated. Prolonged litigation may also lead to high expenses incurred by parties in family disputes. Most importantly, it is saddening to see matters concerning private lives of people being dealt openly in court that may cause embarrassment to the family members as a whole.

Since Malaysia has a dual family system for the non-Muslims in the High Court and for Muslims in the Shariah Court, mediation or known as *sulh* as practised in the Selangor Shariah Courts will be studied. Mediation as conducted by the Bar Council's Malaysian Mediation Centre will also be compared. The study will also include the practices of family mediations in Singapore and Australia.

It is the objective of this dissertation to analyse and scrutinise the practice of mediations for family disputes in the above jurisdictions to examine the possibility of incorporating mediation as part of a pre-trial process before any family law cases are heard in the Malaysian High Court. A comparative study of mediation in various jurisdictions, as stated earlier, will identify a suitable model for the Malaysian High Court to adopt in settling its family law cases. This dissertation will make recommendations and propose reforms, where necessary.

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LIST OF STATUTES AND RULES

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Australian Family Law Act 1975

Islamic Family Law (State of Selangor) Enactment 2003 (No. 2 of 2003)

Law Reform (Divorce and Marriage) Act 1976 (Act 164)

Rules of High Court, 1980 [PU (A) 50/1980]

Shariah Court Civil Procedure (State of Selangor) Enactment 2003 (No.4 of 2003)

Shariah Court Civil Procedure (Sulh) Selangor Rules 2001

Women's Charter (Cap.353)

LIST OF ABBREVIATIONS

ADRJ	- Australian / Australasian Dispute Resolution Journal
AJFL	-Australian Journal of Family Law
ALJ	-Australian Law Journal
Ibid	- abbreviation for *Ibidem,* means 'in the same place'
ILR	- Industrial Law Reports
L.M	-Law Majalla, IIUM
loc.cit	-abbreviation for '*loco citato*', means 'in the place' cited
MLJ	-Malayan Law Journal
op. cit.	- abbreviation for '*opere citato*', means 'in the work' cited
p.	-page
S.Ac.L.J.	- Singapore Academy of Law Journal
SJLS	-Singapore Journal of Legal Studies

CHAPTER 1

1.1 Introduction

It is an undeniable fact that a family unit plays a pivotal role in society. Currently, non-Muslims family law matters are referred to the High Court, similar to other matters that are also dealt by the very same court. This leads to the possibility of some family cases to be caught by the same problem of delay in disposing cases in court. If there are postponements in court, parties have to incur more expenses if lawyers charge for each appearance in court. The element of open court litigation for family matters is also seen as an inevitable drawback. Family matters deserve to be treated in confidence since they are very personal and sensitive which may affect the lives and privacy of people. In addition, there are other issues in family disputes, which are non-legal in nature, thus they are more suitable to be addressed in a venue such as family mediation in order to preserve future relationship of disputing parties.

Family mediation should be introduced as a pre-trial court process, to provide an alternative to family litigation. Unlike conciliation as the only alternative dispute resolution available in the non-Muslims' family matters, family mediation is not about reconciling parties to stay together. It is a venue where a mediator facilitates parties to craft their own terms of agreement. Family disputes involve socio-legal issues, thus are more inclined to be considered as social problems rather than legal problems. It is submitted that family mediation is socially relevant to solve these social problems.

It is opined that family mediation, as the name suggests, should not be limited to divorce cases only. It should be made available to other kinds of family disputes that are not necessarily related to divorce cases.

1.2 Objective of Study

This dissertation aims to analyse the use of mediation to solve family disputes in the High Court in Peninsula Malaysia by making critical analysis on the following aspects:

1. To study the factors for backlog of civil cases in the High Court with special reference to the effects on family cases.
2. To consider whether mediation will reduce the number of family cases litigated in the High Court.
3. To suggest an alternative mechanism for parties in family disputes to avoid open court litigation.
4. To examine the effectiveness of 'Majlis Sulh' / Islamic mediation as a pre-trial procedure in solving family disputes for Muslims as practised in Selangor Shariah Courts.
5. To study the possibility of adopting any parts of either 'Majlis Sulh' / Islamic mediation in Selangor Shariah Courts or the practice of mediation in the Bar Council's Malaysian Mediation Centre (hereinafter MMC) or family mediation as practised in other countries like in the Family Courts in Singapore and in Australia into Malaysian High Court system.

1.3 Literature Review

There is no local textbook written specifically on family mediation. Only general textbooks on family law are available such as Mimi Kamariah Majid, 'Family Law in Malaysia', (1999) and Ahmad Ibrahim, 'Family Law in Malaysia', 3rd ed, (1997). Some academics and legal practitioners had made efforts to write short articles on alternative dispute resolution (ADR) generally and mediation specifically.

Sharifah Zubaidah Syed Abdul Kader, 'Mediation of Legal Disputes : Whither in Malaysia?'(1996) briefly discussed the process involved in a mediation session. She regarded the difference between mediation and conciliation in non-Muslims and Muslims family law disputes as academic and considered them to have more similarities rather than differences. The writer of this dissertation is of the opinion that, in settling family law disputes, conciliation is different from mediation as far as the mediation process is concerned. The dissertation serves to show the different stages that exist in a mediation session to support the point that family mediation should be used as a distinctive dispute resolution apart from the existing conciliation.

In 1999, Ranjan Chandran, in 'Mediation-Charting The Right Course For The Millenium' explained various aspects of mediation in general. In relation to family mediation, two examples as practised in Australia and United States were discussed. Since Chandran tried to cover most aspects of mediation in a nutshell, his recommendations regarding the use of mediation in Malaysia were brief. In addition, he did not study the mediation mechanism under the MMC since at the time of his writing, the Bar Council ADR Committee was in the midst of being set up. This dissertation will also attempt to further expand his views pertaining to roles of various bodies to bring about the use of mediation in Malaysia.

As from the year 2000 onwards, more articles were written on various types of alternative dispute resolution including mediation. Vasanthi Arumugam in 'Mediation of Family Disputes' (2000), highlighted on the advantages and disadvantages of the use of mediation process in family disputes. The author then concluded by stressing the importance of family mediation in society in view of the expeditious, economical and amicable solution of the dispute. The author believed that family mediation can be a viable alternative to litigation depending on the training of lawyers, the attitude of lawyers and

policymakers and trained human resource and funding. Like Chandran's article stated earlier, this article is relatively short which resulted in the factors to bring about mediation practice in Malaysia not being discussed in detail. The factors need to be explored in greater depth.

Yong Yung Choy in his article 'Mediation an Alternative To Arbitration and Litigation' (2000), discussed the principles behind mediation. He went on to discuss the procedure involved. It is observed that the article serves only to give general ideas to the readers pertaining to the concepts of mediation and the stages involved in mediation.

In 2001, Yong Yung Choy continued to write about mediation. In another article, 'Alternative Dispute Resolution (Mediation) in Malaysia' (2001), he shared views of various authors in Malaysia and in other countries regarding the need to have ADR in addition to the court system to reduce backlog of cases in court. Since the author is a qualified mediator with the MMC, he strongly promoted civil cases to be referred to the MMC. However, he did not attempt to compare mediation as practised by other organisations in Malaysia, to serve as a comparison with MMC's mediation. This dissertation will attempt to compare MMC's mediation with 'Majlis Sulh' / Islamic mediation in Selangor Shariah Courts to fill in the gap.

Cecil Abraham in 'Mediation and Alternative Dispute Resolution : Developments in the various jurisdictions – Have The Lawyers Caught On' (2000) discussed various forms of ADR in Malaysia, namely mediation, reconciliation and arbitration. The paper was intended to discuss the growth of mediation and alternative dispute resolution in Malaysia at the 12th Commonwealth Law Conference, held in Kuala Lumpur on 16th September 1999.

Another proponent of ADR in Malaysia, Syed Khalid Rashid, in his article 'The Importance of Teaching and Implementing ADR in Malaysia' (2000), briefly highlighted the advantages of ADR and proposed it to be taught in every law faculty in Malaysia as part of the LL.B programme. As the author is an academic, the approach of his article is to theoretically discuss various points relating to ADR. He made some comparative studies of the views on ADR mechanisms propounded by the Western and Islamic scholars. Mediation has not been given great weight in his article because he discussed ADR as a whole. This dissertation will attempt to give some practical insights on mediation practice, particularly in MMC and Selangor Shariah Courts.

Syed Khalid Rashid, in another article, 'Factors Behind The Emergence of ADR in the World and ADR in Malaysia' [2002], discussed the factors behind the emergence of ADR in the common law world, taking England and Wales as representatives, specifically referred to Lord Woolf's Interim Report – Access to Justice in 1995 and the final report in 1996. Similar to his earlier article in 2000, he attempted to focus on the big picture of ADR and did not specifically select one method out of the various types of ADR for a special scrutiny.

Sundra Rajoo, in his article, 'Mediation and Alternative Dispute Resolution' (2002), briefly explained the role of the court in relation to the increasing trend of using alternative forms of dispute resolution. He then considered some aspects of arbitration and mediation. As the author is a Chartered Arbitrator who experienced conducting arbitrations for commercial disputes, he had the tendency to see mediation as a dispute settlement in disputes of business nature and did not discuss mediation as a possible settlement in family disputes.

With regard to the use of mediation in the Shariah Courts, in 1999, Zaleha Kamaruddin, in her article, 'Delays in Disposition of Matrimonial Cases in the Shari'ah

Court in Malaysia (1990-1997)', wrote on various aspects of delay in disposing matrimonial cases in all Shariah courts in Malaysia. She then made some recommendations for reducing the delay. In this article, she did acknowledge that some Shariah Courts in certain States settle cases faster than Shariah Courts in other States by using "out-of-court" settlement method, i.e. *sulh* rather than going straight to "open court". Since her major concentration in the article was on the aspect of delays in disposing matrimonial cases, *sulh* was not considered comprehensively.

At a seminar on the setting up of a Family Court in Malaysia, organised by the Bar Council of Malaysia on 9th until 10th November 2000, Mohd Na'im bin Mokhtar, presented a paper on Administration of Family Law in the Shariah Court which was later published in the Malayan Law Journal in 2001. He talked about the establishment of courts in Islam during the era of the Prophet Muhammad SAW and the establishment of Shariah Courts in Malaysia. The author, a Shariah Subordinate Court Judge in Petaling, Selangor, had openly discussed some problems in the Selangor Shariah Courts and suggested solutions for reform. When the articles written by Zaleha Kamaruddin (1999) and Mohd Na'im (2000) were published, there was no detailed and specific provision on reference by the court to a special mediation. It is one of the aims of this dissertation to discuss the latest development on *sulh* / mediation in the Selangor Shariah Courts after the appointment of 11 officers called '*sulh* officers' in May 2002 to specifically act as Islamic mediators.

Papers presented at various seminars further clarified the function of *sulh* / mediation and the role of '*sulh* officers'. These papers, however, were confined to mediation as practised in the Shariah Courts in Malaysia without any comparative study on the use of mediation either in other institutions in Malaysia or in other jurisdictions in the world. Some of the seminar papers were presented by Yang Amat Arif Dato' Sheikh Ghazali bin Abdul Rahman, the Chief Sharie Judge, who also acts as a Director General of

the Department of Judiciary, Malaysia.[1] Some papers were presented by *sulh* officers.[2] There was also a paper presented by a former academic, Salleh Buang.[3]

There are also project papers written at the degree level, on *sulh*/mediation in Shariah Court. Examples can be found in the project papers written by students of Bachelor in Shariah (Law) at the Department of Shariah and Law, Akademi Islam, University of Malaya, Kuala Lumpur. Some examples of these project papers are 'Perlaksanaan Sulh di Mahkamah Syariah Selangor, Implikasi Terhadap Pengendalian Kes dan Profesyen Kepeguaman', by Mohd Hairuddin bin Abdul Rahim in 2003 and 'Pemakaian Kaedah-kaedah Tatacara Mal (Sulh) Selangor 2001, Kajian di Mahkamah Rendah Syariah Hulu Langat', by Junaidah binti Mohamed Nasir also in 2003. However, it is observed that the contents of the above project papers were confined to *sulh* as practised either in Selangor Shariah Courts or Shariah Courts in other States in Malaysia. The writer is not aware of any dissertations written at the Masters' level that compare mediation as practised by the MMC with *sulh*/mediation as practised in Selangor Shariah Courts. Nevertheless, there is one PhD thesis that relates to mediation in family disputes, written by Nora Abdul Hak in April 2002 entitled 'Islamic Arbitration (Tahkim) and Mediation in Resolving Family Disputes – A Comparative Study under Malaysian and English Law'. The thesis discussed arbitration, reconciliation and conciliation/mediation in the context of family disputes in the

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[1] Among the papers he presented were;

a) Sheikh Ghazali bin Abdul Rahman, Ketua Pengarah/Ketua Hakim Sharie, Jabatan Kehakiman Shariah Malaysia, 'Sulh (Mediasi) Dalam Pentadbiran Mahkamah Shariah : Cabaran dan Masa Depan', In Seminar Kebangsaan Penyelesaian Pertikaian Alternatif, Kuala Lumpur, 4th- 5th February 2002

b) Sheikh Ghazali bin Abdul Rahman, 'Sulh – Amalannya dalam Perundangan Islam', In Seminar Kaedah Alternatif Penyelesaian Pertikaian Menurut Islam, Dewan Besar, Institut Kefahaman Islam Malaysia (IKIM), Kuala Lumpur, 5th-6th November 2001

c) Sheikh Ghazali bin Abdul Rahman, 'Pelaksanaan Sulh di bawah Pentadbiran Mahkamah Shariah', In Bengkel Penyelarasan Pelaksanaan Sulh di Mahkamah Shariah, Kangar Travelodge, Perlis, 21st-23rd August 1996

[2] Examples; Atras bin Haji Mohamad Zin, 'Jawatankuasa Pendamai dan Sulh : Satu Pengalaman di Mahkamah Shariah Selangor', Paper Presentation, Institut Latihan Islam Malaysia, Bangi, 2003, Siti Noraini bt. Haji Ali, 'Majlis Sulh di Mahkamah Shariah Selangor' In Seminar Undang-undang Kekeluargaan Islam Selangor, Kelab Shah Alam, Selangor, 26th September 2002.

[3] Salleh Buang, 'Nota Kursus Mediasi Mahkamah Shariah Selangor Darul Ehsan', In Kursus Mediasi Mahkamah Shariah Selangor Darul Ehsan, Quality Hotel, Shah Alam, Selangor, 22nd -24th April 2002.

dual system of family law in Malaysia and also the relevant provisions in English Law. However, the PhD thesis did not cover mediation in MMC and *sulh* in Selangor Shariah Courts. This dissertation will complement the above literature by comparing mediation in family disputes in local practices in the MMC and Selangor Shariah Courts. As far as foreign practices in family mediation are concerned, Singapore and Australia will be taken as example.

Family law textbooks in Singapore and Australia only provide brief explanations on family mediation. This area is usually discussed in one chapter or some parts of a chapter in those textbooks. Examples of family law textbooks in Singapore are Leong Wai Kum, 'Principles of Family Law in Singapore', (1997) and Kevin YL Tan (ed.), 'The Singapore Legal System', (1999). Examples of family law textbooks in Australia are Anthony Dickey, 'Family Law', (1997) and H.A. Finlay and Rebecca J Bailey-Harris, 'Family Law in Australia', (1989). For more detailed discussion on family mediation, textbooks on alternative dispute resolutions or specifically, on mediation have to be referred to. To get a picture of family mediation in Singapore, Lim Lan Yuan and Liew Thiam Leng, 'Court Mediation', (1997) and Subordinate Courts Singapore and Butterworths Asia, 'Families in conflict : theories and approaches in mediation and counselling', (2000) will be of much help. In Australia, textbooks like Hilary Astor and Christine M Chinkin, 'Dispute Resolution in Australia' (1992) and Ruth Charlton, 'Dispute resolution guidebook', (2000) cover various aspects of ADR in Australia with one chapter on family mediation. Reliance on textbooks alone will not suffice. Various articles written by authors in Singapore and Australia further clarified the practice of family mediation in their respective countries. Examples of articles by Singapore authors are Adrian Loke, 'Mediation in the Singapore Family Court', (1999) and Steven Chiang, 'Mediation in the Family Court – In Reply', (1998). Examples of articles on family mediation in Australia can be found in

Family Court Mediation Section Melbourne Registry, 'Mediation in the Family Court – An Overview of the Model', (1994) and Susan Gribben, 'Mediation of Family Disputes', (1992). It should be noted here that family mediations in Singapore and Australia would not be discussed in detail. References to relevant textbooks and articles will only serve as a guide in finding a suitable model for the Malaysian High Court to adopt.

It is observed from the above-mentioned literature that contemporary scholars in Malaysia have not adequately researched the area of family mediation. Since Malaysia has a dual family law system for the non-Muslims in the High Court and for Muslims in the Shariah Court, it is the writer's intention to conduct an analysis on the practice of mediation in family disputes in both systems.

1.4 Research Methodology

The research was based on library research carried out in the main Law Libraries in Peninsula Malaysia for example at the University of Malaya (hereinafter UM), International Islamic University Malaysia (hereinafter IIUM) and Universiti Teknologi Mara, Shah Alam (hereinafter UiTM), where Alternative Dispute Resolution is either taught as a subject or a component in a subject, whether at the postgraduate level (like at the Law Faculty, UM) or at the undergraduate level (like at Ahmad Ibrahim Kulliyyah of Laws, IIUM and at the Law Faculty, UiTM). These libraries had provided references comprising of textbooks, legislations and articles in journals.

In retrieving more up-to-date materials on current development of family mediation in other countries like Singapore and Australia, online researches were conducted.

Fieldwork was conducted in the form of visits to selected High Courts (the list of these courts can be found in Chapter 4 of this dissertation) and interviews were conducted with either their Deputy Registrars or Senior Assistant Registrars. Apart from interviewing

the said court officials, the intention of the visits to the High Courts was to gather statistics of cases of family nature (and not confined to divorce cases only) which were registered, disposed off and delayed from year 2000 until the latest month of 2004. However, these High Courts could not provide records on the breakdown of other kinds of family cases except for divorce cases only. This point will be elaborated later under heading 6 of this Chapter.

To understand the practice of 'Majlis Sulh' in Selangor Shariah Courts, visits were made to selected Shariah Courts in Selangor to interview four (4) '*sulh* officers'in four (4) selected Selangor Shariah Subordinate Courts, one '*sulh* officer' in Shariah High Court, Shah Alam, two (2) judges from two (2) selected Selangor Shariah Subordinate Courts and the Chief Registrar of Selangor Shariah Courts, whose office is at Selangor Shariah High Court, Shah Alam (their lists are given in Chapter 6 of this dissertation). Statistics of cases referred to 'Majlis Sulh' in all Selangor Shariah Courts, from May 2002 until August 2004, were also obtained from the '*sulh* officer' in Shariah Subordinate Court, Sabak Bernam, who is the person in charge of maintaining these statistics.

Pertaining to the practice of mediation in the Malaysian Mediation Centre (MMC), a visit was made to the Bar Council's building in Kuala Lumpur to interview the Chairperson to the Bar Council's Alternative Dispute Resolution Committee. In addition, interviews were also conducted with four (4) mediators accredited with MMC; two (2) in Kuala Lumpur, one in Johor (for all these three mediators, face-to-face interviews were held) and the other one in Pulau Pinang, who was interviewed through email. Two of these four mediators; one in Johor and the other one in Kuala Lumpur, were also interviewed in their capacity as experienced family law practitioners.

1.5 Outline of Chapters

Chapter 1 will deal with routine introductory matters encountered in the process of compiling and writing this dissertation, for example the objectives of study, literature review, research methodology, problems and limitations.

Chapter 2 will focus on the general explanation of concepts and terms. Discussion on the meaning of alternative dispute resolution and its various types will be made. The meaning of mediation and mediator will be considered, followed by the explanations of family, family law disputes or family disputes and family mediation. This chapter will then proceed to highlight the different types or models of mediation for example facilitative, therapeutic and evaluative. The nature of reference made to mediation i.e. compulsory mediation / court-annexed mediation and voluntary mediation / party-referral mediation will be discussed. The advantages and disadvantages of both types of reference will be briefly considered.

Chapter 3 will begin by elucidating problems in family law litigation. The advantages of mediation, which prevail over litigation, will then be explored. To provide a balanced view of mediation, the disadvantages of mediation will also be highlighted. This chapter will end with highlighting cases suitable and not suitable for mediation.

Chapter 4 will attempt to analyse factors for delay in disposing civil cases, for example divorce cases, from the High Courts' and the family law practitioners' points of views. Some internal High Courts' administrative variants and relevant statistics of cases in selected High Courts will also be examined.

Chapter 5 will start with the origin of mediation as a dispute settlement method, where the rise of mediation in United States will be briefly considered. The developments of mediation in Singapore and Australia, with emphasis on family law disputes, will also be studied. Singapore is chosen, not because it is our neighbouring country but due to its

identical legal provisions in most areas of law in Malaysia. It is also an example of an Asian country that had adopted a court-annexed mediation in its Family Court. Similarly, the well-established Family Court of Australia will give invaluable guidance as to the use of court-annexed family mediation over the years. This chapter will move on to explain the development of mediation in Malaysia, particularly in the legal profession, namely the MMC, that offers mediation for various types of civil cases and the existence of 'Majlis Sulh' as a court-annexed mediation in Selangor Shariah Courts.

Chapter 6 will concentrate on various aspects concerning MMC's mediators and '*sulh* officers' in Selangor Shariah Courts, together with their mediation practices. Among points to be explored are their roles / functions, their qualifications and skill trainings, their Code of Ethics / Code of Conduct, their categories, specific needs or qualifications of mediators for family disputes and stages or processes involved in a mediation session. The similarities and differences between the two will be highlighted. A comparative approach will be taken in studying the above aspects of mediation in the MMC and 'Majlis Sulh' in Selangor Shariah Courts.

Chapter 7 will highlight some key findings in the research, then suggestions for possible reforms in bringing about the family mediation as part of the High Court process will be elaborated. Finally, the chapter will end with comments on the overall Chapters of the dissertation.

1.6 Problems and Limitations

There were not many materials, particularly, textbooks on ADR and/ or mediation in the libraries visited, in UM, UiTM and UIAM. Many textbooks that were available relate to the practice of ADR and/or mediation in the United States and United Kingdom. Most textbooks on the Australian mediation practice focus on the practical aspects of mediation, which is useful for practitioners of mediation in conducting mediation sessions but would give less assistance in understanding the theoretical part of mediation. The existence of fewer textbooks providing information on the Singapore mediation practice is due to the fact that mediation practice is still new in Singapore, if it is to be compared with Australia.

There were also not enough volumes for the journals available on ADR and/or mediation for Australia and Singapore for example Australian Dispute Resolution Journal, Australian Journal of Family law, Singapore Law Gazette and Singapore Academy of Law Journal. Online research was conducted to access other journals not available in the libraries.

As for interviews, it was difficult to fix appointment dates within the planned timeframe for data collection to be completed since the dates depended very much on the availability of time on the part of the respondents.

There were also problems in collecting complete statistics of family cases from the High Courts visited. Despite the fact that statistics asked from them were family cases and other civil cases, those statistics obtained were divorce cases and civil cases. In reality, the High Courts visited could not provide statistics of cases in other types of family disputes not related to divorce for instance, those involving custodial dispute or claims for maintenance only. Even in the statistics of divorce cases themselves, there was no

breakdown of 'non-contested divorce' (joint petition) [4] and 'contested divorce'.[5] There also seemed to be no standard method to prepare the statistics; some High Courts provided yearly statistics which included cases carried forward from the preceding year (which may then be included in the number of cases disposed off in that particular year), while some High Courts excluded these cases carried forward from the statistics given. The lack of such statistics was influenced by the fact that all High Courts in Malaysia are only required to submit statistics of civil cases and criminal cases for each year, without detailed breakdown of types of cases within these two categories, to the department in charge of courts' statistics at the Palace of Justice, Putrajaya.

It is hoped that in the future, the above type of record-keeping should be given due attention and a uniform standard in maintaining breakdown of cases in the courts' statistics should be adopted by all High Courts in Malaysia.

As for the practice of 'Majlis Sulh' in Selangor, most materials on it like seminar papers, brochure on 'Majlis Sulh' and court's circulars detailing matters relevant to 'Majlis Sulh' could only be obtained in Shariah High Court, Shah Alam and were not available in any of the Law libraries visited.

[4] See section 52 of the Law Reform (Marriage and Divorce) Act 1976.
[5] See section 53 of Law Reform (Marriage and Divorce) Act 1976.

CHAPTER 2

2.1 Introduction

This chapter explains the general concepts and terms involving alternative dispute resolutions (ADR) generally and mediation specifically. Various types of ADR will be explored and the definitions of mediation, mediator, family, family law disputes and family mediation will be clarified. This chapter will also elaborate on some different models of mediation. It will then touch upon the nature of reference to the mediation, whether voluntary or compulsory type of reference. Finally, the chapter ends with highlighting the advantages and disadvantages of a mandatory mediation.

2.2 Meaning of Alternative Dispute Resolution (ADR)

Heike Stintzing considered "alternative" to involve several aspects. Firstly, "alternative' dispute resolution does not incorporate the traditional adversarial features as in the court system. In court, the judge is the one who controls the whole process. Parties refer their disputes to the judge because they failed to reach a 'peaceful settlement'. Whereas, in "alternative" dispute resolution, parties would try to communicate with each other to reach an agreement. Secondly, "alternative" may refer to structural differences between the traditional court and the ADR methods. For example, the structural difference between ADR methods and the court system is the informality in ADR methods, where there are no specific formal rules in ADR methods and they can be held in any place which is 'less public and official surroundings'. Stintzing also agreed with many authors in that the above aspects of ADR methods showed that "alternative" could be regarded as "additional" and not as an "exclusion" or a"replacement" to the court system. "Alternative" dispute

resolutions give "additional" options to parties in settling their disputes, but when the ADR methods fail, parties would still resort to the court for a final decision.[6]

In relation to ADR as used in family disputes, Stintzing opined that "a family dispute arises if one spouse feels entitled to certain behaviour or part of property or any other right which he or she is not granted by the other spouse. The spouse thinks the other spouse could and should comply with this wish or demand but the other spouse refuses.".[7]

While in explaining the term "resolution", Stintzing pointed out the same purpose of resolving disputes in ADR methods and the court system. He then quoted several writers when explaining the resolution of a dispute is presumed to be achieved if the dispute reaches a conclusion "which the parties regard as final and which is acceptable to both or all parties involved". He strongly believed that the court system could only 'settle' a dispute rather that 'resolve' it. The final decision on the settlement of the dispute lies with the court. The court is not concerned with whether both or even one party is satisfied with its decision. The parties accept the decision of the court due to the authority vested in it. Whereas, ADR methods emphasise on resolving the underlying causes of the dispute. Stintzing also realised that the success in reaching an agreement by using ADR methods did not guarantee that the underlying causes had been satisfactorily dealt with. Nonetheless, he opined that an agreement reached through free negotiations of the parties involved seemed to more closely approach full resolution than an imposed decision of a judge.[8]

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[6] Stintzing, Heike, Mediation – A Necessary Element in Family Dispute Resolution? A Comparative Study of the Australian Model of Alternative Dispute Resolution for Family Disputes and the Situation in German Law, European University Studies : Series 2, Law ; Vol. 1503, 1994. See explanation on the term "alternative" at pp.36-39.

[7] Stintzing, Heike, *op. cit.*, see explanation on the term "dispute" at pp.39-40.

[8] Stintzing, Heike, *op. cit.*, see explanation on the term "resolution" at pp.40-41.

Stintzing finally concluded his explanation on ADR by regarding ADR methods as supplementary to the court system. ADR offers an option to parties to solve their dispute in a different way than the court's adversarial system. However, if agreement is not possible, the court still has its role to play. [9]

Ruth Charlton, one of Australia's leading dispute resolution practitioners, appeared to agree with Stintzing in that alternative dispute resolution (ADR) involves "processes that are alternatives to the traditional legal methods of resolving disputes." She also discussed attempts to apply different adjectives to the letter "A" in the "ADR" acronym, such as "Assisted" Dispute Resolution or "Additional" Dispute Resolution or "Appropriate" Dispute Resolution. With regard to the letters "DR" for the term "dispute resolution", she described that as "dispute resolution processes which are generally alternatives to the traditional legal routes of litigation or arbitration." [10]

The Victorian Attorney General's Discussion Paper (hereinafter Victorian Report)[11] regarded ADR to include "those processes that have a certain formality attached to them, in that each is a recognisable process with a commencement and a conclusion, and is conducted by third party neutrals other than judicial officers acting in that capacity."

The above definition seems to depart from what Stintzing said in that the Victorian Report considers ADR processes to have some formalities attached to them.

The summary of ADR in the Victorian Report was even more helpful where ADR was considered as ;

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[9] Stintzing, Heike, *op. cit.*, at p.41.

[10] Charlton, Ruth, Dispute Resolution Guidebook, 2000, at p.3.

[11] Quoted in Astor, Hilary, and Chinkin, Christine Mary, Dispute Resolution in Australia , 1992, at p. 66. This Discussion Paper was also known as Victorian Report. In 1990 the Attorneys-General of three States in Australia (South Australia, Victoria and New South Wales) produced reports or discussion papers on ADR. They explored ways in which the relevant State government could support the development of dispute resolution outside and within the formal court system. They were published to promote discussion from interested persons. The most far-reaching was the Victorian Report. It aimed at "bringing potentially advantageous ADR processes into the mainstream of dispute resolution – in terms of thinking, perception and accessibility." Its major recommendation was to establish a statewide Victorian ADR service "to provide advice, assistance and ADR services throughout Victoria, with no limit on the type of matter in dispute or its monetary value, if the application of an ADR process is likely to assist in resolution"; see these explanations on Victorian Report in Astor and Chinkin, *op. cit.*, at p.2.

" ...a means of resolving disputes other than by litigation. The processes may either be governed by statute or regulation and lead to an imposed solution, as in the case of arbitration; or a non-statutory leading to an agreed solution, as in the case of conciliation or mediation. ADR processes are generally subject to the agreement of the parties as to the adoption of the particular process and the nature and form of the process."[12]

On the point of ADR processes being dispute resolutions other than litigation, the above summary is seen to be in line with Stintzing and Charlton. Nonetheless, the summary widens the definitions provided by Stintzing, when it talks about ADR processes either to be statute-based which leads to an imposed solution or a non-statutory which leads to an agreed solution.

A more comprehensive explanation of ADR was provided by Simon Davis. [13] It includes not only the nature of a settlement in ADR processes i.e. facilitated, confidential and without prejudice settlement but also covers the absence of a third party's decision,[14] the parties to maintain control of ADR processes and the freedom of parties to choose either to agree or disagree to reach a settlement. Due to the "without prejudice and confidential" nature of ADR processes, when parties fail to settle and refer their case to the court, the reasons for parties to have failed in reaching settlement will not usually be disclosed to the court.

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[12] Ibid, at p.66.

[13] He defined ADR as "ADR is a form of facilitated settlement, which is confidential and without prejudice. Consequently the contents of the process need not usually be disclosed to a court. Because it is a form of settlement process the client is not at risk of being bound to an unfavourable outcome by the third party's decision. If the agreement is reached, a binding settlement agreement can be entered into. If it is not, the fact that ADR has taken place but failed can be disclosed to the court, but usually not the reasons why. Because the process is without prejudice and non-binding, the client does not lose control of the process, as contrasted with what happens when the court proceedings are commenced and proceed to judgment at trial" ; see Davis, Simon, Chapter 1, 'ADR : What Is It And What Are The Pros And Cons?', in Russell Caller (ed.) ADR & Commercial Disputes ,2002 at pp. 1 and 2.

[14] Although there is a third party in ADR process, he does not make decision for the parties. He only facilitates parties to come out with their own decision.

Nevertheless, most authors recognise the difficulty of giving a single and an accurate definition of ADR due to some differences in the features of ADR diversified components or methods. [15]

2.3 Various types of ADR

There are different words used by various authors to explain the types of ADR. Most authors used "processes"[16] or "forms",[17] others preferred the word "procedures", [18] some used the word "methods[19] or techniques.[20]

The aim of this part of the chapter is not to give a comprehensive explanation of varieties of ADR processes. It will only serve as an overview of the abundance of such processes, other than mediation. Mediation is reserved for a subsequent discussion since it is the main focus of the remaining parts of this Chapter and other Chapters in this dissertation as a whole.

[15] See for example Astor, Hilary and Chinkin, Christine Mary, *op. cit.*, at pp 66-68; Stone, Marcus, Representing Clients in Mediation A New Professional Skill, 1998, at p. 112.

[16] See for example Golberg, Stephen B. and Sander, Frank E.A. and Rogers, Nancy H. , Dispute Resolution : Negotiation, Mediation and Other Processes, 2nd ed., 1992, at pp. 4-5; Bevan , Alexander H., Alternative Dispute Resolution A Lawyer's Guide to Mediation and other Forms of Dispute Resolution, 1992, at p.6; Astor, Hilary, and Chinkin, Christine M, *op. cit.*, at p. 59; Noone, Michael, Mediation (Essential Legal Skills Series), 1996, at p.18; Charlton, Ruth, *op. cit.*, 2000, at p.3.

[17] Marcus Stone used both "processes" and "forms"; see Stone, Marcus, *loc. cit.*, p. 112.

[18] Dauer, Edward A., Manual of Dispute Resolution - A Student's Guide to ADR Law and Practice, McGraw-Hill, Inc, 1994, used the term dispute resolution "procedures" at p.5-4.
Brown and .Marriott used both the words "procedures" and "processes". They began with the words dispute resolution "procedures" as the heading of sub-topic 3 in Chapter 2 ; see Brown, Henry J., and Marriott , Arthur L, Chapter 2 of ADR Principles & Practice, 2nd. ed., 1999 at p. 15. They then continued their explanation with the words dispute resolution "processes" from p.15 until the end of Chapter 2; see Brown, Henry J. and .Marriott, Arthur L., *op. cit.*, from pp.15-20. However, earlier in the same Chapter, they used the words "procedures" in the definition of ADR; see Brown, Henry J. and .Marriott, Arthur L., *op. cit.*, at p. 2.

[19] Stintzing, Heike, *op. cit* ., had consistently used the word "methods", see example Chapters A and B, at pp 22-58.

[20] Fulton, Maxwell J., Commercial Dispute Resolution, 1989, at p.53.

2.3.1. Arbitration

Fulton had defined arbitration by covering the nature of its process, the parties involved and the effect of the decision made by the arbitrator (award). According to him, arbitration means

" the private process whereby a private, disinterested person, called an arbitrator, chosen by the parties to a dispute (which dispute is justiciable in court of civil jurisdiction). The arbitrator acts in a judicial fashion, but without regard to legal technicalities. He applies either existing law or norms agreed by the parties and acts in accordance with equity, good conscience and the perceived merits of the dispute. He then makes an award to resolve the dispute. The award is, in most cases, binding, with only limited avenue for review by a court."[21]

Fulton regarded the above definition to fall within the type of a "binding arbitration".[22] He then moved on to consider two other variants of arbitration, "final-offer arbitration" [23] or "baseball arbitration" and "combined arbitration".[24]

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[21] Fulton, Maxwell J., *op. cit.*, at p.55.

[22] Fulton, Maxwell J., *op. cit.*, at p. 70.

[23] Ibid. According to Fulton, this type of arbitration was categorised by Carl Stevens in 1966. For further details, see Stevens, Carl M., 'Is Compulsory Arbitration Compatible With Bargaining?', (1966) 5 Industrial Arbitration 38.

"Final-offer arbitration" is also called "baseball arbitration" because historically in United States, this type of arbitration was used to settle disputes in professional baseball. In "final-offer arbitration";
"each party submits a final offer for settlement to a neutral adviser who is empowered to choose only one final offer or the other in accordance with (presumably) what he or she considers to be fair. No other set of outcomes available to the arbitrator, he or she is not permitted to split the difference or to indulge in any other form of compromise. The offer chosen determines the dispute."; see ibid.

[24] Fulton, Maxwell J., *op. cit.*,at p. 71. Under "combined arbitration",

"the disputants and the arbitrator all submit a figure. The disputants' offers are then revealed and if they converge then the dispute is settled. If they do not, the parties are given a further opportunity to settle their dispute by negotiation. If those negotiations do not result in a settlement then the arbitrator's figure is revealed. If the arbitrator's settlement figure is between the disputants' offers, then the party's offer closest to the arbitrator's figure becomes binding. If the arbitrator's figure falls outside the disputants' offers, that is to say the arbitrator's figure is higher or lower than both final offers, the arbitrator's figure becomes binding. Under "combined arbitration", there is always the possibility that a party will be worse off than if he or she had accepted the other side's final offer before the arbitrator's figure was revealed – this in theory at least, induces the disputants to negotiate before they submit to the imposition of a solution by the arbitrator."; see ibid.

In explaining "combined arbitration", Fulton referred to Brams, S.J., and Merrill, S., 'Binding Versus Final-Offer Arbitration : A Combination is Best', (1986) 32, Management Science, 1346.

Another definition of arbitration, which is quite similar to Fulton's version of "binding arbitration", was given by Astor and Chinkin. However, there is one point of difference; Fulton's definition of arbitration only implies one arbitrator at a time but Astor and Chinkin's definition connotes the possibility of having more than one arbitrator making the award. [25]

Ruth Charlton, in her definition of arbitration, seemed to include features of a "binding arbitration" as put forward by Fulton, Astor and Chinkin above. She, however, added the following points;

- parties' submissions comprise of arguments and evidence
- decision of the arbitrator is referred to as a "determination".
- the arbitrator need not have a legal background but has expertise in the disputed subject matter. [26]

2.3.2. Early Neutral Evaluation (ENE)

An evaluator who is usually a legal practitioner will be engaged. The evaluator is a person who is specialised in or practises extensively in the subject matter of the dispute. Each side of the disputants will put their case before the

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[25] Astor and Chinkin viewed arbitration as

"an adversary process whereby an independent third party (or parties) chosen by the parties makes an award binding upon the parties after having heard submissions from them. Arbitration is a private process. Although the parties have considerable freedom in determining the scope and nature of an arbitration, commercial arbitration in Australia is subject to legislation and court review. Australian legislation distinguishes between domestic and international commercial arbitration. The parties have limited rights of appeal to the courts which also have some limited powers of review over the exercise of the arbitral function. Under the legislation arbitral awards are enforceable through the courts....."; see Astor and Chinkin, *op. cit.*, at p. 65.

[26] Her definition of arbitration is as follows;

"..a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination. An arbitrator can be part of a court-annexed scheme, or the parties may choose an arbitrator who is not necessarily legally qualified. The choice of arbitrator may be based on his or her particular expert knowledge of the subject matter, for example an engineer or accountant."; see Charlton, Ruth, *op. cit* ., at p.9

evaluator. At first, the evaluator will encourage parties to mutually settle the matter and he will only play the role of a chairperson. However, if agreement is not possible, the evaluator will then produce his or her evaluation of the likely court outcome based on the merits of each side's argument. By relying on this evaluation, the parties may try to negotiate their settlement. ENE can be said as a cousin to expert appraisal or expert determination.[27]

2.3.3. Expert Appraisal / Independent Expert Appraisal / Expert Determination

Expert appraisal is also known as Independent Expert Determination.[28] Expert appraisal is a process which provides for an objective, independent and impartial determination of disputed facts or issues by an expert appointed by parties. The parties may opt to regard the determination either to be final or binding or to be used as a basis for their negotiations. Parties may agree as to the procedures used for exchanging information and its presentation to the expert. The expert's role is described as investigatory and inquisitorial when eliciting further information from the parties. He finally makes his determination as an expert and not as an arbitrator.[29]

[27] Charlton, Ruth, *op. cit* ., at pp.9-10.

[28] Astor and Chinkin, *op. cit.*, at p.113. Burton, Gregory K., and Angyal, Robert S., 'Australia', in Center for International Legal Studies Dispute Resolution Methods, Comparative Law Yearbook of International Business : Special Issues, (1994) used the term "independent expert determination" or "valuation", see at p.1.
Expert determination as practiced in Singapore is similar to an expert appraisal in Australia. In Singapore, parties commonly use expert determination in the case of share valuation; see Andrew, Chan, 'ADR in Asia (Singapore)', Asia Business Law Review, No.19, January 1998, at pp.55-56. This can be illustrated by the case of *Kuah Kok Kim & Ors v. Ernst & Young (a firm)* [1997] 1 SLR 169.A party was not satisfied with a share valuation conducted by an accounting firm. The unsatisfied party then took a pre-action application for discovery against the said accounting firm. The court held that, generally, an expert determination was binding on the parties to the dispute. If any party was not satisfied with the expert determination, then that party could take an action against the expert for negligence.

[29] Astor and Chinkin, *op. cit* ., at p. 65.

2.3.4. Facilitation

Facilitation may involve several processes, among others; [30]

- A facilitator may be employed to assist in planning meetings being held by a company or organisation. The group of planners may have mutually agreed on the desired outcome but hold different opinions on priorities or how to achieve such desired outcome.
- Another variant of facilitation is facilitated negotiation where parties to a dispute have identified issues for them to negotiate but they need a facilitator to assist in negotiating the outcome.
- It is also possible to employ a dispute resolver to facilitate a public meeting, committee meeting or a workshop. [31]

2.3.5. Mini trial

Mini-trial has been developed in the United States for particular application in commercial or business disputes between corporate entities.[32] Fulton criticised the term "mini-trial" to be misleading because a mini trial is not in fact a trial at all.[33] The most common words to describe mini-trials are information exchanges.[34]

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[30] Charlton, Ruth, *op. cit* ., at pp.8-9.

[31] This may happen in a simple case involving a group of residents who either has a conflict among themselves or has a common interest and would like to put their views to a governmental instrumentality through a public meeting. In the context of committee meeting, this is where a board of an organisation that have a dispute among themselves employ a facilitator. The facilitator will assist in the flow of the meeting and ensure that everybody has the opportunity to speak and nobody is allowed to dominate. While in the workshop context, the facilitator is not actually a dispute resolver. His role is to promote interaction from the audience and prevent any attempt to dominate by particular audience participants; see ibid.

[32] See Astor and Chinkin, *op. cit.*, at p. 141. They stated that mini-trial has very little use in Australia; see Astor and Chinkin, *op. cit.*, at p. 142.

[33] Fulton, Maxwell J, *op. cit.*, at p.111. Edelman and Carr considered 'the word mini-trial is a misnomer"; for further details, see Elderman L and Carr F, 'The Mini-Trial : An ADR Procedure', The Arbitration Journal, Vol 42, 1987, pp-16 at p. 9.

[34] See Fulton, Maxwell J, *op. cit.*, at p.111.

A mini-trial is commenced by agreement between the parties. It involves an exchange of information by the disputants (or their representatives) before a panel comprising other representatives of the disputants who are authorised to settle the dispute. Thus in a mini-trial the parties select a panel before which they (or their representatives) will present their "best case". Typically the panel comprises a

In Australia, Sir Laurence Street, former Chief Justice of New South Wales, had developed a new process which is modeled from the American mini-trial. The process is called "senior executive appraisal" and it is meant to be one of the resolutions for commercial disputes.[35]

2.3.6. Negotiation

Most ADR processes are based on negotiation techniques and assumptions.[36] There are two forms of negotiation, simple bilateral negotiation and supported negotiation.[37] According to Roberts, simple bilateral negotiation involves the parties in dispute approaching each other without the assistance of any third party and seeking a mutually acceptable outcome through discussion.[38] Whereas, supported negotiations "...represents a process of bilateral negotiation in the sense that the parties approach each other without the help of an apparently neutral intervener; but the structure is altered by the appearance of partisans in support of the respective disputants."[39]

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senior executive, with authority to settle, from each of the parties. In some mini-trials, the senior executives are joined by a neutral adviser selected by the parties. There may be some limited discovery process to enable the panel to be better informed of the parameters of the dispute. After the oral presentation of each party's case there may be an open question and answer session between the parties and the panel. Following these presentations, and after consideration of the submissions of parties, the panel members will meet together and attempt to negotiate an agreement. It may be agreed that the neutral adviser be asked to perform the role of a mediator or a facilitator during this meeting. If no agreement can be reached by the executives the neutral adviser will give an advisory opinion as to the likely outcome of the dispute, if it were to be submitted to litigation. This advisory opinion forms the basis for a second attempt at reaching settlement between the senior executives. If this is still not achieved, the process may be terminated, or the executives may submit written offers of settlement to the neutral adviser upon which a settlement recommended by that neutral person will be based. If this recommendation is rejected, either party may declare the process terminated; see Astor and Chinkin, *op. cit.*, at pp.141-142.

[35] For further details on the differences between the Australian "senior executive appraisal" and the American "mini-trial", see Astor and Chinkin, *op. cit.*, at p. 143.
For further details on "senior executive appraisal", see Street Sir L, 'Senior Executive Appraisal', Australian Construction Law Newsletter, No.6, July-August 1989, pp.9-11.

[36] Astor and Chinkin, *op. cit.*, at p. 59.

[37] Ibid, Astor and Chinkin cited Roberts, Simon, 'Mediation in Family Disputes', Modern Law Review, (September 1983), Vol. 46, No. 5, 537, at pp. 543-545.

[38] Ibid; quoting Roberts, Simon, *op. cit.*, at p. 543.

[39] Roberts, Simon, *op. cit.*, at p. 544.
There are different roles that may be played by the partisan. The role may be as minimal as giving a supportive physical presence like a friend. The role may also be in the form of legal advice before or during the process of negotiation or the partisan may be a party's lawyer who is part of the negotiating team. The partisan may even conduct the negotiation on behalf of the disputants and Roberts calls this kind

Joel Lee Tye Beng considered two main models of negotiation; the "competitive model" and the "co-operative model".The "competitive model" is where it involves a "win-lose" situation in which one sees the other party as the "enemy" and the goal is to "win". This is commonly used by lawyers and business people. On the other hand, the "co-operative model" concerns the "win-win" situation where one sees the other party as an ally and a valuable resource in the negotiation. The goal is to resolve the problem of parties and try to allow both parties to gain as much as possible.[40]

Joel Lee Tye Beng opined that there is a place for both models of negotiation. He also stressed on the danger to resort to one model of negotiation as the only model available.[41]

2.3.7. Rent-a-judge

"Rent-a-judge" is similarly called "private judging" or "trial by reference".[42] The process involves the parties agreeing to accept a private adjudication of their dispute. After the parties have reached such agreement, they will petition the court for an order submitting the dispute to a referee for decision. When the court order has been obtained , the parties hire a person to determine all issues of fact and law in their dispute. The referee's report is then entered as a judgment of the court with

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of partisan as a 'champion'. Astor and Chinkin opined that with the presence of such partisan who may play different roles, the nature of the negotiation will be changed and parties' level of control over the process will also be affected; see Astor and Chinkin, *op cit* ., at p. 60.

[40] Lee, Joel Tye Beng, Chapter 2, 'The ADR Movement in Singapore', at p. 417, in Kevin, YL Tan (ed.), The Singapore Legal System, 2nd ed., 1999. This "co-operative model" is also known as the "principled", "problem solving" and "interests-based" model. It was introduced by Fisher, Roger and Ury, William, Getting to Yes : Negotiating Agreement Without Giving In, 2nd ed., 1991.

[41] Ibid, at p. 418. He seems to form the same opinion with two authors from the United States, Lax, David A. and Sebenius, James K., in their book, The Manager as Negotiator, Bargaining for Cooperation and Competitive Gain , 1986. They talked about the value creator or principled bargainer (a negotiator who resorts to an approach similar to a cooperative model of negotiation) and value claimer or positional bargainer (a negotiator who resorts to an approach similar to a competitive model) and concluded that a combination of both kinds of negotiator would form the best negotiator.

[42] Fulton, Maxwell J. , *op. cit.* , at p.118.

full rights of appeal. While most of the statutes in America allow reference of disputes to any person agreed upon by the parties, typically that person is a retired judge or less frequently, a senior barrister. Retired judges are chosen because of their experience, repute and acceptability to the legal fraternity. [43]

There are criticisms about the danger of having a rent-a-judge process. Although this process is under the auspices of the court, it lacks protection in the public system since people can buy-in a judge of their own choice to conduct a hearing which is held in private. It is also feared that judges tend to abandon the existing public system due to the advantages which are prevalent in rent-a-judge process; with private judging, higher pay per case, the ability to choose most interesting cases and the freedom to work within their own timetables.[44]

It also has the potential to create "a two-tiered system of justice in which those able to afford private judges abandon the public system leaving it to the poor and those accused of crimes."[45]

2.3.8. Hybrid processes

Golberg, Sander and Rogers stated that there are three primary processes of dispute resolution i.e. negotiation, mediation and adjudication. According to them, if the elements of these three primary processes were combined, they would form a rich variety of "hybrid"

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[43] Ibid. Fulton commented on an Australian newspaper report in August 1988 of a judge "for hire" is not similar to the process of rent-a-judge in America. He compared the service in Australia and the process in America and concluded that the Australian service is informal, consensus based service which is essentially mediation approach. Whereas, the American process is on the other hand court-annexed and non-consensual; the judge actually determines the dispute, not the parties; see ibid, at pp. 119-120.

[44] See Astor and Chinkin, *op. cit* . , at p. 172.

[45] 'ABA President Sounds Warning on Private Judging', Australian Law News, Vol. 24, No.1, 1989, p.20; cited in Astor and Chinkin, *op. cit.*, at p. 172. Astor and Chinkin also draw attention to the scenario in California where the number of retirements among judge were increasing. The two authors express their concern that rent-a-judge has swayed from the purposes of having ADR processes, particularly ADR processes are aimed to divert poorer litigants from the courts; see ibid.

dispute resolution processes.[46] They also provided two Tables in their book to illustrate on these various dispute resolutions. Table 1-1 is for "Primary" Dispute Resolution Processes that comprise of adjudication, arbitration, mediation and negotiation, while Table 1-2 is for "Hybrid" Dispute Resolution Processes i.e. private judging, neutral expert fact-finding, mini-trial, ombudsman and summary jury trial.[47] These two Tables have continuously been made references by many authors in the area of dispute resolutions.

2.4 Meaning of mediation and mediator

2.4.1. Some definitions of mediation in the United States

The definition of mediation process is always intertwined with the explanation on the mediator. It is perhaps better for us to look at the definitions put forward by various writers from the United States, the country in which mediation is believed to have been founded. In addition, most authors, either in Australia or Singapore, will usually turn to the definition of mediation in the United States for guidance before they discuss their local perspectives. Folberg and Taylor's classic definition of mediation has always been referred to. They defined mediation as

"the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider

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[46] They gave examples of; i) an adjudication-like presentation of proofs and arguments is combined with negotiation in the mini-trial, ii) arbitration is combined with court adjudication in a rent-a-judge procedure or private judging, iii) mediation is combined with arbitration in med-arb. They then elaborated on other well-known hybrid processes such as ombudsman (involves mediator-investigator), the neutral expert, the early neutral evaluator and the summary jury trial; see Golberg, Sander and Rogers, *op. cit.* , at p. 3.

[47] See Golberg, Sander and Rogers, *op. cit.* , at pp.4-5.
Bevan , Alexander H. (1992), *op. cit* ., classified the various ADR into binding processes and non-binding processes. ADR processes which are binding include arbitration, adjudication, med-arb and rent-a-judge / private judging. On the other hand, the non-binding processes are mediation, conciliation, family mediation, mini-trials, ombudsmen, neutral expert fact-finding and summary jury trials.
Brown, Henry J., and Marriott , Arthur L, (1999), *op. cit.* , appeared to agree with Bevan's classifications when they categorised the primary dispute processes into adjudicatory processes (where the third party neutral makes a binding determination of the issues) and the "hybrid" combinations as consensual processes (where the parties retain the power to control the outcome and any terms of the resolutions). However, they differed from Bevan when they considered negotiation and mediation, apart from adjudication, to be included in the three primary processes / adjudicatory processes. They also held a different view from Bevan when they considered med-arb to fall within the "hybrid" combinations /consensual processes; see Brown and Marriott, *op. cit.* , at p.16. As to court-annexed arbitration, even though Brown and Marriott regarded it to be one of consensual processes or non-binding processes, they did point out that in some jurisdictions, arbitration through the court is immediately binding; compare Brown and Marriott, *op. cit.* , at p. 16 and p.18.

alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasises the participants own responsibility for making decisions that affect themselves. It is therefore a self-empowering process."[48]

A shorter definition of mediation was given by three prominent proponents of ADR processes; Golberg, Sander and Rogers. They regarded mediation to be "..negotiation carried out with the assistance of a third party." [49]

Edward A.Dauer highlighted on the point of the neutral mediator to meet parties either together or separately in caucus. He then explained on the role of the mediator, which was not covered in Folberg and Taylor's definition of mediation; where a mediator assists parties in recognising their interests, identifying possible solutions and implementing resolution. He also saw mediation as overcoming blockages to communication that developed between parties. Finally, he reminded that there are numerous variations of mediation. [50]

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[48] Folberg, J and Taylor, A, Mediation : A comprehensive guide to resolving conflict without litigation, 1984, at p.7.

In 1990, one Australian mediator, Gribben, Susan, who presented a paper entitled "Mediation of Family Disputes" at the Fourth Family Law Conference, 1990, opined that Folberg and Taylor's definition was still the most useful. Another Australian mediator, Ruth Charlton emulated Folberg and Taylor's definition when she defined mediation; see her definition in Charlton, Ruth, *op. cit.* , at p. 5.

On the other hand, Boulle, Laurence and Nesic, Miryana, Mediation : Principles, Process, Practice, 2001, at p.4, categorised the definition provided by Folberg and Taylor to fall within the conceptualist approach. According to them, there are two approaches in defining the practice of mediation; the conceptualist approach and the descriptive approach. The conceptualist approach concerns the definition of mediation in ideal terms, which emphasise certain values, principles and objectives. Conceptualists definitions have a high normative content and might not reflect what actually happens in mediation practice. On the other hand, the descriptive approach involves the definition of mediation not in terms of an idealised concept or theory, but in terms of what actually happens in practice. To illustrate the descriptive approach, Boulle and Nesic quoted the definition of mediation in "Systems or selves? Some ethical issues in family mediation" (1992) 10 Mediation Quarterly, 11, where Roberts, M., stated that the meaning of mediation as "...a process of dispute resolution in which the disputants meet with the mediator to talk over and then attempt to settle their differences." They then continued to discuss the strengths and shortcomings of both approaches which will not be elaborated here.

[49] Golberg, Sander and Rogers, *op. cit.*, at p. 103.

[50] See Dauer's definition of mediation in Dauer, Edward A., *op. cit.* ,at p.5-5.

2.4.2. Australia and Singapore's definitions of mediation

Some points in the definition of mediation provided by Mr Pat Brazil, the former Secretary of the Attorney-General's Department, Commonwealth of Australia[51] are not much different from other authors. However, some of his additional points are worth noting;

a) the mediator encourages an expeditious settlement to be made by parties,

b) there was no 'decision' but 'agreement',

c) mediation process does not involve application of rules.

In explaining mediation, Burton and Angyal added some other points to the definitions given by writers in the United States. Their definition of mediation includes the following features; [52]

- unlike most authors who regarded mediation as an 'assisted negotiation', they viewed mediation as a 'structured negotiation',
- they also expanded Dauer's explanation on private caucus and joint sessions when they stated that mediation involves private sessions with each party when joint sessions have exhausted progress at that particular point. A mediator must be expressly authorised before discussions in private session are disclosed to other parties to the mediation,
- mediation is confidential and without prejudice,[53]

[51] His definition of mediation was cited in Australian Commercial Disputes Centre, Mediator Training Manual, March 1988.

[52] See Burton and Angyal, *op. cit.*, at pp. 1-2.

[53] d'Ambrumeil, Peter L., Mediation and Arbitration, 1997 also considered mediation as a 'without prejudice' process. He discussed this principle in the light of the Court of Appeal's decision in *Rush & Tomkins v. GLC* [1988] 3 All ER 737. He pointed out the purpose of 'without prejudice' privilege was to enable parties to negotiate without risk of their proposals being used against them if the negotiations failed; see d'Ambrumeil, Peter L., Mediation and Arbitration, *op. cit.* , at pp.41-42. In the context of mediation, a 'without prejudice' procedure would allow the parties to put forward suggestions as to how the matter might be settled in ways which they would not be able to do openly, see d'Ambrumeil, Peter L.,What is dispute resolution?, 1998, at p. 33.

- the mediator uses a number of recognised techniques in assisting parties to reach agreement
- the mediator does not express an opinion on the parties' legal strengths and weaknesses, even though he explores the consequences of not resolving the dispute (such as the level of litigation costs) and may test with a party the reality of its various positions,
- if the matter does not resolve, then the litigation will proceed.

In addition, Fulton divided mediation into "passive" and "active" mediation. It seems that these two different types of mediation would depend on the way the mediator conducts the mediation. According to Fulton, if the mediator encourages and facilitates the communication between parties and also suggests possible solutions, then he is an active mediator. However, if the mediator only encourages and facilitates the communication between parties without suggesting possible solutions to them, then he is a passive mediator.[54]

On the other hand, Michael Pryles categorised mediation into three; mandatory, discretionary and voluntary. Mandatory mediation refers to mediation which is compulsory as stipulated by law. For example, formerly in the state of Victoria, disputes between landlords and retail tenants must be referred to mediation before a prescribed mediator. If the mediation is unsuccessful or if the mediator considers that the dispute is unsuitable for mediation, then it is referred to arbitration. Mediation may also be discretionary. For example, judges in many Australian courts now have the power to refer disputes pending before them to mediation. The court is not obliged to make such a referral but may do so if the judge in a particular instance deems it appropriate to do so. Voluntary mediation refers

[54] Fulton, Maxwell J., *op. cit*., at pp.75-77.

to any voluntary attempt by the parties to settle their dispute by mediation. This may be attempted after the dispute has arisen.[55]

While stressing that the neutral mediator has no advisory or determinative role in the content of the dispute or the outcome, Ruth Charlton added that the mediator can determine the mediation process, that is the steps and stages involved in the process.[56]

As far as mediation in Singapore is concerned, Lim Lan Yuan and Liew Thiam Leng described it as a voluntary settlement process. Their definition of mediation is mostly similar to other authors. They, however, added two more points i.e. parties reach their solution without element of compulsion and the only binding outcome of mediation is one on which parties agree when they eventually come to settlement.[57]

Andrew Chan did not specifically define mediation. He discussed mediation as practised in Singapore comprising the court mediation, mediation before the Singapore Mediation Centre and mediation under the Community Mediation Centre Act (CMC Act).[58]

Boulle [59] and Nesic discussed the same features of mediation as other authors did. Nevertheless, their two additional points are that the mediator attempts to improve the

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[55] Pryles, Michael, 'Alternative Dispute Resolution in Australia', Asia Business Law Review, No. 22, October 1988, at p. 30.

[56] See Charlton, Ruth, *op. cit.*, at p. 5.

[57] See Lim, Lan Yuan, and Liew, Thiam Leng, Court Mediation, 1997, at p.59.

[58] Andrew, Chan, *op. cit.* , at p.55.
By referring to the brochure of the Singapore Mediation Centre (SMC), Andrew Chan stated the comprehensive range of mediation services as offered by SMC. He then highlighted that a basic feature of mediation before SMC is that it is voluntary. He finally explained the mediation under the CMC Act with its basic theme to enable community leaders to act as mediators to help resolve disputes in a non-confrontational way. Under the CMC Act, the Minister may set up the Community Mediation Centres for the purpose of providing mediation services. In illustrating the features of mediation at the Centres, Andrew Chan made reference to various sections in the CMC Act. Among the features are as follows; mediation is voluntary, mediation session is generally conducted in the absence of the public, a party to a mediation should ordinarily represent himself or herself during the hearing, mediation sessions are to be conducted with as little formality and as little technicality and with as much expedition as possible; see ibid.

[59] Laurence Boulle is the Chairman of the National Alternative Dispute Resolution Advisory Council that advises the Australian Federal Government. He is Professor of Law at Bond University on the Gold Coast, Australia, where he founded the Dispute Resolution Centre. He is widely recognised for his work with alternative dispute resolution in Australia. He is accredited to numerous mediator panels and has mediated several hundred disputes in a wide variety of areas. He has also trained more than 2500 judges, lawyers and other professionals in mediation and related subjects throughout Australia and New Zealand. In the year 2000, he and Teh Hwee Hwee had jointly written Mediation Principles Process Practice (Singapore Edition); see Boulle, Laurence and Teh, Hwee Hwee, Mediation Principles Process Practice (Singapore Edition), 2000.

process of decision-making by parties and each party assents to the outcome reached.[60]

2.5 Explanation of family, family law disputes and family mediation

2.5.1. Family

The concept of a "nuclear family" was defined as two married parents and their children.[61] This definition is no longer accurate with the changes of lifestyles in modern days. There are many people, who live together as a family but may be excluded from the definition of a "nuclear family". These people may be a single parent with a child, grandparent with grandchild, family members who do not live in the same household, unmarried couples with or without children, or even homosexual couples. [62]

The definition of family by Linda Fisher and Mieke Brandon tried to cover most people usually included in a family unit. They opined that

"A family might consist of brothers and sisters, fathers and mothers, grandfathers and grandmothers, in-laws, step-relations, cousins, uncles and aunts, nieces and nephews, great-uncles and great-aunts, foster children and godchildren, and formally or informally adopted relatives. People may be linked by ties of blood, marriage, affection, ethnicity, tribe, clan or law." [63]

The definition of "family" given by Stephen Parker, Patrick Parkinson and Juliet Behrens is broader and more acceptable, if all types of families in Australia are to be taken into consideration. They stated that;

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[60] See Boulle, Laurence and Nesic, Miryana , *op. cit.* , at p. 3.
Boulle had provided the same definition of mediation in Mediation Principles Process Practice (Singapore Edition), 2000. In fact his portions in Boulle, Laurence and Teh, Hwee Hwee, (2000), *op. cit.* , are to the large extent similar to that of Boulle, Laurence and Nesic, Miryana (2001), *op. cit.* .

[61] Charlton, Ruth, *op. cit.* , at p. 134.

[62] For detailed discussion on this matter, see Parker, Stephen and Parkinson, Patrick and Behrens, Juliet, Australian Family Law in Context, Commentary and Materials, 1994, at pp.9-11; Charlton, Ruth, *op. cit.* , at p. 134; Fisher, Linda and Brandon, Mieke, Mediating with Families, Making the Difference, 2002, at pp.1-2.

[63] Fisher, Linda and Brandon, Mieke, *op. cit.* , at p.1.

"A group of people may be regarded as a family if

(a) there are at least two members, comprising either two adults or one adult and one child; or if one adult lives apart from the family group but regards the group as his or her family;

(b) the members are related to each other through marriage, blood ties, adoption or interaction;

the members hold certain positions and undertake the roles expected of them." [64]

2.5.2. Family law disputes or family disputes

It is not the intention of this subtopic to explain all family law disputes. This subtopic will be confined to family law disputes which may be referred to a mediation. Some authors referred to "family disputes" when they actually mean "family law disputes". The term family disputes may tend to be inaccurate when we mean to discuss family disputes which are covered by the respective family law. There are other family disputes involving emotions only like siblings' rivalry and wife's jealousy which may fall outside the ambit of family disputes covered in the area of family law.

In explaining mediation of "family law disputes" in Australia, Anthony Dickey said that almost any family dispute which can be resolved by proceedings under the Family Law Act may be made the subject of mediation under the Act. [65] The only exception is a dispute

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[64] Parker, Parkinson, Behrens, *op. cit.* , at p. 11.

[65] Dickey, Anthony, Family law, 3rd ed., 1997, at p.76. He referred to Sections 19A(1), 19A(3), 19B(1) of the Family Law Act 1975 (Cth) [hereinafter FLA].
Section 19A(1) FLA provides that
"A person who is :
(a) the parent or adoptive parent of a child; or
(b) a child; or
(c) a party to a marriage;
and who is not a party to proceedings under this Act, may file in the Family Court, or in a Family Court of a State, a notice asking for the help of a mediator in settling a dispute to which the person is a party."

about a matter which forms, or could form, the subject of either proceedings for principal matrimonial relief, or proceedings in relation to concurrent, pending or completed proceedings for principal matrimonial relief. [66] Mediation accordingly cannot deal with disputes with respect to the dissolution or nullity of marriage. [67]

When John Wade described a "family dispute" capable of mediation, he referred to the definition of "family and child mediation" in Section 4 of the Australian Family Law Act.[68] He then concluded that "family and child mediation" includes mediation about; [69]

a) property disputes between married or divorced couples

b) spousal maintenance

c) child schedules ("contact" and "residence" – formerly "access" and "custody")

d) power over children

e) a limited range of child maintenance [70]

Section 19A(3) FLA states that
"In this section, dispute means a dispute about a matter with respect to which proceedings (other than prescribed proceedings) could be instituted under this Act."

Section 19B(1) FLA provides that
"The Family Court or a Family Court of a State, may, with the consent of the parties to any proceedings before it under this Act (other than prescribed proceedings), make an order referring any or all of the matters in dispute in the proceedings for mediation by a court mediator."
To ensure that the above sections in FLA are the up-dated version, the sections were obtained from a website source, http://www.austlii.edu.au/. This website was visited on 18th April, 2005 and it was last updated on 11th April, 2005.

[66] Ibid. Dickey referred to Sections 19A(3) and 19B(1), read together with section 4 (1) of FLA (definition of "prescribed proceedings"). "Prescribed proceedings' was defined as "(a) proceedings for principal relief; or (b)proceedings in relation to concurrent, pending or completed proceedings for principal relief"; source obtained from http://www.austlii.edu.au/.

[67] Ibid.

[68] Section 4(1) FLA, states that
"family and child mediation means mediation, conducted in accordance with the regulations, of any dispute that could be the subject of proceedings (other than prescribed proceedings) under this Act and that involves:
(a) a parent or adoptive parent of a child; or
(b) a child; or
(c) a party to a marriage."
The above section is obtained from http://www.austlii.edu.au/.

[69] Wade, John, 'Family Mediation – A premature monopoly in Australia?', (1997), Vol.11, Number 1, AJFL, 286, at pp.287-288.

[70] According to Wade, an example to this is the maintenance for children over 18 years of age, see Part VII Division 7 of the Family Law Act; Wade, John, *op. cit.* , at p.288.

f) state disputes which are attached to one of the above kinds of federal disputes under cross-vesting legislation. [71]

Conversely, John Wade stated that "family and child mediation" does not include;[72]

a) disputes about the control and schedules of children who are subject to state child welfare legislation

b) the process of negotiating and drafting of pre-marriage or cohabitation agreements

c) disputes about property between de facto couples

d) dispute about the legal grounds for divorce

e) disputes about child support [73]

Meanwhile, in Singapore, the following categories of cases may be referred to mediation in the Family Court; [74]

a) petitions for divorce (section 75 of the Women's Charter)

b) petitions for judicial separation (section 101 of the Women's Charter)

c) petitions for nullity of marriage (section 103 of the Women's Charter)

d) ancillary matters pursuant to matrimonial proceedings, including those relating to division of matrimonial assets (section 112 of the Women's Charter), maintenance for wife (section 113 of the Women's Charter) , maintenance for children (section 127 of the Women's Charter), and custody of children(section 124 of the Women's Charter)

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[71] Ibid. Wade illustrated this with an example; property disputes between de-facto couples which are incidental to a child residence dispute or financial claims by relatives or creditors which are incidental to inter-spousal property disputes.

[72] Ibid.

[73] Ibid. Wade explained that for couples who separated after 1 October 1989, the quantification of child support does not come within the jurisdiction of the Family Law Act but rather under the Child Support (Assessment) Act 1989 (Cth).

[74] Liew, Thiam Leng, (*et al.)* 'Mediation in the Family Court' in Subordinate Courts, Singapore and Butterworths Asia, Families in Conflict : Theories and Approaches in Mediation and Counselling, 2000, at p.47.

e) applications under the Guardianship of Infants Act (Cap 122) (Child custody disputes in non-divorce situations)

f) applications for protection orders under Part VII of the Women's Charter (domestic violence situations)

g) applications for maintenance for wife and children in non-divorce situations (section 69, Part VIII of the Women's Charter)

h) applications for enforcement of a maintenance order under section 71 and Part IX of the Women's Charter, section 10 of the Maintenance of Parents Act (Cap 167B), Maintenance Orders (Facilities for Enforcement) Act (Cap 168) and the Maintenance Orders (Reciprocal Enforcement) Act (Cap 169)

2.5.3. Family mediation

Family mediation takes a number of forms and is not easily distinguished in some cases from existing methods of dispute resolution. [75] However, according to Susan Gribben, [76] there is now a considerable consensus in Australia about the meaning of mediation and the definition put forward by Folberg and Taylor has been widely adopted.[77]

There are a lot of aspects involved in mediating family matters. Susan Gribben stated that mediation for separating and divorcing couples involves decision-making and dispute resolution, not just about substantive matters, but the relationship itself. This is not a simple matter. The couple, whether by mutual negotiation, or a series of unilateral

[75] Chilsholm, Richard, 'Mediation Services for the Family Court : Something new under the sun?', (1991), Vol.5, Number 3, AJFL, at p.277; cited in Gribben, Susan, 'Mediation of Family Disputes', (August 1992), Vol.6, Number 2, AJFL, 126, at p. 126.

[76] Gribben, Susan, 'Mediation of Family Disputes', *op. cit.* , at pp. 126-127.

[77] For example, Family Court Mediation Section in Melbourne Registry has used the Folberg and Taylor definition to develop the model of its mediation; see Family Court Mediation Section Melbourne Registry, 'Mediation in the Family Court – An overview of the Model', AJFL, (1994), Vol. 8, at p. 58. According to Susan Gribben, Melbourne and Dandenong registries were two registries in the Australian Family Court chosen to commence a pilot mediation service, both before and after the commencement of proceedings in the court; see Gribben, Susan, 'Mediation of Family Disputes', *op. cit.* , at p. 126. In Melbourne registry, mediation in the Family Court is available to parties who have no court proceedings and also to those who have commenced court proceedings but elect to adjourn these while attempting to settle the matter through mediation; see Family Court Mediation Section Melbourne Registry, *op. cit.*, at p. 58.

decisions, have to separate physically, emotionally, financially, socially and legally, and all these aspects are interdependent. It is not only their relationship with each other which they are negotiating, but also that of their children with each other, and all family members' ongoing relationships with extended family and friends. Mediation aims to assist this major transition. [78]

With regard to mediation in family disputes, Anthony Dickey defined mediation to cover features in the definition of mediation in general. [79]

In explaining mediation offered in the Singapore Family Court, Leong Wai Kum regarded mediation as a process whereby parties are assisted to identify what they both agree on so as to leave only the areas where they continue to disagree. Such identification of agreement helps to narrow down the dispute. More successful mediation may even result in settlement. The mediated settlement can then be recorded as a consent order. The settlement of the dispute or even the better identification of where parties disagree gives them a better chance of resolving their dispute quickly and amicably. [80]

Mediation in the Singapore Family Court provides a structured forum where parties can explore the resolution of their dispute constructively. A trained mediator facilitates the discussion between parties and assists them to generate options, from which the parties themselves decide which is acceptable. The judge, who recorded the resulting settlement, ensures that parties understand the effect of the order and are prepared to abide by it. The judicial officer also ensures that the agreement complies with the law. [81]

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[78] Gribben, Susan, 'Violence and Family Mediation : Practice',(1994), Vol. 8, AJFL, 22, at p. 23.

[79] See Dickey, Anthony, *op. cit.* , at p. 83 , where he stated that mediation is a process whereby an independent person assists parties to resolve matters in dispute between them. The matters in dispute are thus resolved by the parties themselves, albeit with assistance from a third party.

[80] Leong Wai Kum, Principles of Family Law in Singapore, 1997, at pp. 11-12.

[81] Tan, Buay Boon, 'Alternative Dispute Resolution in the Singapore Family Court System', (1999) XXVIII No 3, Insaf, 166. Mediation in cases involving the division of matrimonial property and other complex legal and financial issues are done by judicial officers. If mediation fails, the matter will be heard by another judge so that the parties would not be prejudiced by privileged information disclosed during mediation; see Tan, Buay Boon, *op. cit.* , at p.167. Steven Chiang also voiced the same tone of expression when he stated that, for

Steven Chiang, in clarifying some issues pertaining to mediation in the Singapore Family Court, stressed that mediation focuses on assisting parties to consider the range of possible options in a systematic and constructive manner in order to craft an outcome which is mutually acceptable to parties. Mediation is employed to assist parties to resolve matrimonial disputes and the related issues, such as maintenance and division of matrimonial assets. [82]

On the other hand, John Haynes regarded the agreement obtained from a mediation is structured in a way that helps maintain the continuing civil relationships of the people involved. He commented that this is particularly important when former spouses have to continue to work together as parents. He opined that mediation is ideally suited to family disputes because it allows a civil relationship to continue after separation. [83]

Although the practice of family mediation in Australia and Singapore may differ, it is observed that the basic features of family mediation as practiced in both jurisdictions are similar to the extent that they maintain the features of a mediation as propounded by Folberg and Taylor.

2.6. Different types or models of mediation

Most authors referred to the word "models" to describe different "types" of mediation. Others are comfortable to use either the word "approaches' or "styles". For the

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matrimonial cases, a judge who has acted as a mediator in a case will not subsequently hear the case. Information revealed during the mediation process is confidential and not available to the judge hearing the case; see Steven, Chiang, 'Mediation in the Family Court – In Reply', The Singapore Law Gazette, October 1998, 8, at p.10.

[82] Steven, Chiang, *op. cit.*, at p.8.

[83] Haynes, John, 'The Process of Mediation', in Families in Conflict : Theories and Approaches in Mediation and Counselling, *op. cit.* , at p.5.
Golberg, Sander and Rogers considered mediation to play an important role in family cases as an alternative to the adjudicatory process for five reasons. Firstly, mediation looks to the future and has as its principal goal the repair of the frayed relationship. Secondly, mediated solutions are more flexible than those brought about by adjudication because they are crafted by the parties themselves, albeit with the help of mediator. Thirdly, mediation avoids the winner-loser syndrome, a consideration that assumes special importance where an ongoing relationship is involved. Fourthly, the mediation process involves a wide-ranging inquiry into what the judge wants to hear about. Fifthly, mediation gives an enhancing sense of participation to the disputants, thus they have a strong commitment to the result that is reached.; see Golberg, Sander and Rogers, *op. cit.*, at pp. 299-300.

following discussion on varieties of types used in mediation, the word "models" is preferred.

According to Brunet and Craver, there are three models of mediation but mediators would usually employ one of these three models. They explained the models by referring to the way the mediators conduct their mediation sessions. The three models are subtance-oriented mediators, process-oriented mediators and relationship-oriented mediators. [84]

Substance-oriented mediators focus primarily on the substantive terms being discussed. They try to determine the provisions they think the parties should accept and work to induce the participants to agree to their proposed terms. This model is usually used by mediators to interact with inexperienced negotiators who have difficulty to achieve their own agreements. The negotiators either do not know how to initiate meaningful negotiations or are unable to explore the different issues in a manner likely to generate mutual accords. [85]

Most mediators are process oriented. This is the view of Brunet and Craver who explained that process-oriented mediators seek to reopen blocked communication channels and to encourage direct inter-party negotiations that will enable the parties to formulate their own final terms. Process-oriented mediators believe that temporary impasses are the result of communication breakdowns and/or unrealistic expectations. They try to reopen communication channels and to induce parties to reevaluate the reasonableness of their

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[84] Brunet and Craver, Chapter 6, 'The Nature of Mediation' in Alternative Dispute Resolution : The Advocates Perspective, 1997; see pp.193-199.

[85] During the 1960s and 1970s, when various public sector labour relations statutes were enacted, the government employees were given the right to engage in collective bargaining and it was common for them to have substance-oriented mediators who determined the terms they believed would best resolve the controversy and worked to persuade parties to accept their propositions. If parties objected to their suggestions, the said substance-oriented mediators would then try to convince parties that they were wrong and induce parties to accept their assessment. They preferred to use separate sessions to convince the parties to accept their recommendations; see Brunet and Craver, *op. cit.* , at pp. 193-194.
Parties that are uncertain regarding the appropriate way in which to achieve negotiated agreements and who desire substantive guidance from experienced intervenors may appreciate the assistance provided by substance-oriented mediators. They should carefully select substantive experts who are likely to understand their particular interests. In the end, these mediators are going to directly influence the actual terms agreed upon. Individuals who prefer to control their own destinies do not usually feel comfortable with such directive intervention; see Brunet and Craver, *op. cit.* , at p.195.

respective positions. Process-oriented mediators like to use the joint meetings during which the parties engage in face-to-face bargaining. Separate sessions would usually be used for crisis intervention when parties are unable to talk to each other. [86]

There was a new approach which was invented by Robert Baruch Bush and Joseph Folger in 1994 and was also discussed by Brunet and Craver. This is known as relationship-oriented approach. It departs from the previous two approaches. Relationship-oriented mediators will strive to empower weaker parties by demonstrating the rights and options available to the participants and to generate mutual respect among the competing parties. Unlike substance-oriented and process-oriented mediators who are particularly interested in the resolution of the underlying disputes, relationship-oriented mediators are primarily interested in future party relationship. While they are pleased if their efforts generate current agreements, they prefer to help disputants to understand how they can effectively resolve their own future controversies. The focus is on two basic issues; party empowerment and inter-party recognition. Relationship-oriented mediators will show each side that it possesses the power to order its future relationship. Simultaneously, attempt is made to generate inter-party empathy by inducing each side to appreciate the feelings and perspectives of the opposite side. Process-oriented mediators are similar to relationship-oriented mediators in term of preserving inter-party relationship, party empowerment and assisting parties to structure their own agreement. However, process-oriented mediators are different from relationship-oriented mediators in that process-oriented mediators would prefer to generate final agreements than preserve inter-party relationships. While relationship-oriented mediators would rather forego agreements if necessary to enhance

[86] See Brunet and Craver, *op. cit.* , at pp. 195-196. Brunet and Craver equated the role of process-oriented mediators to orchestra leaders who point the participants in the right direction and let then decide what is best for themselves; see ibid at p. 195.
Process-oriented mediators are especially appreciated by proficient negotiators who want minimal bargaining assistance and wish to control their own bargaining outcomes; see ibid at p. 197.

party empowerment and recognition, process-oriented mediators would place final accords ahead of empowerment and respect. [87]

Boulle and Teh talked about four models of mediation; settlement, facilitative, therapeutic and evaluative. [88]

The first type of mediation is settlement mediation and is also known as compromise mediation. Its main objective is to encourage incremental bargaining towards a compromise, at a 'central' point between the parties' positional demands. Dispute is defined in terms of positions, based on parties' self-definition of the problem. The type of mediator involved is of high status like lawyers and managers who would not necessarily have expertise in the process, skills and techniques of mediation. The mediator's main role is to determine parties' 'bottom line' and through relatively persuasive interventions, to move them in stages off their positions to a point of compromise. Other characteristics of this type of mediation are there will be limited procedural interventions by the mediator and parties tend to resort to positional bargaining. The areas where settlement mediation would usually be employed are commercial, personal injury and industrial disputes. [89]

The second type of mediation is facilitative mediation, which is also known as interest-based or problem solving mediation. Its main objective is to avoid positions and negotiate in terms of parties' underlying needs and interest instead of their strict legal entitlements. Dispute is defined in terms of parties' underlying interests comprising substantive, procedural and psychological interests. The type of mediator involved is a person with expertise in mediation process and techniques and who would not necessarily have knowledge in the subject matter of the dispute. The mediator's main role is to conduct

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[87] See Brunet and Craver, *op. cit.* , at pp.197-199.

[88] Boulle, Laurence and Teh, Hwee Hwee (2000), *op. cit.* , at pp. 28-30. Another version which is similar to this can be found in Boulle, Laurence and Nesic, Miryana (2001), *op. cit.* , at pp. 27-29.

[89] Ibid.

the process, to maintain a constructive dialogue between the parties and to enhance the negotiation process. Other characteristics of this type of mediation are a low intervention role for the mediator and parties are encouraged to fashion creative outcomes around mutual interests. The areas where facilitative mediation would usually be employed are community, family, environmental and partnership disputes.[90] Facilitative mediation appears to share the characteristics of Brunet and Craver's model of process-oriented mediation.

The third type of mediation is therapeutic mediation and is also known as reconciliation or transformative mediation. Its main objective is to deal with underlying causes of the parties' problem, with a view to improving their relationship as a basis for resolution of the dispute. Dispute is defined in terms of behavioural, emotional and relationship factors. The type of mediator involved is a person with expertise in counselling or social work and also with understanding of psychological causes of conflict. The mediator's main role is to use professional therapeutic techniques, before or during mediation, to diagnose and treat relationship problems. Another characteristic of this type of mediation is decision-making is postponed until relationship issues have been dealt with. The areas where therapeutic mediation would usually be employed are matrimonial, parent / adolescent, family networks and continuing relationship disputes. [91] This is the same with the relationship-oriented approach discussed by Brunet and Craver earlier.

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[90] Ibid. According to Fisher and Brandon, this is the most common approach used in family mediation. They also called it as negotiative approach or solution-focused approach. In this approach, reaching agreements which are in the best interests of all parties concerned in the dispute forms the focus of the mediation session. Agreements can take the form of a settlement, interim agreement, partial resolution or a decision to continue the 'fight' in another forum such as a court. There is usually a checklist of steps or stages through which the mediator is expected to guide the parties. The rationale is that each of these stages must be completed, or at the very least attempted, to reach an outcome satisfactory to everyone concerned. Fisher and Brandon also differentiated the negotiative approach from the therapeutic approach, where even though feelings are generally validated and acknowledged in the negotiative approach, they are not dealt with the same way as in therapeutic approach. Contrast to therapeutic approach, in negotiative approach, parties are referred for specialist assistance; see Fisher, Linda and Brandon, Mieke, *op. cit.*, at p.11.

[91] Ibid.

The last type of mediation is evaluative mediation, which is also known as advisory or managerial mediation. Its main objective is to reach a settlement according to the legal rights and entitlements of the parties and within the anticipated range of court outcomes. Dispute is defined in terms of legal rights and duties, industry standards or community norms. The type of mediator involved is a person who possesses expertise in substantive areas of the dispute with no necessary qualifications in mediation techniques. The main role of mediator is to provide additional information, to advise and persuade the parties and to bring professional expertise to bear on the content of negotiations. Other characteristics of this type of mediation are high intervention by the mediator and less party control over the outcome. The areas where settlement mediation would usually be employed are commercial, personal injury, trade practices, anti-discrimination and matrimonial property disputes. [92] Evaluative mediation resembles Brunet and Craver's version of substance-oriented mediation to the extent of having a mediator with substantive expert and the existence of a high level of intervention by the said mediator.

Similarly, Fisher and Brandon talked about the problem-solving approach,[93] the same model as Boulle and Teh's facilitative mediation and Brunet and Craver's process-oriented mediation. They also touched upon transformative approach[94] in their book, which resembles the features of Boulle and Teh's therapeutic mediation and Brunet and Craver's relationship approach.

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[92] Ibid.

[93] See Fisher, Linda and Brandon, Mieke, *op. cit.*, at pp.11-14.

[94] See Fisher, Linda and Brandon, Mieke, *op. cit.*, at pp.14-15.

In Singapore, Lim Lan Yuan and Liew Thiam Leng when discussing family mediation in their book, stated that how family mediation is defined is largely dependent on what is being mediated, who is doing the mediating and where the mediation is offered. [95] They then identified four different divorce mediation models i.e. the legal model, the labour management model, the therapeutic model and the communication model. The therapeutic model is the same approach as the therapeutic mediation or relationship-oriented approach as Boulle and Teh and Brunet and Craver had respectively discussed earlier. The labour management model seems to share the features of settlement mediation as Boulle and Teh pointed out. [96]

According to Lim Lan Yuan and Liew Thiam Leng, the legal model assumes that parties can reach agreement if mediators use structure in the form of rules to promote cooperation. Structured mediation illustrates the legal model approaches. Structured mediation is characterised by heavy reliance on a set of rules that fosters a cooperative atmosphere between parties and that governs all aspects of the process that unfolds during sessions. Practitioners of structured mediation assume that parties are rational and will commit to a cooperative process. On the other hand, Lim Lan Yuan and Liew Thiam Leng state that the communication model assumes that if necessary information is freely available to parties and exchanged during mediation sessions, mutually acceptable, equitable agreements will emerge. Mediators provide parties with information, guidance,

[95] They illustrated this by few examples. Mediators from a clinical background tend to define mediation by emphasising the resolution of emotional issues. While the social work mediator helps settle the economic division, he or she also helps the couple place the marriage behind them, deal with the emotional issues that caused the divorce, and look forward to the future. Mediators from a legal background tend to define mediation as a contractual and non-therapeutic process; see Lim, Lan Yuan, and Liew, Thiam Leng, *op. cit* ., at p. 134.

[96] According to Lim Lan Yuan and Liew Thiam Leng, the labour management model assumes that mutually acceptable equitable agreements emerge from the give-and-take bargaining between parties possessing comparable levels of power, skill and knowledge, with each party acting in his or her own self-interest. The process in this approach is shaped by the individual mediator, who takes an active and a directive role. Mediators help parties understand each other's proposals, define what is reasonable, list areas of agreement and disagreement, suggest trade-offs and compromises and encourage concessions; see ibid.

legal assistance, strategies for communicating and for building their communication skills. [97]

An advocate and solicitor in Singapore, Adrian Loke, highlighted that Singapore Family Court had adopted a directive model of mediation. A directive model concerns parties to be more actively guided by the mediator in the negotiations. In other words, the mediator is more active in proposing options even though not to the extent of expressing definitive opinions or views on the issues as in the evaluative model. The final decision making authority still rests with the parties. Lim Lan Yuan and Liew Thiam Leng regarded the directive model to fall between the facilitative and the evaluative models in the extent to which the mediator assists the parties in coming to a settlement. To the contrary, Adrian Loke strongly felt that a directive model is liable to be subverted by forms of pressure or influence by persons of authority and its heavy reliance on skilled mediators means an added emphasis on mediator's training. Nevertheless, he opined that in the light of Singapore's cultural aspects, a directive model may be the only feasible option. According to him, a purely facilitative model will not function well due to the nature of the society i.e. introverted and to some extent subservient to authority. [98]

[97] Ibid.

[98] See Adrian, Loke, *op. cit.*,at pp.209-210 and Lim, Lan Yuan, and Liew, Thiam Leng, *op. cit* ., at p. 224.

2.7 Nature of reference made to mediation

Generally, there are two methods of reference to mediation i.e. where parties are compelled to refer their dispute to mediation or parties themselves voluntarily refer their case to mediation. The first method is a compulsory / mandatory mediation or is also known as court-annexed or court-sponsored or court-attached or court related or court-connected mediation. On the other hand, the second method is a voluntary mediation or private mediation or sometimes is called party-referral mediation.

Paul Venus commented that mediation mandated by court order has become a familiar feature in Australian litigation. The rules of most Australian courts allow a court to order even unwilling parties to attend mediation. [99]

A lawyer for Crown Solicitor in Queensland, Magdalena McIntosh, [100] referred to the definition of mediation by Tania Sourdin [101] when explaining a voluntary mediation in that Tania described mediation as a voluntary process whereby parties consented to the intervention of a trained, neutral third party to assist them in reaching a solution to their dispute. According to McIntosh, in more recent times, mediation has been mandated by court rules, legislation and tribunal procedures. [102]

With a slight variation to the Australian mandated mediation, Boulle and Teh explained that the term court-connected mediation in Singapore refers to any situation in which the parties to a dispute are ordered, encouraged or voluntarily referred to mediation by the court before their matter proceeds to trial. In Singapore, the majority of court-

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[99] SeeVenus, Paul, 'Court directed compulsory mediation – attendance or participation?' (2004) 15 ADRJ, 29.
Paul Venus gave some examples of statutes in Australia which mandated mediation, *inter alia*, section 53A of the Federal Court of Australia Act 1976 (Cth), section 110K of the Supreme Court Act 1970 (New South Wales), rule 319 of the Uniform Civil Procedure Rules (Queensland), section 65 of the Supreme Court Act 1935 (South Australia) and few others.

[100] McIntosh, Magdalena, 'A step forward – mandatory mediations', (2003) 14 ADRJ, 280.

[101] Sourdin, Tania, Alternative Dispute Resolution, 2002, at p. 23.

[102] McIntosh, Magdalena, *loc. cit*.

connected mediations are court-based, in that they take place in the Subordinate Courts and are part of the Court Dispute Resolution (CDR) process. [103]

In the Singapore context, private mediation services refer to mediation services offered by mediators or mediation service providers outside the court system, government agencies and tribunals or community organisation. [104] Freelance mediators [105] in Singapore and mediation services provided by the Singapore Mediation Centre [106] fall within the category of private mediation service providers.

2.8 Explanation of advantages and disadvantages of mandatory mediation

The advantages of a voluntary mediation are undeniable. They are enshrined in the features of mediation themselves. One of the most important feature of mediation is it is a voluntary process. We need not embark on discussion of advantages of voluntary mediation because they become obvious when we talk about the disadvantages or limitations of mandatory mediation.

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[103] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, at p. 215. They pointed out that a minority of mediations are not court-based and occur outside the judicial system, for example, when cases are referred by the courts to the Community Mediation Centres or the Singapore Mediation Centre.

[104] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at p. 228. They highlighted that there is little systematic evidence on the extent and nature of private mediation practice in Singapore, but in quantitative terms is considerably less significant than non-private forms of mediation. Many private mediations are conducted informally and without any charge. Mediations that take place in clan, ethnic and religious organisations are examples. For further details, see Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at pp. 228-229.

[105] Such mediators usually combine their mediation practice with conducting training and providing consultancy services in dispute resolution. Mediation by individual private mediators is usually undertaken as a supplementary part of their work as arbitrators, lawyers, social workers or academics. This is due to lack of regular case referrals. The courts and government departments are potential sources of referrals but they tend to refer cases to other government agencies or government related establishments such as the Community Mediation Centres and the Singapore Mediation Centre. Lawyers and other professional are also potential sources of referrals. However, experience shows that it takes many years to develop a reputation as an effective and trustworthy mediator before such referrals come by on a regular basis; see Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, at p. 229.

[106] The Singapore Mediation Centre is a private ADR institution that provides mediation services as one of its functions. It was incorporated on 8th August 1997 and was officially opened by Chief Justice Yong on 16th August 1997. It is a company incorporated under the Companies Act (Cap 50) and limited by the guarantee of the Singapore Law Academy. It is a non-profit making entity funded in part by the Government through the Ministry of Law. The Centre complements the functions of the courts. It deals with what Chief Justice Yong referred to as 'private, non court-based' mediation. Such mediation does not take place within, and is not part of, the judicial system. It is therefore unlike mediation conducted as part of the CDR process in the Subordinate Courts. However, the cases mediated at the Singapore Mediation may or may not be court-based; see Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, at pp. 229-230.

Magdalena McIntosh laid down the benefits (advantages) and limitations (disadvantages) of mandatory mediation. [107] It was opined that its limitations are equally balanced with its benefits. [108]

There are nine limitations and benefits respectively in mandatory mediation. **Limitations of mandatory mediation** are;

- Firstly, to compel mediation means to lose the voluntary character of mediation if parties are forced to participate.
- Secondly, parties are better able to resolve their disputes through a consensual process. [109]
- Thirdly, in order to reach a settlement, the parties must turn their minds to cooperating with the other and engaging in meaningful participation. Should the parties be unable to do this, the mediation process will be frustrated. [110]
- Fourthly, some cases may not be suited to mediation. Mandatory mediation would therefore result in unsuitable cases being mediated which in turn increases cost and delay. [111]
- Fifthly, a party may not attend the mediation. For whatever reason for the non-attendance, the attending party has received no benefit for acting in good faith and may be discouraged to make future attempts at ADR. [112]

[107] See McIntosh, Magdalena, *op.cit.*, at pp. 286-288.

[108] McIntosh, Magdalena, *op.cit.*, at p. 286.

[109] Ibid, citing Hon. Justice Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part II' (1995) 69 ALJ, 790, at p.801.

[110] Ibid, citing Hon. Justice Olsson, 'Mediation and the Courts – Inspiration or Desperation?' 5 IJA, 236.

[111] Ibid, citing Altobelli , Tom, 'Mediation : Primary Dispute Resolution 1996 : Mandatory Dispute Resolution', (1996) AJFL, 55, at p. 65.

[112] Ibid, citing Ingleby R, 'Court Sponsored Mediation : The Case Against Mandatory Participation', (1993) 56 The Modern Law Review 441, at p.449.

- Sixthly, the ideals comprehended by the rule of law are threatened by compulsory mediation. [113] If parties are compelled to attend mediation, the system is promoting parties to settle for what is on offer rather than looking for justice. The question then asked is why have courts at all? [114]
- Seventhly, there is no empirical evidence that suggests mandatory mediation is more successful than the voluntary submission to ADR. [115]
- Eighthly, parties compelled to mediate feel that their access to litigation is blocked. As a consequence, they will be conscious of their compulsion and will be less likely to reach settlement as they would prefer to return to litigation. [116]
- Finally, mandated mediation is simply a management strategy for the courts. It is no more than a "product of administrative expediency". [117] It promotes the evolution of cheap, but inferior quality of justice, so as to reduce the number of matters proceeding to full adjudication. These factors would generate far more discontent than the problems associated with litigation. [118]

[113] Ibid, citing Ingleby R, *op.cit.*, at p.443.

[114] McIntosh, Magdalena, *op.cit.*, at p.451.

[115] McIntosh, Magdalena, *op.cit.*, at p. 287.

[116] Ibid, citing Smith G, 'Unwilling Actors : Why Voluntary Mediation Works, Why Mandatory Mediation Might Not Work', (1998) 36 (4) Osgoode Hall Law Journal, 847, at pp.875-876.

[117] Ibid, citing Hon. Justice Olsson, *op.cit.*, at p. 241.

[118] Ibid, citing Hon. Justice Olsson, *op.cit.*, at pp.238-239.

Benefits of mandatory mediation are;

- Firstly, the parties even though coerced to participate in the mediation, have a right to disregard any solution that emerges. The mediator is in no position to force settlement on the parties. It is clearly within the parties control whether or not to settle. [119]
- Secondly, even though parties have not voluntarily decided to attend the mediation, the mediation process is more consensual than the adversarial process. The purpose of mediation is not to convince parties to settle but to identify and explore the interest and needs of the disputing parties and search for integrative solutions to accommodate them. [120]
- Thirdly, it may be the case that the parties have not turned their minds to mediation. However, even if they had and rejected the idea, by being compelled to mediate the parties may decide to make the most of the opportunity, if not resolve the matter, but to define the issues. [121]
- Fourthly, no dispute can be said to be unsuited to mediation. Mediators are skilled persons, trained extensively in managing disputes. Mediators are experienced at enhancing communication and participation. They are involved in the process simply to encourage parties to cooperate in solving their dispute. [122]

[119] Ibid, citing Ingleby R, *op.cit.*, at p. 445.

[120] Ibid, citing Hon. Justice Olsson, *op.cit.*, at p. 237.

[121] McIntosh, Magdalena, *op.cit.*, at p. 286.

[122] Ibid, at pp.286-287.

- Fifthly, a system which mandates mediation generally has a system of enforcement so as to uphold integrity of the process. Enforcement predominantly comes in the form of the imposition of costs orders. [123]
- Sixthly, mandatory mediation does not seek to abolish the court system. It should be viewed as an integral part of that system. Rather than being an alternative, Justice Olsson suggests mandated mediation be viewed as complementary. Her Honour argues that the court system is obliged to provide parties with various dispute resolution options and that these options should be provided uniformly to all litigants in the same jurisdiction. [124]
- Seventhly, the use of mandatory mediation has grown at an alarming rate. It is recognised that mandated mediation is a more efficient use of resources than resolution of disputes by trial. [125]
- Eighthly, parties unwilling to participate fully in mediation are leaving themselves with no option but to continue to trial. At trial, a decision is imposed by a judge who knows little about the parties' needs. The judge is primarily concerned with arriving at the right legal answer. In contrast, at mediation parties take over the decision making role. Obviously, this is more favourable as the parties are best placed to decide what is in their own interests. [126]
- Last but not least, even though it is correct to say that mandatory mediation evolved as a consequence of the escalating costs and long delays in the adversarial system, it

[123] Ibid, at p.287.

[124] Ibid, and citing Hon. Justice Olsson, *op.cit*, at p. 237.

[125] Ibid, and citing Hon. Justice Ipp , *op.cit*, at p. 802.

[126] Ibid, and citing , Ingleby R , *op.cit*, at p. 446.

is simplistic to view this as its role. The mandatory mediation process should not be criticised for being able to facilitate the efficient disposal of disputes. [127]

2.9 Conclusion

ADR processes have emerged to complement the litigation process, the same way as the rise of equitable rules to supplement the common law in England. The most common ADR process used in family disputes is mediation. Among salient features of mediation are i) parties are assisted by a neutral third party who does not impose any decision, ii) parties remain in control of the whole process including the stage of decision-making, iii) mediation provides a confidential and "without prejudice" setting for parties in negotiating their settlement.

The decision to adopt which model of mediation to suit mediation in family disputes will depend not only on what seems to be the universal culture in that family institutions form part of people's private lives. The specific culture and values in a specified society are the defining factor. It is a known fact that some Western practices are not suitable to be applied in the Eastern cultures. Although mandatory mediation has its own disadvantages, it may be the most suitable nature of reference to be adopted when some of the Eastern cultures are taken into consideration.

[127] Ibid, at p.288.

CHAPTER 3

3.1 Introduction

This chapter will begin by elucidating the problems that usually arise in litigation generally and family law litigation specifically. The advantages of mediation that prevail over litigation will be explored. The disadvantages of mediation will also be highlighted. Finally the chapter will examine categories of cases suitable and not suitable for mediation.

3.1 Problems in litigation

3.2.1. High Financial Cost and Lengthy Hearing

Joel Lee Tye Beng highlighted the pros and cons of litigation / adjudication when speaking about the reasons for the emergence of the ADR movement.[128] He said that, among others, it was due to the high financial cost of litigation and lengthy hearing. Litigation can be a long drawn-out process, starting from reference of a case to a lawyer until the trial process. In Singapore, the whole process can take a range of 12 to 18 months. A charge for appearance of lawyer in court per day is at the average of $4000 to $5000. These amounts exclude the lawyer's charge for preliminary interview, advice and pre-trial work and research.[129] Not only litigants have to pay the lawyer's fees but they also have to make payments to the court as well. In Singapore, the first day of hearing is free. The court fees may vary depending on the level of court and the number of days consumed for hearing. By referring to the Singapore Rules of Court, 1996, S 71/96, the court fees can vary from $1,500 to $3,000 per day. On average, it is fair to say that a hearing lasts about 5 to 10 days.[130]

[128] Lee, Joel Tye Beng *op. cit.*, at pp.417-427.
[129] See Lee, Joel Tye Beng, *op. cit.*, at p.421.
[130] Ibid.

Similarly, in Australia, the high costs incurred are also considered a disadvantage of litigation as a dispute resolution process. Maxwell J. Fulton[131] and Astor and Chinkin[132] stated the costs of taking action in court as follows;

a) the Queen's Counsel costs

-$400 to $600 per hour in pre-hearing and $3,000 to $4,000 per hour during trial.

b) the barrister's fees

-$200 to $250 per hour in pre-hearing and $2,000 to $3,000 per hour during trial

c) the solicitor's fees

-$150 to $200 per hour in pre-hearing and $1,200 to $1,500 per hour during trial.

Astor and Chinkin also highlighted that not only the parties to litigation incur high expenses but there are other financial consequences on the general community and governments. These are the general expense of operating the court system[133] and the unquantifiable costs of lost working hours of litigants, witnesses, police officers and other public officials.[134]

3.2.2. Differences in Dispute Resolution Paradigm

There are differences in dispute resolution paradigm between litigation and ADR processes. Litigation resolves dispute by looking at rights and duties of parties and looks backwards to find fault of either party. The law has determined the rights and duties of parties and the same law also provides for remedies available to parties. The remedies very

[131] See Fulton, Maxwell J., *op. cit.* ,at p. 87. He quoted the court fees and costs of services of lawyers as provided by a leading Melbourne legal firm in May 1988.

[132] See Astor, Hilary, and Chinkin, Christine Mary, *op. cit.* , at p.31. They referred to Fulton, *op. cit.*, p.87.

[133] Ibid. According to Astor and Chinkin, this includes the maintenance of the buildings and plant, staffing costs, including judicial and other salaries, costs of producing documentation including transcripts and records.

[134] Ibid. This point of high costs in litigation is equally valid in the United Kingdom. According to Marcus Stone, enormous costs may be incurred in litigation, especially if an unsuccessful party has to pay those of his opponent. Costs may either be grossly out of proportion to or may even exceed the amount in dispute, see Stone, Marcus, *op. cit.* , at pp.9 and 110.

often omit to see the reasons behind the dispute. The "people aspect" of the problem is also neglected in court. The court process may damage the relationship between parties. Furthermore, the court is restricted to legal remedies as opposed to creative solutions addressing the parties' long-term needs.[135]

There is a setback in having restricted scope of claims and legal remedies. Astor and Chinkin reminded that real disputes do not always fit easily into a recognised legal category and unlikely to be confined to one category.[136] The limited legal remedies may also be inappropriate to a particular dispute or disputants.[137] In addition, legal remedies are backward looking in that they are a response to an act or more likely, a sequence of actions and reactions. Legal remedies do not look to the future, nor do they necessarily require an acceptance of personal responsibility for the action itself, or for future dealings with the same or other parties. A fine or damages may be paid or other remedy fulfilled thus finalising the court's interest in the affair both with respect to the parties and from the wider community interest.[138]

3.2.3. Inflexibility of Court Process and Formality of Court Procedure

The inflexibility of court process and formality of court procedure are also seen as a disadvantage. The strict procedural rules of evidence focus on facts to assist the court in deciding the rights and liabilities of parties. Emotions and opinions of parties are generally

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[135] Lee, Joel Tye Beng *op. cit.*, at pp.423-424.

[136] Astor and Chinkin, *op. cit.*, at pp. 37-38. They gave example of a neighbourhood dispute, which may involve tortious acts (trespass, nuisance), breach of statute (excessive noise) and crime (intimidation, assault, damage to property). Legal action may deal with only one of these categories. A penalty may be imposed by the Local Court, for example for assault, while the dispute which led to that assault remains unsolved; see at p. 38.

[137] Astor and Chinkin, *op. cit.*, see pp. 38-39 for further discussion on this.

[138] Astor and Chinkin, *op. cit.*, at p. 39. In contrast to courts, it has been argued that requiring the parties to confront the consequences of their own actions and to work out what they regard as appropriate and workable remedies promotes a feeling of social responsibility; see at pp. 39-40.

not considered.[139] To most people, with the exception of judges and experienced litigators, courts are experienced as intimidating.[140] Courtrooms also do not often provide facilities such as childcare.[141] Court lists are generally organised according to the priorities and timetable of the court rather than the convenience or needs of parties and public. There are also the inconveniences of court sittings. They take place only during office hours, which can leave witnesses and parties out of pocket, anxious to leave and frustrated with the proceedings. Adjournments can mean unwarranted journeys to the courthouse, and lack of explanation for the adjournment can cause confusion and irritation.[142]

3.2.4. Lack of Consensuality and Party Control

Litigation has been criticised for its adversarial nature. The adversarial nature of litigation has been particularly criticised for its effect on parties who are in a continuing relationship. The criticisms of litigation in this respect have been especially strong in relation to family disputes.[143] Irving and Benjamin described litigation as;

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[139] Lee, Joel Tye Beng *op. cit.*, at p. 425.
According to Astor and Chinkin, court proceedings may provoke resentment among the participants and make them feel alienated from the proceedings. The rules of evidence, for instance, prevent witnesses from speaking freely in court. They cannot give evidence in the way they would choose but are restricted to answering the questions addressed to them in examination and in cross-examination; see Astor and Chinkin, *op. cit.*, at p.35.
In relation to family disputes, Heike Stintzing said that the adversarial system does not allow sufficient scope to deal with the psychological and emotional aspects of a divorce. Parties fight about specific tangible issues like money, children and property, even though the real conflict may be emotional. The adversarial legal system treats only the symptoms of the problem, instead of resolving the underlying conflict; Stintzing, Heike, *op. cit.*, at p.28.

[140] Astor and Chinkin, *op. cit.*, at p.36. One Australian judge, Rogers Justice A, had said in "Alternative Dispute Resolution 1990", a keynote address to the Australian Dispute Resolution Association Annual Conference 1990;
"There are some cases that have to go to courts whether we like it or not. But going to court is now recognised as one of the most stressful, unhappy experiences that anyone can undergo...sometimes there is a recognition, albeit in passing, by the courts of the tremendous strain and difficulty which is cast upon litigants by having to participate in litigation....It is the sort of thing that made me think...that there must be a better way"; quoted in Astor and Chinkin, *op. cit.*, at p.36.

[141] The High Court (Civil Division 8) in Kuala Lumpur, which specifically deals with family law cases, has made an effort to provide facilities for children while waiting for their parents' case in court. The examples of such facilities readily available for them are children's playroom inside the court's building and a playground that is placed in the vicinity of the court.

[142] Astor and Chinkin, *op. cit.*,at pp.35-36.

[143] Astor and Chinkin, *op. cit* , at p.36. Heike Stintzing, who cited Pearson and Thoennes (1984), stated that the adversarial system does not emphasis the option of agreement between the spouses. It does not encourage the parties to come to an agreement to which both will feel committed and which is therefore of long-lasting effect; Stintzing, Heike, *op. cit.*, at p. 30.

"There is a general consensus that adversarial proceedings in divorce are both traumatising and alienating...Forced to say and do things they may later regret, many emerge from the experience with an unsavoury taste in their mouth...and with a much reduced respect for the law."[144]

Those often held responsible for 'forcing parties to do things they may later regret' are lawyers. Lawyers acting in accordance with the requirements of the adversarial system are often accused of attacking the other party than attacking the problem.[145]

Normally parties do things through their lawyers, therefore, they generally give up their control over their case to their lawyers.[146] The loss of control over the dispute alienates parties from the process of resolving their difficulties. This may result in parties and their families experiencing emotional disturbances when a matter goes to litigation.[147]

3.2.5. Adverse Publicity / Public Scrutiny

Litigation is a public event. Trials are open to the interested public and to the press. The pleadings and factual submissions are, unless sealed by the court, public records. Although to some parties the publicity can be useful, in some circumstances, it can be seriously adverse.[148] The invasion of privacy, which arises in litigation may matter greatly to some parties.[149]

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[144] Ibid, Astor and Chinkin cited Irving, H, and Benjamin, M, Family Mediation : Theory and Practice of Dispute Resolution, Carswell, Canada, 1987, at p.39.

[145] Astor and Chinkin, *op. cit.*, at pp. 36-37.

[146] Astor and Chinkin expressed the same thing; see Astor and Chinkin, *op. cit* , at p.37. They said when lawyers are consulted, the dispute ceases to belong to the disputants. The direction it takes and the moves which are made towards resolving it are controlled by lawyers. They even quoted a comment from a divorcing man on the fact that lawyers control events;
"..the starting of the divorce was so sudden. She told me she was seeing a solicitor, I was advised to get one – bang, bang, bang – just like that, we were divorcing.."; Quoted in Davis, G, and Murch, M, Grounds for Divorce, 1988, at p. 62.

[147] See Lee, Joel Tye Beng *op. cit.*, at p. 425.

[148] See Dauer, Edward A., *op. cit.*, at p. 4-11.

[149] Stone, Marcus, *op. cit.*, at p.111.

With regard to divorce cases in Malaysia, for example, one of the grounds for the petitioner to petition for divorce is that the marriage has irretrievably broken down. The court which conducts an open hearing will have to inquire into the facts alleged as causing or leading to the breakdown of marriage before deciding on whether it is just and reasonable to make a decree for its dissolution.[150] It is submitted that the process of proving the facts alleged as causing or leading to the breakdown of marriage is a 'fault-finding' process. The petitioner has to show that the respondent is the one to be blamed for the breakdown of their marriage. The petitioner will prove facts related to adultery, unreasonable behaviour and/or all other negative behaviour of the respondent.[151] This is a real drawback of litigation on divorcing parties; they are "washing their dirty linen" in an open court. "Face-saving" to them, who once loved each other, is no longer important. This 'fault-finding' process may not only produce negative effects on them but also possibly on their children as well, if any.

Although most problems with litigation as mentioned above were discussed in the context of litigation in general and not specifically referred to family law litigation, it is believed that the very same problems equally arise in family law litigation since the court processes involved in litigating family matters are, in principle, similar to other civil matters.

[150] See section 53 of the Law Reform (Marriage and Divorce) Act 1976 and Mimi Kamariah Majid, Family Law in Malaysia, 1999, at p. 168. Singapore also has this as one of the grounds for divorce; see Women's Charter, section 95 (1) and section 95 (2), section 93 (3) paragraphs (a), (b), (c), (d), (e), section 93 (7) and section 93 (8) and Leong, Wai Kum, Principles of Family Law in Singapore, 1997, at pp. 708, 715, 720 and 727.

[151] See section 54 (1) of the Law Reform (Marriage and Divorce) Act 1976 for further details.

3.3 Advantages of Mediation

3.3.1. Time Saving and Cost Effective

Joel Lee Tye Beng made comparisons in term of costs and length of time taken between litigation and other types of ADR i.e. arbitration, mediation and negotiation. As the focus of this dissertation is on mediation, it is relevant to see his comparison on the financial costs and time incurred in mediation. According to him, the lawyer's fees for representing the client during the mediation tend to be less than the amount charged for a day in court. As for the time of achieving resolution, a matter can be resolved in a period between 2 to 6 months from the time it is referred to a lawyer and resolved by mediation. A mediation session can be arranged in 1 to 2 weeks. This also contributes to the effect of lowering lawyer's fees. In addition, the cost of physical facilities[152] of reference to mediation is also cheaper.[153]

Concerning the use of court mediation in Singapore, Lim Lan Yuan and Liew Thiam Leng stated that many court mediations take an hour to conclude, and most are completed in less than an hour. By employing mediation to resolve dispute, much time can be saved and costs can often be kept proportionate to the value of the dispute being contested.[154]

The cost and time savings which can be achieved through mediation are equally true in Australia. The Australian Commercial Dispute Centre claims that its costs for resolving disputes are 10 per cent of the costs of litigation. The Centre's journal has published the

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[152] Some examples of physical facilities which relate to mediation are venue, accommodation and communication facilities like telephone and fax; see Boulle, Laurence, Mediation Skills and Techniques, 2001, at pp.29-33.

[153] Lee, Joel Tye Beng *op. cit.*, at p.422. He gave an example of a matter referred to the Singapore Mediation Centre. The administrative fee is $250. The fee for the mediation itself depends on the amount of claim. Up to $250,000, the total fees payable by both parties per day is $1,500 (inclusive of premises and mediator's fees). Between $250,001 to $500,000, the total fee per day is $2400 and above $500,000, the total fee per day is $3,000. Lee opined that, considering the average length of a mediation session, these costs are cheaper than litigation and arbitration. Most mediation sessions last in a day. There is something to be achieved by the end of one day; either a resolution or some movement towards a resolution or an acknowledgment of the absence of a common ground. Although sometimes a mediation session may be extended for a second day, it rarely goes beyond that.

[154] Lim, Lan Yuan and Liew, Thiam Leng, *op. cit* ., at p.61.

results of successful mediations in commercial matters. One commercial dispute settled in 1988 involved a claim and cross claim amounting to $250,000. It was estimated that trial or arbitration of the matter would have taken five more weeks. The successful mediation took only a few hours. [155]

In addition to private savings, there are also public savings. The mediator's fees are paid by the parties, not by the taxpayer. The facilities are either supplied by parties or rented by the parties. Mediators do not operate "with the expensive panoply of the judicial process". [156]

However, it is important to note that ADR only saves costs if it produces a workable agreement. If it fails, it will increase expense to the parties who will have to pay the costs of ADR, as well as the costs of litigation. [157] In one study of divorce mediation, the parties with the highest costs were those who had tried mediation and failed. [158] One Australian family lawyer / mediator, when contacted by lawyers who wanted to refer their clients to him for mediation, asked them whether their clients could afford 'a possible one thousand dollar excursion'. That was his estimate of the highest possible costs if mediation failed. [159]

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[155] Resolution of Commercial Disputes , Vol. 2, No. 3, 1989, p.3; cited in Astor and Chinkin ,*op. cit.*, at pp. 43-44.
In 1987, the Resolution of Commercial Disputes also had reported its success in assisting companies in Western Australia to resolve a dispute involving the construction of an open-cut gold mine. The dispute had been in existence for two years. The amount of claim was $400,000 and legal proceedings had been commenced. Both parties agreed to use the Centre. A number of joint and separate meetings were held with the parties reaching agreement after joint sessions totaling only six hours. The parties not only settled the $400,000 claim but further claims between them totaling over $1,000,000. A minimum of six weeks in court hearings was saved as was an estimated $500,000 in legal and technical expert costs and lost management time and resources; see Resolution of Commercial Disputes ,Vol.1, No. 2, 1987, at p.1; cited in Fulton, Maxwell J., *op. cit.*, at pp. 88-89. Fulton opined that the savings would have been even greater had the dispute been mediated earlier without its escalating to the stage where legal proceedings were commenced; see Fulton, Maxwell J., *op. cit.*, at p. 89.

[156] Fulton, Maxwell J., *op. cit.*, at p. 89, citing W.Burger, 'Isn't There a Better Way?' (1982) 68 American Bar Association Journal 274 at 277. The Chief Executive Officer of the Australian Commercial Dispute Centre, Mr David Newton, estimates that in the period mid 1986 to mid 1989 that Centre alone has saved the community $20 million in costs related to litigation and about $1 million in costs related to court staff and judges; see M.Sidis, 'Alternative to Disputes Settling', Australian Financial Review, 31st July 1989, 58, quoted in Fulton, Maxwell J., *op. cit.*, at p. 90.
Astor and Chinkin also agreed with the cost-saving ADR processes, like mediation, can offer to the state. They stated that the federal and state governments provide the infrastructure of litigation, including judicial and other salaries, the cost of courts and the cost of legal aid. The potential savings in these costs has led support for ADR from governments; Astor and Chinkin,*op. cit.*, at p. 45.

[157] Astor and Chinkin,*op. cit.*, at p. 46.

[158] Ibid. Astor and Chinkin cited Pearson J and Thoennes N, 'Divorce Mediation : Strengths and Weaknesses Over Time', in Davidson H, Ray L and Horowitz R (ed.), Alternative Means of Family Dispute Resolution, American Bar Association, 1982.

[159] Ibid.

Joel Lee Tye Beng, however, argued that saying that one should not refer a matter to ADR process because it might fail and therefore would be an additional cost is as invalid as saying that all matters should be referred to ADR because it might succeed and save money. He thinks that the key is to ask whether the chances of the dispute being solved through ADR is worth the financial cost going through the process. It is simply a matter of opportunity cost. [160]

3.3.2. More Creative Solutions Can Be Explored

With mediation, parties can invent more creative solutions aiming at their mutual benefits. Joel Lee Tye Beng said that ADR processes, specifically negotiation and mediation, allow for an approach which can lead to more generative and creative solutions that may more appropriately meet the needs of the parties. Further, the "people-problem" can be dealt with and, in some cases, the working relationship preserved and even enhanced.[161]

Lim Lan Yuan and Liew Thiam Leng also expressed the same thing. They opined that parties in mediation are free to explore the most novel or creative ways of resolving their problems and need not be confined to the legal definition of the scope of their dispute. When parties have reached agreement, they will write and sign an agreement, which is an

[160] See Lee, Joel Tye Beng *op. cit.*, at p. 423.

[161] Lee, Joel Tye Beng *op. cit.*, at p. 424. He supported this with an example which is based on a real case and has been resolved by a mediation. The example concerns a dispute involving a breach of contract where A is the supplier of building materials and B is the contractor. If this matter is referred to court, the court will determine whether there was a breach, by whom, and the remedy to be awarded to the aggrieved party. Suppose that B is in breach and the court awards damages. The award of damages may make B a bankrupt because he is unable to carry on business. This will also put A in a difficult situation. If A does not pursue B, he may not get the whole amount. However, even if A does pursue B, he also may not get the whole amount. If the dispute had been referred to mediation, A may have been willing to consider payment by instalments or payment in kind. That way, A would have gotten his money and B would have been able to stay in business. The mediation can also have improved the working relationships between the parties so that future breaches would not occur Such a resolution would not have been possible in litigation.

enforceable contract. In court mediation, the agreement between parties often results in a consent order.[162]

With mediation, parties can produce comprehensive and customised agreements. Mediated settlements are able to address both legal and extra legal issues. Mediated agreements often cover procedural and psychological issues that are not necessarily susceptible to legal determination. The parties can tailor their settlement to their particular situation.[163]

3.3.3. Flexible and Informal Process

The procedures in mediation process can be tailored to meet parties' respective needs and the particular fact situation. In mediation, a dispute does not have fixed boundaries as it does in litigation. The process can take into account not only the simplicity or complexity of the dispute but virtually anything that might lead to a better analysis of the parties' true interests and goals and the construction of a creative solution that fits the parties' needs.[164]

Informality means that parties feel competent to embark on the process without professional guidance.[165] The control of the dispute remains with the disputants and not lawyers, therefore, the dispute can be discussed and analysed on personal terms. In family disputes, this would allow the focus to remain on the dispute as being essentially a family problem requiring a collective solution, rather than being a legal problem.[166]

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[162] Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p. 61.

[163] Ranjan Chandran, 'Mediation – Charting the Right Course for the New Milleneum', Insaf, (1999), XXVIII No. 3, at p. 76.

[164] Vasanthi Arumugam, 'Mediation of Family Disputes', Insaf, (2000) XXIX No. 4, at p. 27. See also Ranjan Chandran, *op. cit.*, at p. 75 and Fulton, Maxwell J., *op. cit.*, at p. 92.

[165] Fulton, Maxwell J., *op. cit.*, at p. 92.

[166] See Vasanthi Arumugam, *op. cit.*, at p. 28. See also Fulton, Maxwell J., *op. cit.*, at pp. 92-93 and Ranjan Chandran, *loc. cit.*

3.3.4. Control over the Process

Mediation is a self-empowering process. It allows the parties to retain control over the procedures and the outcome. Since the parties have control of the process, they are free to withdraw at any stage and the mediator's participation and presence can be rejected at any time.[167]

As far as mediation in family disputes is concerned, Vasanthi Arumugam, when explaining on the "self-empowering process", stressed that parents are the best people to make decisions for their children and lawyers should not undermine or intrude upon that process.[168]

Parties also make their own decisions with regard to venue, date and time for mediation. For court mediations, however, the parties have less control over the place and time for mediation. Although the mediator manages the mediation session, the parties are in full control of the content and outcome of the discussion.[169]

3.3.5. Confidentiality

The existence of the dispute, settlement discussions and the outcome (if there is one) remain private and confidential. Details are not going to be publicised in legal reports and journals and this aids in the preservation of goodwill.[170]

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[167] Fulton, Maxwell J., *op. cit.*, at pp. 91-92. Fulton explained that the rationale behind mediation is that the parties have to accept the consequences of their own decisions. The parties' responsibilities start right at the beginning when, having agreed to use mediation, they must choose whom they want to act to mediate their dispute. They discuss their respective needs, hopes, frustrations and anything else they consider to be a blockage to reaching agreement. With the insights produced by this interchange they will, hopefully, negotiate an agreement which each party can embrace as its own; see Fulton, Maxwell J., *op. cit.*, at p. 91.

[168] Vasanthi Arumugam, *op. cit.*, at pp. 26-27.

[169] Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p. 61.

[170] Neither it is reported in newspapers, as the Press likes to sensationalise the family disputes in Court; see Vasanthi Arumugam, *op. cit.*, at p. 26. Ranjan Chandran also appeared to agree with this. He said that mediation is sought by parties to avoid the glare of publicity and to keep their disputes low-key and private; see Ranjan Chandran, *op. cit.*, at p. 76 and Fulton, Maxwell J., *op. cit.*, at p. 93.

Not only is mediation conducted in private, the discussions in private meetings with the mediator are kept confidential unless permission is given by the parties to reveal them.[171]

3.3.6. More Satisfying Solutions and High Rate of Compliance

In mediation, parties work together to reach an agreement, so they will likely be more committed to abide by its terms of settlement than one which is imposed upon them.[172] It has been found that compared to adversarial procedures, divorce mediation results in a higher level of user satisfaction, higher rate of compliance, lower costs in terms of time and money, and a reduction in the number of cases proceeding to court.[173]

3.4 Disadvantages of Mediation

3.4.1. Possibility of Unskilled Mediator

Mediation is driven by skill and energy of one person; the mediator. The mediator's role is crucial to the outcome of the process as he or she carries the momentum of the process as well as the hopes and aspirations of the parties. The effectiveness or otherwise of the process depends to a large extent upon the calibre of the person chosen by the disputants to mediate the dispute. If the person is not strong enough to guide and structure the discussions in a meaningful way, then there is a risk that the process will either

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[171] Lim, Lan Yuan and Liew, Thiam Leng, *loc. cit.*, at p. 61.

[172] Ibid. See similar opinions in Ranjan Chandran, *op. cit.*, at p. 76 and Vasanthi Arumugam, *op. cit.*, at p. 29. Tania Sourdin also stated that mediation promotes compliance and more durable settlements She quoted the empirical data produced by Golberg, Stephen and Rogers to support her statement. See Sourdin, Tania, 'Matching Disputes to Dispute Resolution Processes – The Australian Context, A Study in Methods of Classifying Disputes *Vis-à-vis* their Suitability for Mediation' in P.C.Rao and Sheffield, William, Alternative Dispute Resolution, What it is and How it works, 1997, at p.154 and Golberg, Stephen B., Sander, Frank E.A. and Rogers, Nancy H., *op. cit.*, pp. 154 and 155 for further details.

[173] Ibid, Lim Lan Yuan and Liew Thiam Leng referred to Kressel, K and Pruitt, DG, 'Conclusion : A Research Perspective on the Mediation of Social Conflict', in Kressel, K, Pruitt, DG, and Associates, Mediation Research : The Process and Effectiveness of Third-Party Intervention, 1989.
Concerning mediation of family disputes, Vasanthi Arumugam opined that a child's future relationship with each of his parents is better ensured and his existing relationship less damaged by a negotiated settlement than one imposed by the court after an adversarial proceeding; see Vasanthi Arumugam, *op. cit.*, at p. 29.

degenerate into mutual exchange of insults or that it will meander aimlessly and ineffectually. In either case, it is difficult, if not impossible, for a solution to emerge.[174]

Inadequately trained and inexperienced mediators might have powerful influence on the outcomes for the parties and more likely to perpetuate rigid and predetermined views. Vasanthi Arumugam opined that as mediators assist parties toward settlement by focusing discussion, procedurally and substantively, their actions constitute a form of manipulation. There is also a great opportunity for manipulation during caucus. If the mediator has more information about the parties' sources of power, acceptable settlement ranges, psychological states and so forth, and controls all communication between them, there is an increased potential for the mediator to shape or actually dictate the terms of settlement.[175]

3.4.2. No safeguard of rules and procedures as in Court proceedings

To most people, mediation is a new setting. Its norms are generally not understood by the parties in advance, with the result that the parties are extremely sensitive to cues as to how they are supposed to act; they will look to the mediator to provide these cues. There is no discernible body of rules and procedures governing the sessions held behind closed doors and consequently none of the safeguards of court proceedings. The parties also cannot prepare their strategies in knowledge of the rules.[176]

3.4.3. Power Imbalances

This may be specifically true in some cases referred to family mediation. There may be a long history of dominance of one spouse by another; often the wife by the husband.

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[174] Fulton, Maxwell J., *op. cit.*, at p. 99.

[175] Vasanthi Arumugam, *op. cit.*, at p. 33.

[176] Vasanthi Arumugam, *op. cit.*, at p. 31.

One spouse may also be in a superior economic position who has a greater earning power and social mobility. There may be imbalances of knowledge, experience and negotiation ability that are gender specific. In this context, mediation can be said to be inappropriate in family law disputes because it reinforces the gender-advantage of the husband and removes the protection of the legal process. A powerful and controlling party may attempt to impose self-serving decisions by exerting their traditional dominance and inducing compliance or even fear in the other. The power imbalance is obvious and reinforcement of fear and implicit approval of violence can follow.[177] For the weaker party, the formal legal process with the safeguards of arms length negotiation and adjudication may be the only means of ensuring access to justice.[178]

3.4.4. Mediation is a lesser forum than court

Mediation trivialises family law issues by delegating them to a lesser forum. It diminishes the public perception of the relative importance of laws addressing women and children rights in the family by placing these rights outside the legal system. Loss of one's children and protection of one's physical safety should be considered too important to entrust to any other but the legal system.[179]

3.4.5. Mandatory Mediation has its Disadvantages

When mandatory mediation is part of the court system, the notion that parties are actually making their own decisions is purely illusory. First, the parties have not chosen or timed the process according to their ability to handle it. Second, they are not allowed to

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[177] Ibid.

[178] Vasanthi Arumugam, *op. cit.*, at p.32, quoting Bridge, Caroline, 'Conciliation and the New Zealand Family Court : lessons for English law reformers', Legal Studies, p. 304.

[179] Ibid.

decide themselves how much their lawyers should participate but instead are deprived of whatever protection their lawyers have to offer. Finally, they are not permitted to choose the mediator and they cannot leave without endangering their legal positions even if they believe the mediator is biased against them.[180]

3.4.6. Issue of Fairness and Justice

As mediation is conducted in private and is less regulated by rules of procedure, substantive law and precedent, it can be questioned whether the process is fair and the terms of a mediated agreement are just.[181] Owen Fiss, one of strong opponents of alternative dispute resolution, said that

> "Settlement is for me the civil analogue of plea bargaining. Consent is often coerced...the absence of trial and judgment renders subsequent judicial involvement troublesome and although dockets are trimmed, justice may not be done."[182]

The criticism of lack of fair process and just terms of settlement is based on the fact that mediation lacks the legal protection associated with the adjudicative process.[183] The adversary process is fairer because representation by trained and skilled advocates tends to equalise the opportunity for a full and effective presentation by each side. This reduces the injustice that would be produced by the disparities between the parties in intelligence, articulateness and ingenuity.[184]

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[180] Ibid, quoting Grillo, Trina, 'The Mediation Alternative : Process Dangers for Women', Yale Law Journal, Vol. 100 [1991] at p. 1545. Note that since Trina Grillo is a feminist, she appeared to present the feminist's point of view on mediation. See also Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p. 61, for a contrary view. They said that even parties had less control in court mediation, that is a mandatory mediation, parties are still in control of the content and the outcome of mediation.

[181] Vasanthi Arumugam, *op. cit.*, at p.33.

[182] Fiss, Owen M., 'Against Settlement', Yale Law Journal, Vol. 93, (1984), at p. 1075.

[183] Vasanthi Arumugam, *loc. cit.*

[184] M. Rosenberg, 'Resolving Disputes Differently : Adieu to Adversary Justice?', (1988) 21 Creighton Law Review 801, at p. 811; quoted in Fulton, Maxwell J., *op. cit.*, at p. 99.

3.4.7. Access to Justice and Secondary Justice

In theory, justice is accessible to all, but with the ever escalating cost of justice, there is now a question mark over its accessibility to those who need to use it. The fairness of litigation is open to question when there is a disparity in the wealth of the disputants. There is a real danger of the disputants only getting such justice as they can afford. It can be seen from the judge's criticism of the junior counsel appearing in the *Pimas Constructions* arbitration[185] that inexperienced and for that reason, relatively inexpensive, legal representatives are often at a severe disadvantage when presenting a case against an experienced senior, and for that reason relatively expensive, barrister. In such cases a deciding factor can be, not "intelligence, articulateness and ingenuity" of the respective parties, but the "intelligence, articulateness and ingenuity" of the respective barristers that each side can afford to brief.[186]

Regarding the notion of 'secondary justice', the Chief Judge of the United States Court of Appeals once said

> "Diversion of cases for dispute resolution to other forms of *secondary justice* are poor solutions for coping with the case load problem"[187]

[185] *Pimas Constructions Pty Ltd* v. *Metropolitan Waste Disposal Authority* (unreported, Supreme Court of New South Wales, Brownie J , 4th August 1988)

[186] The case of *Pimas Constructions* was quoted in Fulton, Maxwell J., *op. cit.*, at p. 102. Another Australian judge, Pincus J. of the Federal Court explained the role of wealth in the litigation process by stating that ;
"It is of the essence that people are free to engage their own lawyers and to remunerate them as they see fit. They are therefore necessarily, if well-heeled, free to engage better lawyers than their opponent has obtained. It is my opinion that nothing can reasonably be done to eliminate whatever advantage can be obtained by the richer litigant's access to the more expensive and therefore presumably more expert legal assistance."; see C.W. Pincus, 'Judge Asks Why Old Methods Are Still Used To Resolve Disputes', (1988) 23 (No. 10), Australian Law News, at p. 11, quoted in Fulton, Maxwell J., *op. cit.*, at pp. 102-103.

[187] Chief Judge of the United States Court of Appeals, .Lay, D., 'A Blueprint for Judicial Management', (1984) 17 Creighton Law Review 1047, at p. 1067; quoted in Fulton, Maxwell J., *op. cit.*, at p.99.

On the contrary, some proponents of alternative dispute resolution techniques stated that, in effect, if the disputants reach a voluntary settlement then that is all that matters and criticisms of 'secondary justice' are all but irrelevant.[188]

In relation to family disputes, according to Vasanthi Arumugam, whatever the case is with the argument of mediation as 'secondary justice', a mediated agreement is much more likely than a judicial decision to match the parents' capacity and desires with the child's needs. Whether the parents' decision is the result of reasoned analysis or is influenced by depression, guilt, spite or selfishness, it is preferable to an imposed decision that is more likely to impede cooperation and stability for the child.[189]

3.5 Cases Suitable for Mediation

3.5.1. Moderate Conflict[190]

Where there is intense hostility, mediation may be unable to provide the control, protection and influence necessary to generate constructive decision-making. On the other hand, where the hostility can first be dealt with through counselling, mediation may be an option thereafter. Likewise, where intense conflict leads to stalemate, exhaustion and a cessation of hostilities, mediation might become an appropriate option for parties strongly motivated to resolve the matters in dispute.[191]

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[188] Fulton, Maxwell J., *op. cit.*, at p.99. Among the proponents are Golberg , Green and Sander, who questioned the criteria of 'first-class justice' then if alternative dispute resolution processes are to fall within the category of 'secondary justice' or 'second-class justice'. They said;
"What is first-class justice? If it is defined as a method of resolving disputes that includes legal representation, formal rules of procedure, and a resolution based on law, then those alternatives that are mediatory in nature will inevitably be labelled second-class, and the central question essentially answers itself. If, however, first-class justice is defined as that dispute resolution process which most satisfies the participants, research can be conducted by surveying the user of the alternative processes concerning their satisfaction with them, and comparing their responses with those of the users of courts. Much of that research has been done, and uniformly concludes that participants in the alternative processes are as satisfied or more satisfied with those processes than are participants in court adjudication."
See Golberg, S., Green, E., and Sander, F., 'ADR Problems And Prospects : Looking to The Future', (1986) 69 (No. 5) Judicature 291, at pp.295-296 ; quoted in Fulton, Maxwell J., *op. cit.*, at pp.99-100.

[189] Vasanthi Arumugam, *op. cit.*, at p. 34.

[190] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, p. 78.

[191] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, at pp.78-79.

3.5.2. Party Commitment and Lawyer Commitment[192]

Both parties are committed to achieving a negotiated settlement, accept the responsibility of making their own decisions and accept the legitimacy of mediation. The stronger these commitments and acceptances, the more likely it is that the parties will respond to the facilitation of a settlement through mediation. The parties' lawyers should also be committed to a negotiated settlement through mediation as professional advisers can readily undermine the process.[193]

3.5.3. Continuing relationship[194]

There is a continuing relationship between the parties, either through necessity, for example parents in a matrimonial dispute, or through choice, for example commercial entities that wish to do future business with each other. Integrative bargaining, taking into account future interests, is more feasible where there is a continuing relationship. In this situation parties will be concerned not only about an outcome but also about the way in which it is achieved.[195]

3.5.4. Power Equality[196]

There is a rough equality of bargaining power between the disputing parties, or the disparity in power is not so severe as to reduce the chances of a fair process. It is difficult to determine unsuitability of the process when there are some differences in power resources. However, where there is a gross disparity such that one party can dictate the outcome, or

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[192] Ibid, at p. 78.
[193] Ibid, at p. 79.
[194] Ibid, at p. 78.
[195] Ibid, at p. 79.
[196] Ibid, at p. 78.

the other could be intimidated into agreeing to a settlement which is prejudicial to its rights and interests, mediation would not be an appropriate option.[197]

3.5.5. Party Ability[198]

The parties have the capacity and abilities to negotiate, or where they lack these qualities by virtue of youth or mental condition, have representatives who can negotiate on their behalf. This flows from the mediation principle of self-determination in terms of which mediating parties are required to make their own informed decisions on settlement options. Legal capacity is often required to turn mediated decisions into formal agreements.[199]

3.5.6. Multiple Issues[200]

There is more than a single issue in dispute and the issues are sufficiently tangible to allow the parties to commit to a settlement or future course of action. Multiple issues provide the basis for collaborative and integrative bargaining, involving trade-offs, compromise and linkages between issues. Most commercial and family disputes involve multiple issues.[201]

Susan Gribben considered a dispute to be suitable for mediation when

i) there is a willingness of both parties to try mediation, having understood what it involves and

ii) both parties have the capacity to participate in the mediation process.

[197] Ibid, at p. 79.
[198] Ibid, at p. 78.
[199] Ibid, at p. 79.
[200] Ibid, at p. 78.
[201] Ibid, at p. 79.

The greater the degree of willingness and capacity in both parties, the greater the likelihood of a successful outcome for the couple. Susan Gribben defined capacity as 'ability of the parties to perform the tasks required of them in mediation'. She opined that to negotiate successfully in mediation each party needs to be able to listen to and understand the other, communicate effectively to the other, obtain relevant information and advice, absorb new information and ideas, put forward options, formulate proposals and represent their own interests. With regard to willingness, she explained that as 'the readiness to communicate and to negotiate with the other – to sit down at the table and talk, rather than run away or fight'. Willingness involves having overcome to some extent the initial powerful feelings which most of us feel when faced with intense conflict, both within ourselves and with others. [202]

3.5.7. Adequate Resources[203]

Examples of adequate resources are funds, time and information. As mediation does not have the mechanisms for enforcing discovery, it is not suited to circumstances where one or more parties do not have available information, for example on technical or scientific matters. There is also a need to have resources to negotiate over; mediation is unsuited where one party has nothing of value to place on the negotiating table.[204]

3.5.8. No clear Guidelines[205]

There are no clear legal principles or other standards to guide the parties' decision-making. Thus mediation might be unsuited in claims where there are limited legal precedents or community standards. On the other hand, in some circumstances, the

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[202] See Gibben, Susan, 'Mediation of Family Disputes', *op. cit.*, at pp. 130-131.
[203] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, at p. 78.
[204] Ibid, at p. 80.
[205] Ibid, at p. 78.

uncertainty of external standards might make mediation more attractive to parties as it allows them to take control over the outcome.[206]

3.5.9. Privacy Accepted[207]

The parties can accept that the process is private and the outcome is confidential; an example of such parties is celebrities in a matrimonial dispute. Where parties wish to publicise the process and outcome among their members, supporters or general public, as in disputes between government and organisations accountable to the community, mediation would be less appropriate.[208]

3.5.10. External Pressure[209]

There is some external encouragement for the parties to settle in mediation. Despite its consensual principles, there is relatively little spontaneous demand for mediation and it is often used effectively where the larger community encourages its use. Here the larger community could comprise government, insurers, employers or social organisations.[210]

3.6 Cases Not Suitable for Mediation

3.6.1. Matters of policy[211]

There are broad matters of policy at stake affecting many people or the whole society, such as constitutional or human rights issues : or the parties wish to establish an authoritative precedent for future disputes of a similar nature.[212]

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[206] Ibid, at p. 80.
[207] Ibid, at p. 78.
[208] Ibid, at p. 80.
[209] Ibid, at p. 78.
[210] Ibid, at p. 80.
[211] Ibid, at p. 78.
[212] Ibid, at p. 80.

3.6.2. Pure legal questions[213]

The dispute involves a pure legal question, for example the interpretation of a statute or a contract, and this interpretation will determine all aspects of the outcome.[214]

3.6.3. Ulterior motives[215]

The parties have ulterior motives for using mediation, for example to cause delay beyond a limitation period, to gather further information, to punish the other party, or to achieve some illegal or immoral purpose on a confidential basis.[216]

3.6.4. Personal danger[217]

The use of mediation could involve the risk of personal danger for one or more parties, or where the dispute resolves around issues of child abuse or family violence.[218]

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[213] Ibid, at p. 78.
[214] Ibid, at p. 81.
[215] Ibid, at p. 78.

[216] Ibid, at p. 81. This seems to be similar to the principle in equity; 'those who come to equity (or here mediation) must come with clean hands'. Lim Lan Yuan and Liew Thiam Leng agreed with this in that mediation should not be carried out when a party is treating mediation as a delaying tactic or other abuse of court process; see Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p. 62. Similarly, in Australia, Susan Gribben stated that mediation is inappropriate when one or both parties are dishonest, manipulative, or operating from a hidden agenda (e.g. to gain information to use against the other) ; see Gibben, Susan, 'Mediation of Family Disputes', *op. cit.* , at p.132. Another Australian writer, Tania Sourdin, urged for a pre-screening before mediation commences or in some cases, a screening after mediation has commenced, to decide whether mediation is appropriate or not. According to her, one of cases which can be screened at a later stage, after mediation has commenced, is that the parties are not *bona fide* and are either attempting to delay the process or use mediation as a "fishing expedition" ; see Sourdin, Tania, 'Matching Disputes to Dispute Resolution Processes – The Australian Context, A Study in Methods of Classifying Disputes *Vis-à-vis* their Suitability for Mediation' *op. cit.*, at p. 163.

[217] Ibid, at p. 78.

[218] Ibid, at p. 81. Lim Lan Yuan and Liew Thiam Leng stressed that mediation should not be carried out when there is a fear or threat of violence, or where violence has occurred or is occurring; see Lim, Lan Yuan and Liew, Thiam Leng, *loc. cit.* Generally, mediation is inappropriate when one or both parties are unable to control their behaviour whether physically or verbally, inside or outside the mediation room ; see Gibben, Susan, 'Mediation of Family Disputes', *loc. cit.* Concerning family disputes, Susan Gribben reminded that mediation is usually not appropriate when there is a history of control in the couple's relationship by violence or threat of violence ; see Gibben, Susan, 'Mediation of Family Disputes', *op. cit.* , at p.133. Equally, Tania Sourdin spoke about the need to have a pre-screening of cases which include those where there is a history of violence or fear of violence between the parties and also where the matter involves child abuse or sexual abuse ; see Sourdin, Tania, *loc. cit.*

3.6.5. Fact-finding required and Credibility Determinations[219]

The dispute cannot be resolved without making complicated findings of fact or credibility, for example where a party's liability for damages depends on determining the accuracy of conflicting versions of an accident.[220]

3.6.6. Emotional Problems and Responsibility Avoidance[221]

One or more of the parties is in a disturbed emotional or psychological state, for example denial, anger and severe depression, or where one or more of the disputants does not want to take responsibility for any ultimate decision and wants to deflect blame.[222]

3.6.7. Value Differences[223]

The dispute involves an uncompromising difference over matters of value or fundamental principle which are not susceptible to negotiation, for example a policy conflict over affirmative action or the question of whether a church should have women priests.[224]

3.6.8. Court Remedy needed and Great Urgency[225]

Where there is a need for a remedy which only the court could provide, such as injunction or a protection order, or where something has to be achieved with great urgency.[226]

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[219] Ibid, at p. 78.
[220] Ibid, at p. 81.
[221] Ibid, at p. 78.

[222] Ibid, at p. 81. In highlighting situations where mediation is inappropriate, Susan Gribben stated that the fact that one or both parties are suffering from an emotional or physical disability prevents them from making an informed and effective negotiation; see Gibben, Susan, 'Mediation of Family Disputes', *op. cit.* , at p.132.

[223] Ibid, at p. 78.
[224] Ibid, at p. 81.
[225] Ibid, at p. 78.
[226] Ibid, at p. 81.

3.6.9. Power Imbalance

Mediation should not be carried out where there is a serious inequality in the parties' capacity to negotiate as mediation may not produce the necessary settlement for the weaker party.[227] When one party, usually a woman in family disputes, is so dominated by or frightened of the other (her husband), or of the possibility of conflict, she is unable to represent her own interests.[228] Power imbalance may also occur through lack of information of either party. If one of the disputants is so seriously deficient in information, any ensuing agreement will not be based on informed consent.[229]

3.7 Conclusion

The pitfalls in the litigation process itself (as discussed above) have undoubtedly spurred the growth of mediation as one of the alternative modes of dispute resolution. The advantages of mediation are, in fact, reflections of disadvantages of litigations. Nonetheless, under certain circumstances, mediation also carries its own disadvantages. In addition, not all types of disputes are suitable to be referred to mediation. For various reasons and in some circumstances as elaborated earlier, some cases are better litigated in court rather than being settled in mediation.

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[227] Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p. 62.

[228] See Gibben, Susan, 'Mediation of Family Disputes', *op. cit.* , at p.132.

[229] See Sourdin, Tania, 'Matching Disputes to Dispute Resolution Processes – The Australian Context, A Study in Methods of Classifying Disputes *Vis-à-vis* their Suitability for Mediation' *op. cit.*, at p. 163.

CHAPTER 4

4.1 Introduction

Chapter 4 will attempt to analyse interviews made with Deputy Registrars or Senior Assistant Registrars in the High Courts visited and also statistics on civil cases generally and divorce cases particularly, registered, disposed off and were still pending in certain High Courts in Peninsular Malaysia from 2000 until the latest month of 2004. Due to time and financial constraints, visits were made to selected High Courts, namely;

- High Court (Civil Division 8), Kuala Lumpur (known also as Family Court), on Thursday, 15th April, 2004 and its Deputy Registrar was interviewed
- High Court, Kota Bharu, Kelantan on Thursday, 10th June, 2004 and its Senior Assistant Registrar [230] was interviewed
- High Court, Kuala Terengganu, Terengganu on Sunday, 13th June, 2004 and its Senior Assistant Registrar [231] was interviewed
- High Court, Georgetown, Pulau Pinang on Tuesday, 21st September, 2004 and its Deputy Registrar, High Court 1, was interviewed
- High Court, Muar, Johor on Wednesday, 6th October, 2004 and its Deputy Registrar was interviewed
- High Court, Johor Bharu, Johor on Tuesday, 12th October, 2004 and its Deputy Registrar, High Court 2, was interviewed
- High Court, Ipoh, Perak on Tuesday, 28th December, 2004 and its Deputy Registrar, High Court 3, was interviewed

[230] Its Deputy Registrar could not be interviewed since he was away for a 3-week course when the visit was made.
[231] Same reason as footnote 230 above.

- High Court, Taiping, Perak on Tuesday, 11th January, 2005 and its Senior Assistant Registrar [232] was interviewed
- High Court, Shah Alam, Selangor on Tuesday, 1st February, 2005 and its Senior Assistant Registrar, High Court 3, was interviewed

Since the statistics of family and civil cases obtained did not provide any breakdown of cases showing other family-related cases like applications for maintenance and custodial right not involving divorce, this chapter will only study statistics of divorce cases and interviews made in the High Courts visited. For the purpose of record in statistics of the High Court, a divorce decree and its ancillary claims are considered as one case. Divorce cases referred here are those related to sections 52 [233] and 53 [234] of the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as LRA). Section 52 of LRA is commonly known as 'joint petition' or 'non-contested divorce', while section 53 of the LRA has been constantly referred to as 'contested divorce' by the High Courts visited.

From the above visits made, two main questions were explored; firstly, the minimum and maximum period [235] for divorce cases to be disposed off in the High Court visited (to be calculated from the time such cases were filed in court), secondly, the factors for a disposition of divorce cases to be delayed.

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[232] As at 11th January, 2005, there was no Deputy Registrar yet in High Court, Taiping.

[233] Section 52 of the LRA provides that
"if husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage present a joint petition accordingly and the court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of divorce as it thinks fit."

[234] Section 53 of the LRA contains two subsections; subsections (1) and (2).
Section 53 (1) states that
" either party to a marriage may petition for a divorce on the ground that the marriage has irretrievably broken down."
Section 53 (2) continues to explain the role of the court, in that
"the court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution."

[235] The minimum and maximum period referred to here concerns the period when the court grants the divorce decree together with its ancillary claims.

4.2 Some Internal Administrative Variants Among High Courts Visited

It is observed that different High Courts would adopt different internal administrative policies to suit the needs of their territorial jurisdictions, which are influenced by the volume of cases they have to handle and also the shortage of judges. For example, although there are three High Courts in Ipoh, there are only 2 judges to carry out duties which are supposed to be the workload of 3 judges. As at 28th December, 2004 when the Deputy Registrar, High Court 3, Ipoh was interviewed, the post of the judge for High Court 1 was still vacant since a year ago.[236]

With regard to allocation of civil and criminal cases, High Court Ipoh, allocates different weeks in a month for civil and criminal cases; 2 weeks for hearing civil cases and the remaining two weeks for hearing criminal cases. While High Court Muar, allocate different days in a week for mentioning and hearing cases.[237] There are also courts that hear all these civil and criminal cases everyday in a week as practised in High Court Taiping.

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[236] The workload of currently vacant post of the judge for High Court 1, Ipoh is distributed between judges in High Courts 2 and 3, Ipoh. These judges hear cases according to the serial number of cases registered; the judges for High Court 2 and 3 hear cases bearing odd registration numbers and even registration numbers respectively; information from an interview with Tuan Roslan Hamid, Deputy Registrar, High Court 3, Ipoh on Tuesday, 28th December, 2004, at his office.

[237] In High Court, Muar, Mondays and Tuesdays are for mentioning cases, ranging from a total of 40 to 50 cases. These mentioning cases involve divorce cases, cases related to 'case-management' under Order 34 of the Rules of High Court, 1980, originating summons and other types of civil cases. Out of these 40 to 50 cases, usually 15 to 20 cases are originating summons and 20 to 25 cases are divorce cases.
Wednesdays and Thursdays are allocated for hearing all types of civil cases including divorce cases and also criminal cases. Although the maximum number of cases fixed for trial in a day is 5 cases, not all cases are tried because there are parties who would usually ask for postponements. In practice, when a full trial is involved, only one or two cases would be heard in the open court.
Fridays and working Saturdays are for cases involving mentions only or cases involving a shorter trial period for example, those involving one witness, or cases which involve fixing the date for appeals of civil and criminal cases from Subordinate Courts or cases which involve parties to 'show cause' i.e. to inform the court about the latest progress of their cases still pending in court. Cases heard on working Saturdays would usually be heard in the judge's chamber; information obtained from an interview with Puan Jumirah Marjuki, Deputy Registrar, High Court Muar, on Wednesday, 6th October, 2004 at her office.

On the point of fixing more than one case for trial in a day, High Court Taiping shares the same policy as High Court Muar. In so far as criminal trials are concerned, High Court Taiping usually would fix 2 or 3 cases on the day of the trial. Although in practice, only a case would consume one day for its full trial, the practice of fixing 2 or 3 cases is seen to serve as 'standby cases' in the event that the first case is postponed at the request of any party, the court can proceed with trials for the second and the third cases in the list without wasting its time; information obtained from an interview with Tuan Niran Tan Kran, Senior Assistant Registrar, High Court Taiping, on Tuesday, 11th January, 2005, at his office.

It appears to be unavoidable to have a judge in a sole High Court to hear both civil and criminal cases like High Courts Kota Bharu, Kuala Terengganu, Taiping and Muar. However, it is interesting to note the different internal administrative policies practised in High Courts, Georgetown, Pulau Pinang and Johor Bharu. The similarity between High Courts Georgetown, Pulau Pinang and Johor Bharu is that both Courts have four High Courts in their territorial jurisdictions. Nevertheless, High Court Georgetown, Pulau Pinang specifically separates civil cases to be heard in 3 High Courts i.e. High Courts 1, 3 and 4 while criminal cases are heard in a single High Court i.e. High Court 2. To the contrary, the four High Courts in Johor Bharu hear all civil and criminal cases in their courts respectively.

There are also courts with Senior Assistant Registrars and Deputy Assistant Registars like in High Courts Kota Bharu, Kuala Terengganu, Kuala Lumpur, Muar, and Ipoh; even though High Court Ipoh only has one Senior Assistant Registrar for its 3 High Courts. To date, High Court Taiping only has one Senior Assistant Registrar to perform the duties of Deputy Registrar and Senior Assistant Registar. As at 11th January, 2005, when the Senior Assistant Registar of High Court, Taiping was interviewed, the post of Deputy Registrar for High Court, Taiping had been left vacant since a year ago.

Administratively speaking, it is the High Court's policy to have a High Court judge to be assisted by a Deputy Registar, who acts as his research officer, and a Senior Assistant Registrar. A Senior Assistant Registrar is below in ranking to a Deputy Registar. The role of a Senior Assistant Registrar is more to signing documents and hearing cases in chambers. As for the role of a Deputy Registar , other than acting as a research officer to the judge, he also hears cases in chambers similar to that of a Senior Assistant Registrar. No matter what the court's administrative policy may be, the truth is both a Senior Assistant Registrar and a Deputy Assistant Registar are actually performing the duties of a

Registrar, whose jurisdiction is governed by Order 32 rule 9 of the Rules of High Court, 1980. [238]

With all Deputy Assistant Registrars visited hearing cases in chambers [239], there is also a practice of having one Deputy Assistant Registar who does not hear cases but is entrusted with purely administrative matters such as matters related to complaints about court's administration, as practised in High Court, Shah Alam.[240]

[238] Order 32 rule 9 of the Rules of High Court, 1980 provides that
" The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these rules be expressly directed to be transacted or exercised by a Judge in person."

[239] A Deputy Registrar would be in charge of court administrative work which includes administering court staff who are subordinate to him or her, filling of cases in court and hearing cases in chamber. Examples of cases which a Deputy Registrar is empowered to hear includes cases involving summons in chamber, setting aside a writ, summary judgment under Order 14 of the Rules of High Court, 1980 and interlocutory applications; information obtained from an interview with Puan Jumirah Marjuki, Deputy Registrar, High Court Muar, on Wednesday, 6th October, 2004 at her office.

[240] Information obtained from Puan Hasbi Hassan, one of the Deputy Registrars in High Court, Shah Alam, through a telephone conversation on Thursday, 30th December, 2004.

4.3 Minimum and Maximum Period for Disposition of Divorce Cases

Non-contested Divorce Cases

(Based on interviews with Deputy Registrars or Senior Assistant Registrars)

COURT	MINIMUM PERIOD	MAXIMUM PERIOD
High Court 1, Georgetown, Pulau Pinang	2 to 3 months	6 months to one year
High Court 3, Ipoh	One month (first date of hearing before the judge)	2 months (2 dates of hearing before the judge)
High Court, Taiping	Within 3 months	Not more than 3 months
High Court, Muar	2 months	3 months
High Court 2, Johor Bharu	3 to 4 months	5 to 7 months
High Court (Civil Division 8), Kuala Lumpur	One month	-
High Court, Kota Bharu	2 months	6 months
High Court, Kuala Terengganu	2 months	3 months
High Court 3, Shah Alam	One month to 6 months	One year

4.3.1. (a) Minimum period for disposing off non-contested divorce cases

Most High Courts visited had experienced settling some non-contested divorce cases in a minimum period of 2 months from the date on which these cases were filed. It is rather expected from the High Court (Civil Division 8), Kuala Lumpur, which only hears family cases, to be able in settling non-contested divorce cases within a month from the date of their filling in court, if all documents are in order. Suprisingly, a High Court with various types of civil cases and criminal cases registered like High Court 3, Ipoh, and High

Court 3, Shah Alam, had the experience of disposing non-contested divorce cases in a month, similar to that of High Court (Civil Division 8), Kuala Lumpur. However, one lawyer interviewed in Kuala Lumpur, with 15 years of experience conducting family cases (hereinafter Lawyer A) [241], had experienced a minimum period of 3 months for a non-contested divorce to be finally settled in the High Court, Kuala Lumpur. While High Court (Civil Division 8), Kuala Lumpur did not state the maximum period of a non-contested divorce cases to be disposed off, Lawyer A had experienced the maximum period to be not more than one year in the High Court, Kuala Lumpur.

4.3.1. (b) Maximum period for disposing off non-contested divorce cases

High Courts Taiping, Muar and Kuala Terengganu had never exceeded the maximum period of 3 months in settling non-contested divorce cases. There is not much difference in the maximum period of settling non-contested divorce cases in High Court 2, Johor Bharu and High Court, Kota Bharu, with 5 to 7 months and 6 months respectively. However, one lawyer interviewed in Johor, with 30 years of experience conducting family cases (hereinafter Lawyer B) [242], had experienced a minimum period of 5 weeks for a non-contested divorce cases to be settled in the High Court, Johor Bharu (with a certificate of urgency). In normal situation, Lawyer B experienced a minimum period of 6 months for settling non-contested divorce cases in the High Court, Johor Bharu.

The maximum period for High Court 1, Georgetown, Pulau Pinang and High Court 3, Shah Alam to settle non-contested divorce cases seemed to be longer than other High Courts, i.e. 6 months to one year in High Court 1, Pulau Pinang and one year in High Court 3, Shah Alam. While other High Courts visited had experienced settling non-contested divorce cases in a maximum period which ranges from 3 months to one year, the High

[241] Lawyer A was interviewed in Kuala Lumpur on Thursday, 28th October, 2004, from 3.00-4.30 p.m.
[242] Lawyer B was interviewed in Johor on Tuesday, 26th October, 2004, from 12.15- 2.30 p.m.

Court 3, Ipoh had experienced disposing off non-contested divorce cases in a shorter period; within two months or after two hearing dates.

Contested Divorce Cases

(Based on interviews with Deputy Registrars or Senior Assistant Registrars)

COURT	MINIMUM PERIOD	MAXIMUM PERIOD	REMARKS
High Court 1, Georgetown, Pulau Pinang	One year	2 to 3 years	
High Court 3, Ipoh	3 months	2 years	
High Court, Taiping	3 months	3 years	
High Court, Muar	3 to 6 months	2 years	
High Court 2, Johor Bharu	5 to 7 months	One year and a half years	
High Court (Civil Division 8),Kuala Lumpur	One year	2 years	
High Court, Kota Bharu	-	-	Most divorce cases here are non-contested. The court seldom has contested divorce cases.
High Court, Kuala Terengganu	-	-	-Same as above reason.
High Court 3, Shah Alam	-	3 to 4 years	

4.3.2. (a) Minimum period for disposing off contested divorce cases

High Court 3, Ipoh and High Court, Taiping equally managed to settle contested divorce cases in a minimum period of 3 months, while the minimum period for the settlement of such cases in High Court, Muar is between 3 to 6 months. High Court 1, Georgetown, Pulau Pinang experienced the minimum period of one year, a similar period to its own maximum period in disposing off non-contested divorce cases. The minimum period for High Court, Taiping in settling contested divorce cases is similar to its own minimum and maximum periods in disposing off non-contested divorce cases. While in High Court 2, Johor Bharu, the minimum period of 5 to 7 months taken in settling contested divorce cases is similar to its own maximum period in settling non-contested divorce cases. High Court (Civil Division 8), Kuala Lumpur, despite its 'specialised' area of cases handled, had experienced settling contested divorce cases in a minimum period of one year; similar to its 'non-specialised' counterpart, High Court 1, Georgetown, Pulau Pinang. The two lawyers previously mentioned, who were interviewed in Kuala Lumpur and Johor Bharu, experienced the minimum period of 2 years for contested divorce cases to be settled in the High Court, Kuala Lumpur and the minimum period of one year in the High Court, Johor Bharu respectively.

4.3.2. (b) Maximum period for disposing off contested divorce cases

In general, the maximum period of contested divorce cases to be finally disposed off in the High Court may be unlimited. High Court 3 Ipoh and High Court, Muar managed to dispose off contested divorce cases within a maximum period of two years, while High Court 1, Georgetown, Pulau Pinang took a maximum period between 2 to 3 years in so doing. Similar to High Court 1, Georgetown, Pulau Pinang, High Court, Taiping also experienced the maximum period of 3 years to settle contested divorce cases in its court. High Court (Civil Division 8), Kuala Lumpur, despite its 'specialised' area of cases

handled, experienced the maximum period of 2 years in finally disposing off contested divorce cases in its court; a maximum period similar to its 'non-specialised' counterparts; High Court 3, Ipoh and High Court, Muar. Ironically, High Court, Johor Bharu took the maximum period of one and a half years, a maximum period lesser to the 'specialised' High Court (Civil Division 8), Kuala Lumpur. High Court 3, Shah Alam experienced the longest maximum period, among High Courts visited, in disposing off constested divorce cases in its court i.e. 3 to 4 years.

Of the two lawyers previously mentioned, who were interviewed in Kuala Lumpur and Johor Bharu, Lawyer A experienced the maximum period between 5 –6 years for contested divorce cases to be settled in the High Court, Kuala Lumpur, while Lawyer B experienced a maximum period of 5 years in the High Court, Johor Bharu. These maximum periods experienced by the two lawyers seemed to contradict what the two Deputy Registars had stated in their respective High Court, as far as maximum period for settling contested divorce cases in their courts are concerned. It is seen to be a huge difference between one and a half year to 2 years maximum period taken to dispose off contested divorce cases as stated by the Deputy Registrars High Court 2, Johor Bharu. and High Court (Civil Division 8), Kuala Lumpur, if compared to 5 to 6 years maximum period experienced by the two lawyers. Perhaps, the experience of Lawyer B relating to the maximum period the High Court took to settle the contested divorce was not the experience of High Court 2, Johor Bharu but other three High Courts in Johor Bharu. Nevertheless, as far as the experience of Lawyer A is concerned, there is only a single court hearing family cases in Kuala Lumpur since 1st November, 1999. [243]

[243] High Court (Civil Division 4), Kuala Lumpur is a specialised court for hearing family cases since 1st November, 1999. The family cases in High Court (Civil Division 4), Kuala Lumpur were then transferred to be heard in High Court (Civil Division 8), Kuala Lumpur on 1st June, 2002 until now ; source obtained from Deputy Registrar, High Court (Civil Division 8), Kuala Lumpur when he was interviewed on 15th April, 2004.

4.4 Factors for Delay in Disposing Divorce Cases

4.4.1. From the Deputy Registars' or Senior Assistant Registrar's point of view

(a) Documents are not in order

This delaying factor was experienced by four High Courts; High Court 1, Georgetown, Pulau Pinang, High Court, Muar, High Court, Kuala Terengganu and High Court 3, Ipoh.

From the experience of High Court 1, Georgetown, Pulau Pinang and High Court 3, Ipoh, in 'non-contested' divorce cases, sometimes documents presented for joint petitions were not in order as required by the Divorce and Matrimonial Proceedings Rules 1980, LRA.

The Deputy Registrar, High Court 3, Ipoh illustrated this with an example. One example is when parties did not file a particular form in the order as required in the Divorce and Matrimonial Proceedings Rules 1980, LRA. There were cases where lawyers for parties in joint petitions left out paragraphs 7 and 8, of Form 3 in the Divorce and Matrimonial Proceedings Rules 1980, LRA. This would result in the judge giving an order for parties to file an amended petition and another trial date would then be given, thus contributing to delay. Nevertheless, in line with the amendment made to the Rules of High Court, 1980 where Order 1A was inserted [244], the current practice of the judge in High Court 3, Ipoh is to use his discretionary power in hearing the non-amended petition on the day of the hearing without requiring the joint petition to be amended on a later date. [245]

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[244] Order 1A, rule 1 of the Rules of High Court, 1980 provides that;
"In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein."

[245] Statements made by Deputy Registrar, High Court 3, Ipoh, Tuan Roslan Hamid on Tuesday, 28th December, 2004, at his office.

As for High Court 1, Georgetown, Pulau Pinang, examples of documents were not in order include the following; [246]

- in joint petition cases, divorcing couples with children, failed to file in Statement as to Arrangements for Children as in Form 4 of the Divorce and Matrimonial Proceedings Rules 1980,LRA
- in contested and joint petition cases, one party failed to file in Direction for Trial

(b) Documents, such as divorce petition, could not be served on the respondent.

This delaying factor was equally mentioned by three High Courts; High Court, Kota Bharu, High Court Kuala Terengganu and High Court, Muar. From the experience of High Court, Kota Bharu, the failure to serve a divorce petition was either due to the fact that the respondent had moved out from the last known address or was residing abroad at the time of the service.

(c) Lawyers asked for their cases to be postponed

This delaying factor was experienced by three High Courts; High Court (Civil Division 8), Kuala Lumpur, High Court 2, Johor Bharu and High Court, Taiping.

However, before any request for postponement is granted, the High Court will carefully scrutinise the reasons for such postponement, to see whether they are genuine. [247]

[246] Interview with Deputy Registrar, High Court 1, Georgetown, Pulau Pinang, Tuan Zainal L. Salleh on Tuesday, 21st September, 2004, at his office.

[247] Information obtained from an interview with Tuan Mohamad Haldar, Deputy Registrar, High Court 2, Johor Bharu on Tuesday, 12th October, 2004, at his office.

(d) One party failed to appear in court

This delaying factor was equally shared by 4 High Courts; High Court (Civil Division 8), Kuala Lumpur, High Court 1, Georgetown, Pulau Pinang, High Court 3, Ipoh and High Court, Taiping. From the experience of High Court (Civil Division 8), Kuala Lumpur, the party who would usually fail to appear in court was the respondent. However, High Court 3, Ipoh, experienced either one of the parties that had failed to appear in court; so it could be the respondent or the petitioner as well. While in High Court 1, Georgetown, Pulau Pinang, this factor was specifically present in 'non-contested divorce' cases where both parties were required to be present in court.

(e) Witness did not appear in court on the date of the trial

In High Court, Muar, for example, there were divorce cases which were delayed due to the non-appearance of the witness called on the trial date.

(f) Ancillary claims

Ancillary claims, such as custodial rights and claims over joint properties, put forward by parties were proven to be one of the factors which contributed to the delay in disposing divorce cases. This was experienced in High Court 1, Georgetown, Pulau Pinang and High Court 3, Ipoh.

There was one 'contested divorce' case in High Court 3, Georgetown, Pulau Pinang where parties were divorced by end of 2001 but by end of 2004, their ancillary claims i.e. issues on maintenance and custodial rights were still not finalised in the court. As at 21st September 2004, when the Deputy Registar High Court 1, Georgetown, Pulau Pinang was interviewed, the next hearing date for ancillary claims of that case was in November, 2004.

There was another 'contested divorce' case in High Court 3, Georgetown, Pulau Pinang where the divorce petition was made on 5th November 2001. After undergoing all the related procedures such as service of notice of trial and service of notice of hearing on the respondent, the case was finally heard on 31st March 2003, when the divorce decree was granted despite the non-appearance of respondent in court. However, as at 21st September 2004, when the Deputy Registrar High Court 1, Georgetown, Pulau Pinang was interviewed, the case was still pending in court since their ancillary claims were not yet settled. [248]

(g) Parties asked for more time to attempt further negotiation outside court

From the experience of High Court 2, Johor Bharu, in 'contested divorce' cases, the period those parties would take to attempt further negotiation ranged from 2 weeks to 3 months.

(h) Transfer of Judge

A judge who was transferred to a high court in another territorial jurisdiction would usually attempt to continue hearing cases that he had partially conducted in his earlier court, which is in another territorial jurisdiction. This would inevitably contribute to the delay of cases he had to hear in the court he was newly attached to. [249]

[248] Information obtained from an interview with Tuan Zainal L.Salleh, Deputy Registrar, High Court 1, Georgetown, Pulau Pinang on Tuesday, 21st September, 2004, at his office.

[249] Information obtained from an interview with Tuan Mohamad Haldar, Deputy Registrar, High Court 2, Johor Bharu on Tuesday, 12th October, 2004, at his office.

(i) Judges on Leave

Although this factor did not form the major factor for delay, it was still acknowledged to have a share in the delay of disposing divorce cases as highlighted by the Deputy Registrar, High Court, Muar and the Senior Assistant Registrar, High Court, Taiping.

4.4.2. From the family law practitioners' point of view

(a) The court registry's factor.

Lawyer B mentioned this as a major factor in High Court, Johor Bharu specifically. According to Lawyer B, if there is a backlog of cases in a particular court registry, family cases need to take turn on the queue. The backlog of cases is governed by the availability of court staff, judges and court's time. The number of court staff and also the judges is insufficient to tackle this problem.

Lawyer B also added that delay could also be contributed by the fact of who holds the administrative position. It depends on how the senior Judge, the Deputy Registrar and the Senior Assistant Registrar ensure that their subordinates do their work.

(b) The judges' factor.

According to Lawyer B, generally, judges nowadays, are responsive, efficient and hardworking. Nevertheless, sometimes they are caught in other administrative commitments, which are beyond their control and would inevitably affect their schedules in hearing cases on the days concerned.

(c) The absence of either parties or witnesses on the trial date.

This is a factor discussed by Lawyer B. Delay can also be contributed by the absence of the witnesses and / or one party to the case on the day of hearing. In some cases, when the court postponed a particular case for many times, the witness refused to come anymore on the next date so postponed. Delay may also occur when a subpoena was filed in court and was then given to the police for carrying out service. Sometimes, there was a delay in serving such subpoena on the relevant witness.

(d) Either the court's or the lawyer's timetable is not free.

Lawyer A was the one to speak about either the court's timetable or even the lawyer's timetable that could not allocate earlier dates for trials to take place. Either the non-availability of the court's time or the lawyer's time or both will have a share in delaying a divorce case from being expeditiously settled in court.

(e) Parties asked for more time to attempt further negotiation outside court

Lawyer A talked about this factor as experienced in High Court, Kuala Lumpur. This factor is the same delaying factor expressed by the Deputy Registar High Court 2, Johor Bharu. This factor appears to exist in High Courts in urban areas like Kuala Lumpur and Johor Bharu. Perhaps it is influenced by two possible facts;

- it is assumed that there are more educated people in urban areas, and/or
- people in urban areas may be wealthier than those in rural areas, with more joint properties to form one of the matters for further negotiation

4.5 Statistics of divorce cases and other civil cases in some High Courts visited

It is important to reiterate that there were limitations in obtaining statistics of family cases registered, disposed off and were still pending, from year 2000 until the latest month of year 2004. In the years stated earlier, some courts experienced some changes in their internal court structures [250] while some courts witnessed changes in the persons holding the positions of Deputy Registrars or Senior Assistant Registrars [251] that may indirectly affect the record-keeping of such statistics. In addition, the High Courts visited could not provide the statistics of cases which could be categorised as family cases, for example cases relating to claims of maintenance and /or custodial rights not involving divorce since they are only required to submit annual statistics of cases in two categories, civil and criminal cases, to the Palace of Justice in Putrajaya. Therefore, with all the limitations, this subtopic will only examine statistics of divorce cases registered, disposed off and were still pending, from year 2000 until the latest month of year 2004, in selected High Courts.

There are four questions that need to be answered in analysing the said statistics:

i) Did divorce cases form the majority of civil cases registered in the High Court?

ii) Were there delays in disposing divorce cases in the High Court?

[250] For example, prior to year 2003, there were 5 High Courts in Shah Alam and all these five High Courts heard all types of civil and criminal cases. However, from year 2003 onwards, High Courts that heard civil cases were separated from High Courts that heard criminal cases. Beginning from year 2003, High Courts 1, 3 and 4 heard civil cases only while High Courts 2 and 5 were specifically meant for criminal cases. In addition, one more High Court was established by the end of year 2004 i.e. High Court 6, which only heard criminal cases; source obtained from an interview with Puan Asha Hoe, Senior Assistant Registrar, High Court 3, Shah Alam, on Tuesday, 1st February, 2005.

[251] For example, as at 28th February, 2005,

- the Deputy Registar, High Court 1, Georgetown, Pulau Pinang, and Deputy Registrar, High Court 2, Johor Bahru, who were interviewed on 21st September, 2004 and 12th October, 2004 respectively were promoted as Session Courts' judges at the Sessions Court, Georgetown, Pulau Pinang.
- the Senior Assistant Registrar, High Court, Kota Bharu, who was interviewed on 10th June, 2004 was transferred to the Magistrates' Court, Kuantan, Pahang to act as a Magistrate.

Some Deputy Registrar were still new to the job, for example, when the Deputy Registrar High Court 3, Ipoh was interviewed on Tuesday, 28th December, 2004, he had just taken the position for one year and it would be an extra effort on him to compile the statistics required in the preceding years.

Since the statistics referred to were annual statistics, the meaning of delay here is confined to divorce cases that were still pending settlement by the end of a one-year period.

iii) Were there delays in disposing civil cases other than divorce in the High Court?

iv) If there were delays in disposing civil cases other than divorce in the High Court, were divorce cases also caught by the same delay?

4.5.1. High Court , Georgetown, Pulau Pinang

From year 2000 until 31st August, 2004 divorce cases seemed to consistently form the majority of civil cases registered in the High Court, Georgetown; with more than 50% each year. [252]

Year 2000 until year 2002 showed majority of divorce cases were settled, with only 1% to 2% [253] cases were still pending by the end of each year. Although there were more divorce cases which were pending by the end of year 2003, this was reflected by the most number of divorce cases registered in 2003 compared to the preceding 3 years.[254]

As at 31st August, 2004, despite having the least number of divorce cases registered in 2004 (512 divorce cases) if compared to the preceding 4 years, the highest percentage of cases pending settlement was recorded (389 cases,

[252] Divorce cases formed 53% (666 cases out of 1246 civil cases registered) of civil cases which were registered in year 2000. Divorce cases formed 53% (735 cases out of 1398 civil cases registered) of civil cases which were registered in year 2001. Divorce cases formed 51% (767 cases out of 1493 civil cases registered) of civil cases registered in year 2002. Divorce cases formed 52% (812 cases out of 1564 civil cases registered) of civil cases which were registered in year 2003. As at 31st August, 2004, divorce cases formed 51% (512 cases out of 995 civil cases registered) of civil cases registered; source obtained from the Deputy Registar, High Court 1, Georgetown, Pulau Pinang, one week after an interview with him on 21st September, 2004.

[253] In year 2000, out of 666 divorce cases registered, only 1% (5 cases) of such cases were still pending settlement by the end of that year. In year 2001, out of 735 divorce cases registered, only 1% (10 cases) of such cases were still pending settlement by the end of that year. In year 2002, out of 767 divorce cases registered, only 2% (15 cases) of such cases were still pending settlement by the end of that year.; ibid.

[254] In year 2003, out of 812 divorce cases, 14% (114 cases) of such cases were still pending settlement by the end of that year; ibid.

representing 76%). As at 31st August, 2004, 123 divorce cases were settled, representing 24%, which indicated the worst percentage of divorce cases settled if compared to the preceding 4 years. Nonetheless, it should be reminded here that these percentages showed the statistics of divorce cases for a period of 8 months and not one year, as in the preceding 4 years.

Between the years 2000 until 2003, there were constant increases in percentages and number of civil cases, other than divorce, which were still pending by the end of each year. [255] As at 31st August, 2004, despite having the least number of civil cases, other than divorce, registered if compared to the preceding 4 years (483 civil cases, other than divorce, were registered as at 31st August, 2004), a high percentage of cases pending settlement was still recorded (72%). However, it should be similarly noted here that this percentage showed the statistics of civil cases, other than divorce, over a period of 8 months and not one year, as in the preceding 4 years.

Based on the above statistics, from year 2000 until year 2003, even though there were delays in the disposition of civil cases other than divorce, it is fair to say that divorce cases were not caught by such delays. However, as at 31st August, 2004, there were delays in disposing both types of cases; divorce cases and other civil cases. It is worthy to note that the "delay" period, here as shown in the statistics, is confined to one year and not a period lesser than that. If the delay is seen in months, lesser than one year, which could be the maximum of 11 months and 30 days, then

[255] By the end of year 2000, out of 580 civil cases other than divorce registered, there were 106 cases (18%) that were still pending settlement. By the end of year 2001, out of 663 civil cases other than divorce registered, there were 224 cases (34%) that were still pending settlement. By the end of year 2002, out of 726 civil cases other than divorce registered, there were 411 cases (57%) that were still pending settlement. By the end of year 2003, out of 752 civil cases other than divorce registered, there were 551 cases (73%) that were still pending settlement.; ibid.

there may be delay; and this fact applies to High Courts in other territorial jurisdictions as well.

4.5.2. High Court, Shah Alam, Selangor

Contrary to the High Court, Georgetown, divorce cases registered in years 2003 and 2004 did not represent the majority of civil cases heard in the High Court, Shah Alam. [256]

Although there were delays in disposing some divorce cases by the end of each year in year 2003 and year 2004, the percentages and number of such divorce cases are relatively small [257], if a comparison is made with other civil cases.

By comparing divorce cases with other civil cases registered in year 2003, the percentage and the number of civil cases other than divorce, which were still pending settlement by the end of the year, seems to be greater than that of divorce cases. [258] By relying on the year 2004-statistic so obtained, it appears that there were no civil cases other than divorce that were pending settlement by the end of that year. [259] Nevertheless, it is opined that the figures shown in the year 2004-statistic may be inaccurate due to the following reasons;

a) High Court, Shah Alam only provided the number of civil cases other than divorce registered for a particular year (and this also applies to divorce cases as well). It could not provide the number of such cases carried forward from years

[256] Divorce cases formed 12% (705 cases out of 6014 civil cases registered) of civil cases which were registered in year 2003. Divorce cases formed 11% (725 cases out of 6657 civil cases registered) of civil cases which were registered in year 2004; source obtained from Senior Assistant Registrar, High Court 3, Shah Alam, Selangor, three days after an interview with her on Tuesday, 1st February, 2005.

[257] In year 2003, out of 705 divorce cases registered, only 6% (43 cases) of such cases were still pending settlement by the end of that year. While in year 2004, out of 725 divorce cases registered, only 3% (24 cases) of such cases were still pending settlement by the end of that year; ibid.

[258] By the end of year 2003, out of 5309 civil cases other than divorce registered, there were 3956 cases (25%) that were still pending settlement; ibid.

[259] By the end of year 2004, out of 5932 civil cases other than divorce registered, and 1353 cases, of the same category, carried forward from year 2003 (a total of 7285), 7955 were settled; ibid.

prior to 2003 (nevertheless, cases carried forward from previous years, other than year 2003, were included in the record of cases disposed off in year 2004).

b) By referring to the number of civil cases other than divorce disposed off by the end of year 2004, there is a possibility of inaccuracy in the said statistic. To support this contention, let's see the discrepancies in the number of cases registered and number of cases disposed off in year 2004 as shown below ;

RECORD OF CIVIL CASES OTHER THAN DIVORCE REGISTERED AND DISPOSED OFF FROM 2003/2004

MATTERS IN YEAR 2004 IN HIGH COURT, SHAH ALAM	NUMBER OF CIVIL CASES OTHER THAN DIVORCE
(a) Number of civil cases, other than divorce, carried forward from year 2003	1353 cases
(b) Number of cases, other than divorce, registered in year 2004	5932 cases
(c) Total of (a) and (b)	7285 cases
(d) Number of cases, other than divorce, disposed off by the end of year 2004	7955 cases
(e) Number of cases, other than divorce, carried forward from previous year/years (other than year 2003) {(d) – (c)}	670 cases

The above finding indicates that there were delays in disposing off civil cases other than divorce, in the year/years preceding 2003, which cannot be clearly shown by the statistics due to the non-availability of data on actual number of cases carried forward from previous years. The above finding also serves as an example to the inaccuracies of statistics provided by other High Courts as well, where most High Courts visited could not provide the number of cases carried forward from previous

years. They could only provide the number of cases, which were still pending in the immediate preceding year that would then constitute cases to be carried forward to the following year.

Based on the statistics obtained from the High Court, Shah Alam, in years 2003 and 2004, even though there were delays in the disposition of civil cases other than divorce, divorce cases were not caught by such delays. Although divorce cases did not form the majority of civil cases registered in years 2003 and 2004 in the High Court, Shah Alam, it is submitted that judges in the High Court, Shah Alam adopted the same practice as judges in High Court, Georgetown, in that they gave priority to dispose off divorce cases, compared to other civil cases.

4.5.3. High Court, Taiping, Perak and High Court, Muar, Johor

High Courts Taiping, Perak and Muar, Johor would represent High Courts with smaller number of civil cases registered, if compared with greater number of civil cases registered each year in High Court, Georgetown, Pulau Pinang and High Court, Shah Alam, Selangor.

The similarity between High Court, Taiping and High Court, Muar is that, from year 2000 until year 2004, divorce cases formed the majority of civil cases registered in both courts; with more than 50% each year.[260]

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(a) The following statistics explain about divorce cases registered in High Court, Taiping, Perak, from year 2000 until 30th November, 2004.
In High Court, Taiping, divorce cases formed 69% (93 cases out of 135 civil cases registered) of civil cases which were registered in year 2000. Divorce cases formed 60% (70 cases out of 117 civil cases registered) of civil cases which were registered in year 2001. Divorce cases formed 65% (69 cases out of 107 civil cases registered) of civil cases which were registered in year 2002. Divorce cases formed 71% (84 cases out of 119 civil cases registered) of civil cases which were registered in year 2003. As at 30th November, 2004, divorce cases formed 70% (90 cases out of 129 civil cases registered) of civil cases registered; source obtained from Senior Assitant Registrar, High Court, Taiping, Perak in an interview with him on Tuesday, 11th January, 2005.

(b) The following statistics explain about divorce cases registered in High Court, Muar, Johor, from year 2000 until 30th September, 2004.
In High Court, Muar, divorce cases formed 58% (244 cases out of 424 civil cases registered) of civil cases which were registered in year 2000. Divorce cases formed 56% (252 cases out of 451 civil cases registered) of civil cases which were registered in year 2001. Divorce cases formed 61% (331 cases out of 544 civil cases registered) of civil cases which were registered in year 2002. Divorce cases formed 67% (341 cases out of 512 civil cases registered) of civil cases which were registered in year 2003. As at 30th September, 2004, divorce

In High Court, Taiping, from year 2000 until year 2003, there were no delays in disposing off divorce cases.[261] However, as at 30th November, 2004, out of 90 divorce cases registered, there were 27 cases (30%) which were still pending settlement.

High Court, Muar also managed to dispose off most of its divorce cases each year, from year 2000 until year 2002. [262] Although there was a delay in disposing divorce cases by the end of year 2003, it is opined that the percentage and the number of such cases were relatively small. [263] As at 30th September, 2004, greater percentage and number of divorce cases still pending settlement were recorded in High Court, Muar, if compared to year 2003. [264] However, it should be noted here that this percentage and number of cases in year 2004 showed the statistic of divorce cases, over a period of 9 months and not one year, as in the preceding year.

In both High Courts, Taiping and Muar, there were delays in disposing civil cases other than divorce by the end of some of the years between 2000 until 2004. The delays kept increasing every year, in percentages and number of cases, in both High Courts. [265]

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cases formed 53% (144 cases out of 272 civil cases registered) of civil cases registered; source obtained from Deputy Registrar, High Court, Muar, Johor in an interview with her on Wednesday, 6th October, 2004.

[261] By the end of year 2000, all 93 divorce cases registered were disposed off. By the end of year 2001, all 70 divorce cases registered were disposed off. By the end of year 2002, all 69 divorce cases registered were disposed off. By the end of year 2003, all 84 divorce cases registered were disposed off; source obtained from Senior Assitant Registrar, High Court, Taiping, *op. cit.*

[262] By the end of year 2000, all 244 divorce cases registered were disposed off. By the end of year 2001, out of 252 divorce cases registered , 249 (99%) of such cases were disposed off. By the end of year 2002, out of 331 divorce cases registered , 315 (95%) of such cases were disposed off; source obtained from Deputy Registrar, High Court, Muar, *op. cit.*

[263] By the end of year 2003, out of 341 divorce cases registered , 276 (81%) of such cases were disposed off while 65 (19%) divorce cases were still pending settlement; ibid.

[264] As at 30th September, 2004, out of 144 divorce cases registered, 61 (42%) of such cases were disposed off while 83 (58%) divorce cases were still pending settlement; ibid.

[265]

(a) The following statistics explain about civil cases other than divorce cases registered and disposed off in High Court, Taiping, Perak, from year 2000 until 30th November, 2004.
By the end of year 2000, out of 42 civil cases other than divorce cases registered , 34 (81%) of such cases were disposed off while 8 (19%) cases were still pending settlement. By the end of year 2001, out of 47 civil cases other than divorce cases registered , 31 (66%) of such cases were disposed off while 16 (34%) cases were still pending settlement. By the end of year 2002, out of 38 civil cases other than divorce cases registered , 22 (58%) of such cases were disposed off while 16 (42%) cases were still pending settlement. By the end of

Similar to the positions in High Courts, Georgetown and Shah Alam, even though there were increasing delays in the disposition of civil cases other than divorce in High Courts, Taiping and Muar, divorce cases were not caught by such delays. It is observed that there was equal practice of judges in all these four High Courts; Georgetown, Shah Alam, Taiping and Muar; in that priority was given to divorce cases, as far as the disposition of civil cases in the High Courts are concerned.

4.6 Conclusion

It is observed that some internal administrative variants in the High Courts visited were aimed at overcoming their internal shortcomings, for example the insufficient number of judges.

As elaborated earlier, there were various external factors (those related to parties to the case, lawyers and witnesses) and internal factors (those related to High Courts' registries and judges themselves) that influenced the minimum and maximum period of disposing off divorce cases from the court's lists of civil cases.

Pertaining to the disposition of civil cases in some of the High Courts, there were serious delays, in percentages and number of cases, in some of the years between 2000 and 2004. Although, in some years between 2000 and 2004, there were also delays in disposing

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year 2003, out of 35 civil cases other than divorce cases registered , 9 (26%) of such cases were disposed off while 26 (74%) cases were still pending settlement. As at 30th November, 2004, out of 39 civil cases other than divorce cases registered , 8 (20.5%) of such cases were disposed off while 31 (79.5%) cases were still pending settlement.

(b) The following statistics explain about civil cases other than divorce cases registered and disposed off in High Court, Muar, Johor from year 2000 until 30th September, 2004.
By the end of year 2000, out of 180 civil cases other than divorce cases registered , 144 (80%) of such cases were disposed off while 36 (20%) cases were still pending settlement. By the end of year 2001, out of 199 civil cases other than divorce cases registered , 151 (76%) of such cases were disposed off while 48 (24%) cases were still pending settlement. By the end of year 2002, out of 213 civil cases other than divorce cases registered , 141 (66%) of such cases were disposed off while 72 (34%) cases were still pending settlement. By the end of year 2003, out of 171 civil cases other than divorce cases registered , 42 (25%) of such cases were disposed off while 129 (75%) cases were still pending settlement. As at 30th September, 2004, out of 128 civil cases other than divorce cases registered , 9 (7%) of such cases were disposed off while 119 (93%) cases were still pending settlement.

off divorce cases in the High Courts visited, such cases were not caught in delays as serious as that encountered by other civil cases.

CHAPTER 5

5.1 Introduction

This chapter will briefly look at the history of the growth of alternative dispute resolution (ADR) and/or mediation in the United States, due to its rapid growth there as early as 20th century. It is believed that United States is the first country to institutionalise its ADR methods and/or mediation. This chapter will then continue to explore the development of mediation in Australia and Singapore, with emphasis on mediation in family disputes. As for the development of mediation in Malaysia, only two institutions will be studied; the Bar Council's Malaysian Mediation Centre (hereinafter MMC), which offers mediation service for civil cases with certain fees charged and the Selangor Shariah Courts, which conduct *sulh* or Islamic mediation as a free-of-charge service in its pre-trial procedure.

5.2 The History of ADR and/or mediation in the United States

It is not possible to comprehensively explain the history of the growth of ADR and/or mediation in the United States since it is a long and rich history that deserves a topic on its own.[266] This subtopic will only briefly state selected events in that long history to serve an overview of the origin of ADR and/or mediation.

Mediation may have come to the United States formally via religious colonies; whose charters prescribed mediation of disputes that arose among members of the colony. A trusted member of the congregation would help members resolve their disputes in a manner consistent with the colony's religious beliefs.[267]

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[266] In fact, no one has yet written a comprehensive history of dispute resolution movement in the United States; see http://www.lexis.com/research, Hensler, Deborah R., 'Our Courts, Ourselves : How the Alternative Dispute Resolution Movement is Reshaping Our Legal System', 108 Penn St. L. Rev. 165, Summer 2003, at p. 167 (copyright © 2003 Dickinson School of Law; Dickinson Law Review).

[267] Leeson, Susan M., and Johnston, Bryan M., Ending it : Dispute Resolution in America ; Descriptions, Examples, Cases and Questions, 1998, at p. 134.

Although mediation has been used informally since colonial times, the most institutional support for it in the United States has come in the 20th Century. In 1926, the American Arbitration Association (AAA), a private sector dispute resolution organisation, began offering mediation and arbitration services to disputants who preferred private, voluntary resolution over public litigation. In 1934, Congress created the National Mediation Board to mediate railway dispute, then expanded the Board's jurisdiction to include mediation of airline disputes as well. In 1947, Congress created the Federal Mediation and Conciliation Service (FMCS) to provide mediation services for disputes relating to labour and management. The state legislatures were also active in enacting statutes that required mediation of labour-management disputes and in providing mediation service for the disputants.[268]

The conceptual beginning of the contemporary ADR movement may be traced to the Pound Conference (named after Roscoe E Pound) convened by the American Bar Association in 1976.[269] The Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in Saint Paul led an interest in current court reform activity that the creation of alternatives to courts would serve the interests of the judiciary by reducing its workloads while at the same time alleviating access to justice problems by providing efficient, less costly, and less adversarial forums.[270]

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[268] Ibid.

[269] Jacqueline M. Nolan-Halley however stated that this Pound Conference in Saint Paul, Minnesota, was actually convened by the former Chief Justice Warren Burger. Academics, members of the judiciary and public interest lawyers joined together to find new ways of dealing with disputes. Some of the papers that emerged from this conference such as Professor Frank Sander's classic, 'Varieties of dealing with disputes. Some of the papers that emerged from this conference such as Professor Frank Sander's classic, 'Varieties of Dispute Resolution', formed the basic understanding of dispute resolution today. Professor Frank Sander proposed the idea of a multidoor courthouse where individual disputes would be matched to appropriate processes such as mediation, arbitration, fact finding or malpractice screening panels. The American Bar Association adopted his idea and established three multidoor courthouses in Houston, Texas, Tulsa, Oklahoma and the District of Columbia. The success of these programs has led other courts to begin similar programs; Nolan-Halley, Jacqueline M., Alternative Dispute Resolution in a Nutshell, 2nd ed., 2001, at pp. 5-6.

[270] Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at pp. 5-6.

During the 1980s, major public and private institutions incorporated dispute resolution into their regular business at an impressive rate. Hundred of courts, thousands of schools[271], many state governments and scores of communities across the United States began routinely resolving both complex and simple disputes using the tools of dispute resolution; one of them was mediation.[272]

In the latter years of the 20th Century, mediation was either recommended or required by a court order. Court increasingly ordered couples seeking dissolution of their marriage to mediate issues such as child custody, visitation rights and child and spousal support. Any agreement reached in mediation would be submitted to the court as a recommendation for its final order.[273]

The current ADR movement enjoys wide support from the American Arbitration Association, the American Bar Association, legal educators, corporate counsels, federal and state legislators and the media. Mechanisms for alternative dispute resolution are being established throughout the United States, with well over 150 minor dispute mediation centres in almost 40 states. Today, most courts in the United States promote the use of alternative dispute resolution programmes particularly in mediation and arbitration.[274] Most state and federal bar associations today have ADR committees. Law school have gradually

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[271] Hundred of schools have peer mediation programs and dispute resolution is part of Michigan's compulsory school curriculum; see Golberg, Stephen B. and Sander, Frank E.A. and Rogers, Nancy H. , *op. cit.* ,at p.10.

[272] See http://www.lexis.com/research, Fn'Piere, Patrick and Work, Linda, 'On the Growth and Development of Dispute Resolution', 81 Kentucky Law Journal, 959, 1993, at p. 959.

[273] See Leeson, Susan M., and Johnston, Bryan M., *op. cit.*, at p.134.
In Texas, for example, the Texas Alternative Dispute Resolution Procedures Act (Texas ADR Act), which was enacted in 1987, encouraged peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship. The Act authorised each court, on its own motion, or the motion of any party, to refer a pending dispute to an ADR procedure, such as mediation. In the implementation of Texas ADR Act, Dallas County Court has been at the forefront in implementing family mediation. Beginning in September 1987, four out of seven Dallas County Family Court Judges began mandating mediation in most divorce and modification cases involving custody and visitation issues. In 1988, the other three judges began making regular referrals to mediation. Since the Texas ADR Act became effective, over 400 contested cases a year had been mediated. Of these cases, there was over a 60 per cent agreement rate; see Greenspan, Amy L. (ed.), Handbook of Alternative Dispute Resolution, 2nd ed., 1990, at pp.172-173 and p.9.

[274] Alaska, California, Connecticut, Illinois, Louisiana, Maine, Massachusetts, Michigan, New York, Ohio, Oregon and the District of Columbia each has a small claims court that refers cases to mediation or arbitration. Several others also offer ADR programmes at higher court levels; see Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p.6.

been adding ADR to the curriculum and now a majority of law schools offer one or more ADR courses or specialised courses in areas such as mediation and negotiation. Several law reviews are devoted solely to the study of alternative dispute resolution. Similar developments have occurred in graduate and business schools.[275]

5.3 Development of Mediation in Australia (emphasis on family disputes)

There are abundance of mediation services offered by various organisations in Australia. However, this subtopic is confined to the development of mediation in family disputes only. Similar to the history of the growth of ADR and/or mediation in the United States, the growth of ADR and/or mediation in Australia resulted from continuous efforts by various organisations which, despite playing different roles, had shared the same interest in mediation. Australia's wind of change for ADR and/or mediation commenced in mid 1980s.[276]

The Noble Park Family Mediation Centre in Victoria was established in 1985 (known as Family Conciliation Centre), while UNIFAM Family Mediation Centre in New South Wales began in 1986.[277] In 1989, the government, through the Family Services Program, began funding community-based mediation centres to provide family mediation as a distinct service for separating and divorcing couples.[278] Numerous private family

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[275] Nolan-Halley, Jacqueline M., *op. cit.*, at pp.6-7.

[276] See Bagshaw, Dale, 'Mediation of Family Law Disputes in Australia', (August 1997) Vol. 8 ADRJ 182, at p. 182.

[277] Bagshaw, Dale, *op. cit.*, its endnote 2, at p. 188.
But Astor and Chinkin stated that the Family Mediation Centre was instituted in New South Wales in 1985, and not in 1986 as held by Bagshaw. Astor and Chinkin further explained that the New South Wales Family Mediation Centre was instituted by the Family Advancement Resources Co-perative, which was an offshoot of UNIFAM (an organisation which have been involved in marriage counseling for many years) ; see Astor, Hilary and Chinkin, Christine M., *op. cit* . ,at p.4.

[278] Bagshaw, Dale, *op. cit.*, at p. 182. By 1997, there were 17 funded community-based family mediation services in Australia under the auspices of three peak bodies – Centacare, Relationships Australia and Family Services Australia; see Bagshaw, Dale, *op. cit.*, at pp. 182-183.

mediators were also available, some with legal qualifications and others with social science or other specialist qualifications.[279]

There was also a growing pressure for the introduction of more alternative processes within formal court structures. Even politicians / the government in Australia expressed the same enthusiasm. For example, the Prime Minister Hawke stated before the 1990 election that if his government were re-elected, it would introduce legislation to provide a statutory framework for ADR in federal courts.[280] This promise was then honoured by the government's introduction of the Courts (Mediation and Arbitration) Act 1991. The Act would allow the Family Court and the Federal Court of Australia[281] to offer litigants the options of mediation and arbitration in addition to the methods of ADR they already offered.[282] With the passing of the Act, the courts would then play their role to 'develop those forms of alternative dispute resolution in a manner best suited to their jurisdictions by making rules of court to define and prescribe procedures.'[283]

The Courts (Mediation and Arbitration) Act 1991 introduces amendments to the Family Law Act 1975 which allow mediation to be requested by a parent, a child or a party to a marriage before proceedings under the Act have commenced. The court is also given power to refer proceedings to mediation. Mediation is not available for principal relief. Where mediation is requested, it is subject to the availability of mediation at the relevant registry and to a determination that the dispute is suitable for mediation. [284]

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[279] See Astor, Hilary and Chinkin, Christine M., *op. cit.* , at p.248.

[280] He made a statement on 20th March 1990 and it was then reported in the Australian Law News, Vol. 25 No. 4, 1990, at p.18; this was cited in Astor, Hilary and Chinkin, Christine M., *op. cit.* , at p. 1.

[281] Even prior to formal legislative power to refer matters to mediation, the Federal Court had commenced a pilot ADR programme from September 1987 which operated as a pilot study in the Principal Registry in Sydney; see Sordo, Bridget, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial', (February 1994) Vol.5, ADRJ, 62, at p. 63.

[282] Astor, Hilary and Chinkin, Christine M., *loc. cit.*

[283] Ibid, Astor and Chinkin cited Michael Duffy, Attorney General, in his Second Reading Speech of the Courts (Mediation and Arbitration) Bill 1991 (Cth), 5th June 1991.

[284] See Astor, Hilary, and Chinkin, Christine M., *op. cit.*, at p.246.

The legislative framework for the Family Court mediation programme was provided by sections 19A-C [285]of the Family Law Act 1975 and Order 25A of the Family Law Rules introduced as a result of the Courts (Mediation and Arbitration) Act 1991. A one-year pilot mediation programme funded by the Family Court began in February 1992 in the Melbourne and the Dandenong Registries, and from March 1992 in the Adelaide Registry. The Court then extended the pilot programme to the Sydney Registry in November 1993 with some limited services in the Parramatta Registry.[286]

There are three classes of mediators for family disputes as provided by the Family Law Act 1975: court mediators, community mediators and private mediators. They are collectively known as "family and child mediators".[287] A court mediator and a community mediator is subject to an oath of secrecy.[288]

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[285] As at 11th April, 2005, the current provisions are sections 19A, 19AAA, 19AA, 19B, 19BAA and 19BA of the Australian Family Law Act 1975. This source was obtained from http://www.austlii.edu.au/, the website was visited on 18th April, 2005 and it was last updated on 11th April, 2005.

[286] Sordo, Bridget, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial', *op. cit.*, at p.63.

[287] Dickey, Anthony, *op. cit* . , at p. 84.

Section 4(1) of the Family Law Act, 1975 is the interpretation section. Section 4(1) defines each class of mediator, as shown below;
"court mediator" means a person referred to in paragraph (a) of the definition of *family and child mediator* .
"community mediator" means a person referred to in paragraph (b) of the definition of *family and child mediator* .
"private mediator" means a person referred to in paragraph (c) of the definition of *family and child mediator* .

It is further explained in section 4(1) that a"family and child mediator" means
" (a) a person employed or engaged by the Family Court or a Family Court of a State to provide family and child mediation services; or
(b) a person authorised by an approved mediation organisation to offer family and child mediation on behalf of the organisation; or
(c) a person, other than a person mentioned in paragraph (a) or (b), who offers family and child mediation."

The above source was obtained from http://www.austlii.edu.au/ , *op. cit.*

[288] Ibid, Dickey, Anthony, cited section 19K of the Family Law Act 1975. Section 19K states that;

"A court mediator or a community mediator must, before starting to perform the functions of such a mediator, make an oath or affirmation of secrecy in accordance with the prescribed form before a person authorised under a law of the Commonwealth, or of a State or Territory, to take affidavits."

The above section was obtained from http://www.austlii.edu.au/ , *op. cit.*

The Family Court of Australia sponsors and supports a variety of ADR services that are used before proceedings are filed with the court. Disputants are encouraged to use mediation services prior to filling [289]. The services are also available after filling.[290]

The Family Law Reform Act 1995 (Cth), which was implemented on 11th June 1996 [291], referred ADR processes in the Family Court as PDR (Primary Dispute Resolution). [292] Section 14E of the Family Law Reform Act 1995 [293]defines PDR methods as

"procedures and services for the resolution of disputes out of court, including

(a) counseling services provided by family and child counsellors; and

(b) mediation services provided by family and child mediators; and

(c) arbitration services provided by approved arbitrators."

This renaming of ADR processes also serves to emphasise the role these processes have within the Family Court dispute resolution system.[294]

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[289] This relates to section 19A (1) of the Family Law Act, 1975 whereby it states that;
"A person who is:
(a) the parent or adoptive parent of a child; or
(b) a child; or
(c) a party to a marriage;
and who is not a party to proceedings under this Act, may file in the Family Court, or in a Family Court of a State, a notice asking for the help of a mediator in settling a dispute to which the person is a party."

The above section was obtained from http://www.austlii.edu.au/ , *op. cit.*

[290] Sourdin, Tania, 'Legislative Referral to Alternative Dispute Processes', (2001) Vol. 12, ADRJ, 180, at p.184 and see also endnote 12, at p. 193 of her article. See also Dickey, Anthony, *op. cit.*, at pp. 84-85.

The relevant section for this is section 19B (1) of the Family Law Act, 1975. It provides that ;
"The Family Court or a Family Court of a State, may, with the consent of the parties to any proceedings before it under this Act (other than prescribed proceedings), make an order referring any or all of the matters in dispute in the proceedings for mediation by a court mediator."

The above section was obtained from http://www.austlii.edu.au/ , *op. cit.*

[291] Bagshaw, Dale, *op. cit.*, at p. 183.

[292] Sourdin, Tania, 'Legislative Referral to Alternative Dispute Processes', *op. cit.*, at p. 184.

[293] As at 18th April, 2005 when the relevant website, http://www.austlii.edu.au/ was visited, the same wordings of this section were still maintained in the Family Law Act 1975.

[294] Sourdin, Tania, 'Legislative Referral to Alternative Dispute Processes', *loc. cit.*

The Law Societies in Australia were also active in promoting mediation to their members and Australian community as a whole. The New South Wales Law Society[295], for example, piloted Settlement Week 1991 which involved the mediation of the Supreme Court matters awaiting trial between 14th and 18th October 1991. The programme achieved a 65 per cent settlement rate together with considerable savings of time and costs for individual parties and for the Court. [296] In view of the success of the 1991 Settlement Week, another programme was conducted in 1992 involving mediation of 415 matters across four jurisdictions; the Supreme Court, the District Court, the Family Court and the Local Court.[297] Similar effort of Settlement Week or Resolutions Week were conducted in Queensland and Western Australia respectively.[298]

Conferences at the national and international levels were held to further discuss issues relating to family mediation.[299]

Criticisms made to the institution of family mediation acted as catalysts for further evaluations to follow. For example, when feminist groups[300] regarded family mediation was

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[295] The New South Wales Law Society also had formed a Dispute Resolution Committee in 1987. The Committee is comprised of primarily solicitors who are practitioners of ADR and representatives from academia, community justice mediators and the Bar. It aims at considering the impact of ADR on lawyers and promoting ADR to the legal profession; see Astor, Hilary and Chinkin, Christine M., *op. cit.*, at p.3.

[296] Most matters referred to Settlement Week were personal injuries motor vehicle claims (104 out of 235 matters), which achieved a 78 per cent settlement rate; see Sordo, Bridget, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial', *op. cit.*, at p. 69.

[297] Settlement Week 1992 successfully mediated various types of cases including matters related to Family Provision Act and other family law matters, achieving a 65 per cent settlement rate; see ibid.

[298] The Western Australian Law Society initiated Resolutions Week in Western Australia and its pilot programme was held from November 1992 to June 1993 for matters awaiting trial in the Workers Compensation Board, the District Court and the Supreme Court. In Queensland, the first Settlement Week held was from 20th –24th January 1992. The most notable difference of the Queensland Settlement Week was that the project was a joint initiative of the Bar and the Law Society; see Sordo, Bridget, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial', *op. cit.*, at pp. 71-72 for further details.

[299] At the national level, the Inaugural National Family Mediation Conference for example, was held in Adelaide in 1992 and close attention was paid to the issue of mediation and domestic violence. At the international level, the Second International Mediation Conference was held in Adelaide in 1996, which focused on the mediation of disputes involving parties from culturally diverse backgrounds. It was recognised that Western family mediation models promoted in multicultural Australia tend to be inappropriate for people from indigenous, Asian and other communitarian backgrounds; see Bagshaw, Dale, *op. cit.*, at p.184.

[300] Two examples of these feminist groups are the National Committee on Violence Against Women and the National Women's Justice Coalition; see ibid and its endnote 12, at p.188.

potentially hazardous to women, studies were made to evaluate the issues raised by these groups.[301]

Educational institutions in Australia also played an important role in creating awareness of ADR methods. Dispute resolution is increasingly taught in University courses, both as part of legal education and in other disciplines.[302]

5.4 Development of Mediation in Singapore (emphasis on family disputes)

5.4.1 Categories of Mediation Practice in Singapore

Mediation practice in Singapore can be categorised into three; court-connected mediation, private mediation and mediation provided by government agencies and tribunals.[303] In Singapore, the majority of court-connected mediations are court-based, in that they take place in the Subordinate Courts and are part of the Court Dispute Resolution process. A minority of mediations are not court-based and occur outside the judicial system, for example, when cases are referred by the courts to the Community Mediation Centres or the Singapore Mediation Centre.[304] However, all organisations offering mediation in Singapore cannot be sufficiently dealt with in a summary of this type. While

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[301] Bagshaw, Dale, *op. cit.*, at p.184.

For example, in 1994, the result of an evaluation made by the Family Court Mediation Service (FCMS) showed that there was little difference between satisfaction rates for men and women in family mediation.; see ibid and its endnote 13, at p.188. For further details, see Bordow, S. and Gibson, G., 'Evaluation of the Family Mediation Service' , (Research Report, Family Court of Australia, March 1994).

Another South Australian study found that women were more likely than men to see the mediation process as "just"; see ibid and endnote 14, at p. 188. For further details, see Prior, A., 'What Do the Parties Think?"'Relationships Australia (South Australia) Family Mediation Project : A Follow-up Study.

[302] Astor, Hilary and Chinkin, Christine M., *op. cit.*, at p.5. Dispute resolution is being integrated into the teaching of established law subjects and is also being introduced as an optional subject. Consequently a new generation of lawyers will have familiarity with both litigation and alternative methods through their legal education; see ibid.
For more details on ADR in the legal education, see Astor, Hilary and Chinkin, Christine M., 'Dispute Resolution as Part of Legal Education' (1990) Vol.1 No. 4, ADRJ, at pp. 208-224; David, J., 'Integrating Alternative Dispute Resolution (ADR) in Law Schools', (1991) Vol. 2 No. 1, ADRJ, at pp.5-11; Effron, J., 'Breaking Adjudication's Monopoly : Alternatives to Litigation Come to Law Schools', (1991) Vol.2 No.1, ADRJ, at pp.21-31.

[303] See Boulle, Laurence and Teh, Hwee Hwee, , *op. cit.*,at pp.214-250.

[304] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*.at p. 215.

the focus of this subtopic is on the practice of mediation related to family matters, some other mediation institutions will be briefly touched upon to gain an overall picture of Singapore mediation practice.[305]

5.4.2. Court Mediation Centre (CMC)[306]

[to mediate various types of cases within the court]

CMC is a centre that was established within the Subordinate Courts in Singapore in 1994. CMC provides for specialised departments to mediate different kinds of dispute. These departments are [307]

i) Court Dispute Resolution (CDR)

[to mediate civil cases] [308]

ii) Small Claims Tribunal (SCT)

[to mediate a wide range of consumer complaints][309]

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[305] Among the other common law jurisdictions in the Southeast Asia, the courts in Singapore have taken the lead to encourage parties in litigation to consider the mediation option at the preliminary stages of a suit. In this they are following the example set by courts in Australia, the United Kingdom and the United States of America which encourage court attached mediation, and have opened the way for countries in the Asian region to follow suit; PG Lim, 'The Growth and Use of Mediation throughout the World : Recent Developments in Mediation/Conciliation among Common Law and Non-Common Law Jurisdictions in Asia', [1998] 4 MLJ cv, at p.cix.

[306] Or referred to as Court-based Mediation in the Subordinate Courts by Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,see pp.215 and 221.

[307] See Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at pp.50-52 and Lee, Joel Tye Beng, , *op. cit.*, at p.432-433.

[308] CDR commenced with a pilot project spanning the period from 7th June 1994 to 9th July 1994. A total of 43 civil cases were fixed for the project. Among the cases are negligence, contract, landlord and tenant, defamation; see Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p. 51.

A Settlement Judge will act as a mediator and a neutral evaluator in a settlement conference to possibly avoid a full trial. At times, the Settlement Judge may be required to express her tentative views and evaluation of the relative strengths and weaknesses of each party's case from the materials produced and discussions at the settlement conference. Although reference to CDR is voluntary, parties are strongly encouraged to do so. If matters fail to be resolved by CDR, then the case will proceed to trial; see Lee, Joel Tye Beng, *op. cit.*, at p.432.

[309] It was established in 1985. Its aim is to bring the disputing parties to an agreed settlement via an informal hearing by a Referee .The Referee is a Magistrate; Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p. 116.

Small Claims Tribunal plays dual roles; first, the mediatory role and second, if the mediation fails to bring parties to a mutual agreement, SCT proceeds to perform its adjudicatory role by making a binding order. The mediation function is carried out either by the Registrar at the consultation stage, before a hearing date is fixed, or by the Referee at the hearing stage; see Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*,at p. 117.

Cases heard by the Tribunal are confined by statute to certain type of disputes with a certain monetary value as provided by the Small Claim Tribunals Act (Cap 308), which came into operation on 1st February 1985; see Lee, Joel Tye Beng, *op. cit.*, at p.433 and Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p. 115.

iii) Juvenille Court (Family Conferencing) [310]

iv) Magistrate Courts (Magistrate's Complaints) [311]

v) Family Court

[to mediate family court cases]

The Family Court of Singapore as a "One-Stop Service" for families in crisis, as a unified Family Court, was rationalised and established on 1st March 1995.[312] It is a specialised court dealing with all family-related dispute and is a division of the Singapore Subordinate Courts.[313] Since its inception, the Family Court has been conducting mediation for cases involving spousal and child maintenance, enforcement of maintenance orders and family violence. The Court's experience with family mediation has been very encouraging. The Family Court also offers mediation to litigants in divorce cases and the ancillary matters.[314]

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[310] Since its introduction on 30th July 1994, 14 cases were selected for family conferencing. It proved to be fruitful as none of the offenders of these 14 cases had transgressed against the law anymore after their participations in family conferencing; Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*,at p.51.

Family conferencing is based on the theory of re-integrative shaming. The offender, the victim, their families, the teacher/principal of the offender, the Court Prosecutor and the facilitator will meet and discuss the offence, the offender's conduct and how the offence has affected the various parties, in particular, the victim. The facilitator will use her mediation skills to facilitate discussion and guide the process of re-integration of the offender; Lee, Joel Tye Beng, *op. cit.*, at p. 433.

[311] The Magistrate Courts also use mediation to deal with minor criminal matters initiated by private summons. Most of the time, there is some form of relationship between the complainant and the respondent. They are either relatives, ex-spouses, current partners or neighbours; Lee, Joel Tye Beng, *op. cit.*, at p. 433 and Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p.105.

The types of complaints are mainly minor offences such as mischief, causing nuisance, using abusive language, excessive noise and assault, which have been going on for some years in the Subordinate Courts; Lim, Lan Yuan and Liew, Thiam Leng, *op. cit* ., at pp.105 and 51.

There are two levels of mediation for Magistrate's Complaints; before the mention stage and during the mention stage; Lim, Lan Yuan and Liew, Thiam Leng,*op. cit.*,at pp.51-52. The mediator can be the Magistrate or a senior officer or a member of the Court Support Group. With effect from mid-March 1996, the complaints filed have been referred to a mediator instead of the Magistrate for mediation. If the matter is resolved, the Magistrate's role is only to endorse the terms of settlement. If the matter is not settled, the Magistrate will then issue a summons and fix a hearing date; Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p.105.

[312] Divorce and nullity proceedings were previously heard in the High Court of Singapore. With the transfer of divorce cases and other matrimonial causes filed on or after 1st April 1996 to the Family Court, the Family Court is now a "one-stop" centre for the adjudication of all matrimonial and other matters affecting the family. A comprehensive range of services, like mediation, counselling, the Family Law clinic are also provided under one roof; Tan, Puay Boon, *op. cit* ., at p. 168.

[313] The Subordinate Courts of Singapore comprises the District Courts and Magistrate Courts, the Coroner's Court, the Family Court, the Juvenille Court and the Small Claims Tribunal; see Daphne, Hong Fan Sin, 'Doing More with Less : Court Initiatives, Case Reviews & Trial Management, The Singapore Experience', (1999) 28 No. 3 Insaf, 150, at p. 150 and its footnote 1, at the same page.

[314] Tan, Puay Boon, *op. cit.*, at p. 167.

In reality, mediation in the Family Court for cases involving maintenance and spousal violence had taken place much earlier when it was informally carried out in the Subordinate Courts since the 1980s.[315]

When mediation started in the Family Court in 1995, there were no formal legislative provisions for it. Subsequently, in August 1996, the Women's Charter (Amendment) Act 1996 was passed to provide under what is now section 50 (1) of the Women's Charter for the court to refer parties, with their consent, to mediation.[316]

Paragraph 47 of the Subordinate Courts Practice Directions deals with mediations conducted pursuant to section 50 (1) of the Women's Charter. The stated objective is to help the parties reach an agreement or narrow the issues in contention. It provides that lawyers and parties are to be prepared to discuss cases during the mediation. Also, all relevant documents are to be produced if necessary. Such documents include private investigator reports, medical reports, statements from the Housing and Development Board and the Central Provident Fund Board, salary slips, income tax returns and bank and credit card statements.[317]

Mediation is a court-annexed service offered by the Family Court, therefore it charges no cost to the parties.[318] The Family Court provides for a

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[315] See Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*,at p.51 and Lee, Joel Tye Beng, *op. cit.*, at p.432.

[316] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at p.222.
Section 50 (1) of the Women's Charter (Chapter 353) provides that
"A court before which any proceedings under this Act (other than proceedings under section 104) are being heard may give consideration to the possibility of a harmonious resolution of the matter and for this purpose may, with the consent of the parties, refer the parties for mediation by such person as the parties may agree or, failing such agreement, as the court may appoint."

The above section was obtained from http://agcvldb4.agc.gov.sg/ , this website was visited on 15th April, 2005.

[317] Cited in Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at p.223.

[318] See Tan, Puay Boon, *op. cit.*, at p. 167.

mediation and counseling unit with trained judge-mediators and court counsellors. The court also utilises volunteer mediators and counsellors (collectively known as the 'Family Court Support Group') to conduct mediation and counseling.[319] In addition, the Family Court also refers divorce and custody cases to specialist family therapy agencies, which are adjunct to but integrated within the counselling unit in the Family Court. All mediators and counsellors, be they volunteers or adjunct counsellors, are trained by the court's consultant, Dr Carole Brown, the Principal Director of Court Counselling of the Family Court of Australia. They are bound by the Code of Ethics, which has been drawn up for all court mediators and counsellors. In addition to cases referred by the court, the court's primary dispute resolution service is also available to family disputants who have yet to file a suit in court.[320]

In the Family Court, who will be the mediator depends on the type of case involved. For example, a judicial officer will mediate cases involving a contested divorce. However, a court counsellor will mediate matters involving child issues and in certain cases, a co-mediation may be required.[321]

[319] These volunteers are experienced and qualified persons from diverse backgrounds, such as legal, psychology and social work fields. They conduct mediation and counseling at the Family Court, under the court's strict control and supervision; Daphne, Hong Fan Sin, *op. cit.*, at p. 152.

[320] Daphne, Hong Fan Sin, *op. cit.*, at pp. 152-153.

[321] See Lee, Joel Tye Beng, *op. cit.*, at p. 432.
As for co-mediation, it is also practised in the Australian Family Court; see for example Gee, Tony, and Urban, Pat, 'Co-Mediation in the Family Court' (February 1994) ADRJ, 42. Co-mediation is where the mediators work in pairs with a balance of gender, that is a male and a female mediator and also a combination of the different disciplines, that is, a legal background (usually a lawyer) and a social science background (usually a counsellor); see Gee, Tony, and Urban, Pat, *op. cit.*, at p. 43 and also Sordo, Bridget, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial', *op. cit.*, at p. 64.

There are two levels of mediation in the Family Court – before the mention stage and during the mention stage.[322]

The Family Registry is also opened after office hours on two nights a week to accept applications for maintenance and protection orders to make it easier for working litigants, who mostly are not represented, in filling in applications for maintenance and protection orders. Similarly, night mediation is also conducted on two nights a week to provide the same convenience to working litigants.[323]

Information leaflets on Family Court processes and the court's services are available to the public. These brochures are placed at police stations, family service centres and law offices. The Family Court also conducts research on areas of interest or concern. The research bulletins are also available to the public.[324] These efforts made by the Family Court will equally promote mediation as one of its services.

5.4.3. Private Mediation

Private mediations refer to mediation services offered by mediators or mediation service providers outside the court system, government agencies and tribunals or community organisations. There is little evidence on the extent and nature of private mediations in Singapore, but in quantitative terms it is considerably less significant than non-private forms of mediation.[325]

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[322] Lim, Lan Yuan and Liew, Thiam Leng, *op. cit.*, at p.51.

[323] See Daphne, Hong Fan Sin, *op. cit.*, at p.153.

[324] Daphne, Hong Fan Sin, *op. cit.*, at p. 154.

[325] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at p.228.

i) Freelance Mediators

There are only a few freelance mediators in Singapore who usually combine their mediation practice with conducting training and providing consultancy services in dispute resolution. Mediation by individual private mediators is usually undertaken as a supplementary part of their work as arbitrators, lawyers, social workers or academics.[326]

ii) Singapore Mediation Centre (SMC)

SMC was formerly known as Commercial Mediation Service (CMS). The CMS, which was established in January 1997 under the auspices of the Singapore Academy of Law, was a pilot project to offer mediation services for commercial disputes.[327] The CMS, now known as SMC, is a company incorporated under the Companies Act (Cap 50) and limited by the guarantee of the Singapore Academy of Law. It is a non-profit making entity funded in part by the Government through the Ministry of Law. [328]

The SMC complements the functions of the courts. Mediation in the SMC, is private and non court-based. Mediation conducted by the SMC does not take place within , and is not part of, the judicial system. However, the cases mediated at the SMC may or may not be court-connected. The court-connected cases are cases already pending in court that are referred to the

[326] This is due to a lack of regular case referrals. The courts and government departments are potential sources of referral, but they tend to refer cases to other government agencies or government related establishments such as Community Justice Centres and the Singapore Mediation Centre; Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, at p.229.

[327] See Lee, Joel Tye Beng, *op. cit.*, at pp.431.

[328] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at p.230.

SMC by the courts, with the consent of the parties. The non court-connected cases are those referred directly by the parties or their lawyers to the SMC.[329]

SMC mediates a wide range of cases but the bulk of them are cases related to business relationship. Other cases included divorce, family disputes and disputes between neighbours.[330]

SMC also has actively promoted mediation to the public. One example is "Mediation Weeks" in Singapore. The first Mediation Week was held from 14th to 18th September 1998, which was organised by the SMC in association with the Supreme Court, the Subordinate Courts and the Singapore Academy of Law.[331] There was also Campus Mediation Awareness Week[332], organised jointly by the SMC, Temasek Polytechnic and Eagles Mediation and Counselling Centre, as part of the Mediation Week 1998. Then the Mediation Week 1999 followed, which was spread over a two-week period.[333]

There are other professional and trade bodies engaged in ADR that will be not be considered here since they are not related to mediation in family disputes.

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[329] Ibid.

[330] See Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at p.231 for the breakdown of the types of cases referred to SMC as at 31st December 1999.

[331] In this first Mediation Week, litigants in both the Supreme Court and Subordinate Courts were offered the opportunity to settle their disputes by way of mediation at the Singapore Mediation Centre free of charge. Disputants who had not commenced proceedings in court were also invited to participate. The Singapore Mediation Centre's mediation and administration fees were waived during that period. The Mediation Week 1998 managed to mediate 43 matters, with the settlement rate of about 77%.; Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at p.238.

[332] There were mediation talks for students, a seminar on campus mediation for teachers, a Mediation Exhibition and a competition called 'We Can Work It Out', during which students presented songs,skits and jingles on mediation. These activities took place on the campus of the Temasek Pollytechnic All secondary and post-secondary schools were invited to participate in this public education exercise; ibid.

[333] See ibid.

5.4.4. Mediation Provided by Government Agencies and Tribunal

Although there are many institutions which fall under this category of mediation, only two institutions will be stated here. The two institutions are Community mediation at the Community Mediation Centres and family mediation in the Singapore Shariah Court.

i) Community mediation at the Community Mediation Centres

In Singapore, the Community Mediation Centres are set up pursuant to the Community Mediation Centre Act (hereinafter CMC Act).[334] A basic theme of the CMC Act is to enable community leaders to act as mediators to help resolve disputes in a non-confrontational way.[335] Two Community Mediation Centres (CMC) have been set up; the Community Mediation Centre (Regional East), which started operations on 9th January 1998, and the Community Mediation Centre (Central), which started operations in April 1999.[336] The CMC may deal with any family, social and community dispute that does not involve a seizable offence.[337]

Cases have been referred to the CMC by the Subordinate Courts since February 1998 and by the Neighbourhood Police Posts since September 1998. Members of Parliament and grassroots leaders also refer

[334] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at p.244., see also section 3 of the Community Mediation Centres Act.

[335] Andrew, Chan, *op. cit.* ,at p. 55.

[336] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,at pp.244-245. The two Centres were established by the Community Mediation Centres (Establishment) (No.2) Order 1998 and the Community Mediation Centres (Establishment) Order 1999. It was the Minister for Law, exercising his powers conferred by section 3 of the Community Mediation Centres Act, that had issued the said orders for the purpose of providing mediation services in accordance with the Community Mediation Centres Act; see Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*,and its footnote 65, at p. 245.

[337] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, at p.245.

cases for mediation. Some disputants approach the CMC directly for help.[338]

From January 1998 to July 1999, the most common disputes mediated in the Community Mediation Centre (Regional East) were those relating to assaults, family problems, division of family assets, shouting of abuse, harassment, noise pollution and damage to property.[339]

While in the Community Mediation Centre (Central), between April and July 1999, the most common disputes mediated were those relating to noise pollution and harassment.[340]

iii) Family mediation in the Singapore Shariah Court

According to section 35 (2) of the Administration of Muslim Law Act (Cap.3), the Singapore Shariah Court is vested with the jurisdiction to hear and determine all causes in which the parties are Muslims or where they are married under the Muslim law, and where the disputes relate, *inter alia*, to marriage and divorce. The practice of the Shariah Court is to require the parties to first undergo counselling.

Where counselling is unsuccessful, the parties will then be referred for mediation.[341] Rule 22 of the Muslim Marriage and Divorce Rules 1999 provides for mediation in the Singapore Shariah Court. It states;

"The Registrar or the Court may, at any stage of any proceedings in the Court, require all or any of the parties to the proceedings to attend a mediation session or pre-trial conference during which any order or

[338] Ibid.
[339] Ibid.
[340] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, at p. 246.
[341] Boulle, Laurence and Teh, Hwee Hwee, *op. cit.*, at pp.248-249.

direction may be made or given for the expeditious disposal of the proceedings."[342]

There are two full-time mediators who deal mainly with issues relating to the payment of maintenance and gifts under the Islamic custom, distribution of property and custody of children.[343]

5.5 An analysis of the development of family mediation in Australia and Singapore

Family mediation in Australia started to grow outside the court system by the establishments of family mediation centres in some States in Australia. The Australian government had been very supportive in helping to provide venues for family mediation by funding community-based mediation centres. The government's positive attitude towards the growth of mediation and also arbitration was further displayed by the passing of the Courts (Mediation and Arbitration) Act 1991. Pertaining to Family Court mediation programme, more provisions were then inserted; sections 19A-C of the Family Act 1975 and Order 25A of the Family Law Rules; to further clarify the provisions of the general statute, the Courts (Mediation and Arbitration) Act 1991.

From February 1992 onwards, the Australian Family Court started to formally introduce mediation at its registries throughout the country, with its one-year pilot project in the Melbourne and the Dandenong Registries. The Family Court did not only encourage parties to use ADR services, including mediation, after their cases were filed in court but also encouraged them to employ mediation before filling.

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[342] Cited in Boulle, Laurence and Teh, Hwee Hwee, *op. cit.* at p.249.

[343] Ibid.
As at 29th January, 2005, there were still 2 full-time mediators in the Singapore Shariah Court; information obtained from YA Tuan Haji Salim Jaman, Senior President, Singapore Shariah Court, 'Amalan Sulh di Singapura' , in Seminar Isu-isu Mahkamah Shariah Sulhin Jaman, Senior President, Singapore Shariah Court, 'Amalan Sulh di Singapura' , in Seminar Isu-isu Mahkamah Shariah VII"Penyelesaian Konflik Keluarga di Mahkamah Shariah : Peranan Sulh dan Keberkesanannnya", Moot Court, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, 29th January, 2005.

The change of names from ADR processes in the Family Court to PDR or Primary Dispute Resolution, through the Family Law Reform Act 1995, implied that now litigations in the Family Court have fallen into the category of 'Secondary Dispute Resolution'. This change denotes that ADR processes are now lifted to the first rank in a series of actions in the Family Court.

The Australian Family Court was also receptive in handling criticisms of its mediation service. In finding out whether these criticisms were founded or unfounded, the Court reacted rather positively by carrying out researches to evaluate its mediation service.

The Law Societies in Australia appeared to take parallel steps with the Australian courts in promoting mediation by conducting Settlement Week or Resolutions Week, aiming at mediating cases which were still awaiting trials.

Mediation conferences, at the national and international levels, with the participants to come from different backgrounds, provided venues for discussions and debates on issues related to family mediation.

With the recent move of introducing ADR methods as courses taught at the university level in Australia, law students specifically, would not only learn the traditional method of litigation which stresses on combative approach or a win-lose situation but also would be aware of the availability of various alternative dispute resolutions which focus on a win-win situation.

As for the development of mediation in family disputes in Singapore, it was initiated informally as early as 1980s in the Subordinate Courts. However, it was subsequently conducted formally when the Singapore Family Court was established in 1995. Unlike the position in Australia, mediation for family disputes in Community Mediation Centres in Singapore took place in the later years after family mediation began to be offered in the Singapore Family Court.

Two noticeable factors contribute to the fact that that family mediation in the Singapore Family Court is cost saving. The first factor is because it is part of the court processes; hence it is at no cost to parties. The second factor is due to the availability of court-connected mediators; the mediators range from trained judge-mediators to court counsellors to other volunteers under the Family Court Support Group.

It is interesting to note that judges in Singapore Family Court are also trained as mediators. However, if a judge is a trial judge in a particular case, he will not be involved in the mediation process of that same case.[344]

Concerning mediators offering mediation services in the Family Court, there is a similarity between the Australian Family Court and the Singapore Family Court, in that they form three categories of mediators; court mediators, community mediators and private mediators. This is perhaps influenced by the fact that Australia was one of the countries that Singapore turned to in finding its model of family mediation. It is further supported by the fact that the consultant from the Family Court of Australia was the one who trained the mediators in the Singapore Family Court.

In line with the positive attitude of the Australian Family Court towards mediation, the Singapore Family Court has ventured into extending their office hours on certain days in a week and conducted night mediation on two nights in a week. This will further encourage parties, who work during daytime, to attempt mediation and eschew from court trials.

The existence of private mediators, both in Australia and Singapore, serve as supplements rather than competitors to the two Family Courts. Taking Singapore as an example; the Singapore Mediation Centre aims at mostly commercial disputes while the Community Mediation Centres cater for community disputes. In fact, family cases did not

[344] See PG Lim, *op cit.*, at p. ix.

form the major part of cases mediated in the two Centres. Majority of family cases were mediated in the Singapore Family Court through its mediation services. Family cases were only referred to the Singapore Mediation Centre and the Community Mediation Centres either upon referral by the court or at parties' own initiative.

It is opined that community mediators in Australia and Singapore can settle community disputes better. This is due to the fact that they, who usually are leaders in the community concerned, live in the same community, thus would have a better understanding as to how to solve the disputes within their own community.

As far as the legal profession is concerned, the Law Societies and the Singapore Academy of Law in Australia and Singapore respectively displayed encouraging attitude towards mediation generally, by conducting the Settlement Weeks or Resolutions Week in Australia and the Mediation Weeks in Singapore. One should not look at the different purposes served by the Settlement Weeks or Resolutions Week and the Mediation Weeks, in that the Settlement Weeks or Resolutions Week aimed at clearing backlog of court cases within a certain period of time while the Mediation Weeks focused on promoting mediation to the public. What is more important is that they shared the same interest in using mediation as a mechanism to settle cases outside court.

Last but not least, it is worthy to note that since Singapore has a dual family system similar to Malaysia, family mediation is also made available in the Singapore Shariah Court. With Muslims forming a minority segment of the Singapore society, only two full-time mediators are entrusted with this duty.

5.6 Development of Mediation in Malaysia

There are a number of organisations in Malaysia which practise mediation or have mediation as one of the components in their dispute resolution mechanisms. To name a few; the banking industry has established its Banking Mediation Bureau[345] and the insurance industry has its Insurance Mediation Bureau (IMB).[346] On the other hand, Kuala Lumpur Regional Centre for Arbitration (KLRCA)[347], Pertubuhan Arkitek Malaysia (PAM) and Construction Industry Development Board (CIDB)[348] conduct mediation as one of the dispute resolution options available in their organisations.

As for the practice of mediation in Malaysia, the discussions in this subtopic are confined to the Bar Council's Malaysian Mediation Centre and *sulh* or Islamic mediation in the Shariah Courts in the State of Selangor .

5.6.1. Bar Council's Malaysian Mediation Centre (MMC)

In 1997, the Malaysian Bar Council established a committee known as Alternative Dispute Resolution Committee (hereinafter ADR Committee). Among the efforts expected to be carried out by of ADR Committee are[349]

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[345] See Syed Khalid Rashid, 'Factors Behind the Emergence of ADR in the World and ADR in Malaysia', [2002] 1 LM. 64 for example. He commented that mediation at this Bureau is not strictly mediation but a mixture of mediation, conciliation, arbitration and ombudsman. Syed Khalid Rashid, 'Factors Behind the Emergence of ADR in the World and ADR in Malaysia', *op. cit.*, at p. 70.

[346] See Abraham, Cecil, 'Mediation and Alternative Dispute Resolution : Developments in the Various Jurisdictions – Have the Lawyers Caught On', (2000) XXIX No. 1, Insaf, 66, at pp.74-75, he opined that the structure and practice of the IMB do not adhere to the general principles of mediation, hence IMB cannot be termed as mediation in its true sense. He considered that, in practice, the process is more like an informal judicial hearing. See also Sangvi, PS, 'Alternative Dispute Resolution : A Glance at the Law of Malaysia and India', [1998] 3 MLJ xxix, at pp.lv-lvi and Syed Khalid Rashid, 'Factors Behind the Emergence of ADR in the World and ADR in Malaysia', *op. cit.*, at p.70.

[347] See for example Syed Khalid Rashid, 'Factors Behind the Emergence of ADR in the World and ADR in Malaysia', *op. cit.*, at pp.70-71 and Abraham, Cecil, *op. cit.*, at p. 76 for brief information on KLRCA.

[348] For brief information on PAM, CIDB and other bodies conducting mediation and/ or arbitration, see Syed Khalid Rashid, 'Factors Behind the Emergence of ADR in the World and ADR in Malaysia', *op. cit.*, at pp. 71-72.

[349] See Syed Khalid Rashid, 'Factors Behind the Emergence of ADR in the World and ADR in Malaysia', *op. cit.*, at p. 69.

- to introduce mediation in courts
- to strive for the setting up of a Malaysian Mediation Centre
- to promote mediation
- to train lawyers to be mediators
- to draft the mediation rules

The Bar Council has also approved rules for the amicable in-house resolution of law firms partnership disputes through a panel of senior lawyers acting as mediators.[350]

The Bar Council launched its MMC on 6th November 1999.[351] The MMC encourages settlement of civil disputes. MMC mediators are confined to lawyers.[352] The MMC works under the auspices of the ADR Committee.[353]

The ADR Committee did all that was possible within its reach to promote mediation. It went into publicity campaign, where talks and radio/television interviews were held to encourage and to inform mediation to the members of the Bar Council and to the public at large. There was also Mediation and Law Awareness Week held in the Central Market on 21st February, 2001 for four days. ADR Committee also recommended the inclusion of the mediation clause in commercial contracts. A standard agreement, before the commencement of mediation process, for parties to sign to signify their acceptance of mediation was also adopted by the Committee. The Committee also adopted a Code of Conduct of the mediators and Rules governing mediation to be applied by the MMC.

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[350] Ibid.

[351] See Yong Yung Chye, 'Alternative Dispute Resolution (Mediation) in Malaysia' (December 2001), Insaf, 103, at p. 107 and also Syed Khalid Rashid, 'Factors Behind the Emergence of ADR in the World and ADR in Malaysia', *op. cit.*, at p. 70.

[352] See Yong Yung Chye, *op. cit.*, at p.107.

[353] Syed Khalid Rashid, 'Factors Behind the Emergence of ADR in the World and ADR in Malaysia', *op. cit.*, at p. 70.

Mediators' fees, regulated by a scale of charges, were also made applicable for the use of mediation in MMC.[354]

The ADR Committee had made further effort to promote mediation to the judiciary by submitting a memorandum, recommending mediation to be an annexure to the court systems. The memorandum was submitted to the former Chief Justice of the Federal Court, Tan Sri Mohamed Dzaiddin Abdullah. The Committee proposed to use Order 34 rule 4 of the Rules of the High Court (Amendment) 2000 in incorporating mediation under the courts.[355] This is where parties will be directed to attempt a settlement through mediation during the case management before hearing, if the case is suitable for mediation. However, if mediation fails, the case will go back to the court for trial.[356]

The ADR Committee also gave due attention to the issue of training MMC mediators. To maintain high standard and quality, it had invited foreign trainers with successful track record from the United States, Australia and Singapore.[357] Further details of the training workshops are considered in Chapter 6 of this dissertation.

5.6.2. *Sulh* in the Shariah Courts in the State of Selangor

Al-sulh is a well-known term in Islamic law, and it means reconciliation, discontinuance or stoppage of dispute or dissension and contention. Legally, *al-sulh* is the termination or avoidance of a dispute or law suit between two parties.[358] There are some

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[354] Yung Yung Choy, *op. cit.*, at p. 107.

[355] Ibid and its footnote 22, at the same page. Yung, Yung Choy cited the report of Star newspaper, on 23rd June, 2001, concerning the statement made by the Chairman of the Bar Council ADR Committee at that time.

[356] See Yung Yung Choy, *op. cit.*, at pp. 107-108.

[357] See Yung Yung Choy, *op. cit.*, at pp. 106-109.

[358] Syed Khalid Rashid, 'The Importance of Teaching and Implementing ADR in Malaysia', [2000] 1 ILR, i, at p. iv.

provisions in the AlQuran[359], hadith (sayings of Prophet Muhammad)[360] and sayings of the second Caliph of Islam, Umar ibn al-Khattab, that touched upon amicable settlement (*sulh*).[361] Most interesting provisions which related directly to the possible negative effects of disputes resolution by way of court judgments can be found in one of the hadith narrated by Ummu Salamah[362] and sayings of the second Caliph of Islam.[363]

The traditional practice of *sulh* was adopted in Selangor within its Shariah court system throughout the State when provisions relevant to *sulh* was inserted in one of the State Enactments, the Shariah Court Civil Procedure (Selangor) 1991 or 'Enakmen Kanun Prosedur Mal Shariah (Selangor) 1991'. This Enactment is now amended and known as Shariah Court Civil Procedure (State of Selangor) Enactment 2003 or 'Enakmen Tatacara Mal Mahkamah Shariah (Negeri Selangor) 2003'.[364] The Chief Sharie Judge then further made rules to give effect to the provisions of the previous Shariah Court Civil Procedure

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[359] See Surah al Hujurat Verses 9-10; Surah an Nisa' Verses 128 and 114.
They are referred to in
-Abdullah Abu Bakar, 'Konsep Sulh Mengikut Undang-undang Islam', In Bengkel Penyelarasan Pelaksanaan Sulh di Mahkamah Shariah, Kangar Travelodge, Perlis, 21st -23rd August 1998, at p.1;
- 'YAA Dato' Sheikh Ghazali bin Abdul Rahman, 'Pelaksanaan Sulh di bawah Pentadbiran Mahkamah Shariah, *op. cit.*, at pp. 1-3;
-'YAA Dato' Sheikh Ghazali bin Abdul Rahman, 'Sulh – Amalannya Dalam Perundangan Islam', *op. cit.*, at pp.3- 4;
-'YAA Dato' Sheikh Ghazali bin Abdul Rahman, 'Sulh (Mediasi) Dalam Pentadbiran Mahkamah Shariah : Cabaran dan Masa Depan', *op. cit., at pp.*2-3;
-Puan Siti Norainy binti Haji Ali, 'Majlis Sulh di Mahkamah Shariah Selangor, *op. cit., at pp.* 1-2;
-YA Azrac bin Mohamad Zin, 'Adaptasi dan Permasalahan Sulh di Mahkamah Shariah Selangor', In Seminar Isu-isu Mahkamah Shariah VII "Penyelesaian Konflik Keluarga di Mahkamah Shariah : Peranan Sulh dan Keberkesanannya", Moot Court, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, 29th January, 2005, *at p.*4.

[360] For further details, see the seminar papers as cited in footnote 363 above.

[361] See Syed Khalid Rashid, "The Importance of Teaching and Implementing ADR in Malaysia", *op. cit.*, at pp.iv-v.

[362] Narrated by Ummu Salamah : the Prophet s.a.w. said
"I am a human being and you come to report about your dispute. There may be among you someone who is more articulate in delivering his argument, and I judge based on the facts that I heard. So if I judge against your rights and in contradiction to the truth, do not take it as I may have given you a piece of the hell fire."
This hadith is translated from its Malay version as cited in 'YAA Dato' Sheikh Ghazali bin Abdul Rahman, 'Sulh – Amalannya Dalam Perundangan Islam', *op. cit., at pp.* 6-7.

[363] The second Caliph, Umar ibn al-Khattab, said
"Bring those in dispute to peaceful settlement, as most court judgments end up with revenge and vengeance."
The above sayings are translated from their Malay version as cited in
-'YAA Dato' Sheikh Ghazali bin Abdul Rahman, 'Sulh – Amalannya Dalam Perundangan Islam', *op. cit.*, at p.6;
-'YAA Dato' Sheikh Ghazali bin Abdul Rahman, 'Sulh (Mediasi) Dalam Pentadbiran Mahkamah Shariah : Cabaran dan Masa Depan', *op. cit.,at pp.*3-4;
-Puan Siti Norainy binti Haji Ali, *op. cit., at p.*3.

[364] Source obtained from Shariah High Court, Shah Alam, Selangor, interview with Tuan Mohamad Ridzuan bin Zainudin , sulh officer in the said Court on Friday, 6th August, 2004.

(Selangor) 1991 or now the Shariah Court Civil Procedure (State of Selangor) Enactment 2003 (hereinafter the SCCP 2003). The rules are the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001(hereinafter SCCPS 2001) or 'Kaedah-kaedah Tatacara Mal (Sulh) Selangor 2001', which contain nine rules relating to *sulh*. The rules in SCCPS 2001 explain the basic guidelines as to *sulh*. The rules as in SCCPS 2001 are not amended and are still practised in line with the newly amended SCCP 2003.[365]

To effectively enforce the provisions in the SCCPS 2001, a manual called 'Manual Kerja Sulh'(hereinafter Manual) and a Code of Ethics called 'Kod Etika Sulh' (hereinafter Code) were made by a Committee which was chaired by the Chief Sharie Judge ('Ketua Hakim Sharie'), YAA Dato' Sheikh Ghazali bin Abdul Rahman who is also acting as the Director General of the Department of Islamic Judiciary Malaysia ('Ketua Pengarah Jabatan Kehakiman Shariah Malaysia'), issued on 17th July 2002.[366]

The objective of the Manual is clearly stated in 'Bab 2' of the Manual as;

> "The purpose of this Manual is to clarify and ensure uniformity of procedures to be followed by all *sulh* officers in conducting 'Majlis Sulh'".[367]

The Code applies to all *sulh* officers (Islamic mediators) during their employment. If any of them breaches the provisions in the Code, disciplinary action can be taken against him or her. As *sulh* officers are in reality court staff, such disciplinary action is similar to proceedings taken against a public officer in the public service.[368]

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[365] Ibid.

[366] Ibid.

[367] See Manual, Bab 2, at p. 1. 'Majlis Sulh' is Islamic mediation as practised in all Selangor Shariah Courts.

[368] See Item 2 (1) and 2 (2) of the Code, at p. 12.

When *sulh* was formally initiated in the Selangor Shariah Courts in May 2002 [369], there were eleven officers, eight men and three women, appointed as full-time *sulh* officers in all Shariah Subordinate Courts and Shariah High Court in Selangor. Recently, two more *sulh* officers were further appointed, making the number of *sulh* officers to increase to thirteen.[370]

All matters referred to Majlis *Sulh* (Islamic mediation session) are mainly family disputes, as under the jurisdictions of the Shariah Shariah Subordinate Courts and Shariah High Court in Selangor.[371]

Between 15th April, 2002 to 8th December, 2004, there were a lot of seminars attended by *sulh* officers.[372] Further discussions on these seminars can be found in Chapter 6 of this dissertation.

5.7 Conclusion

As far as mediation is concerned, United States of America, Australia and Singapore, enjoyed tremendous supports from their legislatures, members of the legal professions, members of the judiciary, academicians and even their local communities as a whole. The practice of mediation in the Singapore Family Court, to a large extent, emulates the practice of mediation in the Australian Family Court.

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[369] Before the appointments of the *sulh* officers, *sulh* was informally practiced earlier by the Registrar or Assistant Registrars; information obtained from the Shariah High Court, Shah Alam, Selangor and interview with Tuan Mohamad Ridzuan bin Zainudin , *sulh* officer in the said Court on Friday, 6th August, 2004.

[370] Interview with Tuan Mohamad Ridzuan bin Zainudin , *sulh* officer in Shariah High Court, Shah Alam, Selangor on Friday, 6th August, 2004.

[371] For further details, see sections 61-62 of the newly amended Administration of the Religion of Islam (State of Selangor) Enactment 2003 for jurisdictions of Shariah Shariah Subordinate Courts and Shariah High Court in Selangor and also relevant provisions in the newly amended Islamic Family Law (State of Selangor) Enactment 2003 (or earlier Islamic Family Law (Selangor) Enactment 1984).

[372] Source obtained from the Shariah High Court, Shah Alam, Selangor and interview with Tuan Mohamad Ridzuan bin Zainudin , *sulh* officer in the said Court on Friday, 6th August, 2004.

While in Malaysia, the mediation practice, especially involving family disputes, can be considered as relatively new. As far as the legal profession is concerned, despite the fact that the Bar Council had played an active role in promoting mediation, mediation in MMC does not seem to enjoy the support of the majority of Bar Council members. MMC is still finding its way to penetrate the court system insofar as introducing mediation as the court's pre-trial case management is concerned.

Since there is yet any legislation or Practice Direction to empower judges to refer cases to mediation, such references were made by the judges at their own initiatives or by using their discretionary powers. [173]

To the contrary, *sulh* or Islamic mediation in the Shariah Courts in Selangor enjoys the support of the State Legislature in practising a court-annexed Islamic mediation. Provisions pertaining to *sulh* were inserted in relevant State Enactments, followed by Practice Directions by the Chief Sharie Judge to fill in the details of the Selangor Shariah Courts' mediation practice. Although criticisms are unavoidable especially on the skills training of their *sulh* officers, their mediation practice has undoubtedly gradually improved since its formation in April 2002.

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[173] One of the Judges who was known to have encouraged parties to use mediation was YA Dato' Dr Kamalanathan Ratnam (well known as Dato' Dr R.K.Nathan), who was formerly a High Court judge in High Court 4, Pulau Pinang.
Dato' Dr R.K.Nathan was a High Court judge in High Court 4, Georgetown, Pulau Pinang since 15th May, 2001 and then retired on 25th October, 2004, information obtained from the Deputy Registrar, High Court 1, Georgetown, Pulau Pinang through a tele-conversation in December, 2004.

See also Star newspaper, on Tuesday, 27th February, 2001, when Dato Dr R.K.Nathan was reported to have used his discretion to direct litigants in two breach of contract cases to attempt resolving their disputes through the MMC. He further gave a case management date in four months from the date of such direction, giving time to parties to mediate and also to inform the court of their progress. If they failed to settle within that four months, further case management date would be given towards trial.

Another High Court judge who has displayed a positive attitude towards mediation is YA Puan Su Geok Yiam, another High Court judge in High Court 3, Pulau Pinang. According to Deputy Registrar, High Court 1, Pulau Pinang, YA Puan Su Geok Yiam had once advised parties in family disputes to mediate in MMC; there is one MMC centre in Pulau Pinang. This information was obtained from an interview with Deputy Registrar, High Court 1, Pulau Pinang on Tuesday 21st September, 2004.

CHAPTER 6

6.1 Introduction

Chapter 6 will concentrate on various aspects concerning mediators in the Bar Council's Malaysian Mediation Centre (hereinafter MMC) and Islamic mediators or are known as "pegawai sulh" in the Selangor Shariah Courts (hereinafter '*sulh* officers'). While sessions conducted by MMC's mediators are called mediation sessions, the sessions conducted by '*sulh* officers' are known as 'Majlis Sulh'. Matters within this comparative study of mediations as practised by mediators in MMC and '*sulh* officers' in Selangor Shariah Courts include;

- their qualifications,
- their skill trainings,
- their roles,
- their categories i.e; whether they are court-annexed mediators, reporting to the court or they are qualified mediators under professional bodies, working outside the court;
- their Code of Ethics / Code of Conduct,
- the mediation agreement,
- the model of mediation adopted,
- the stage of reference involved,
- the choice of mediators,
- lawyers' presence in mediation sessions,
- mediation process involved
- issues related to costs,
- specific skills for mediators mediating family disputes,

- support from the Government/legislature and support from the judiciary,
- statistics of cases mediated,
- types of cases mediated,
- minimum and maximum period of settlement,
- number of mediators accredited with MMC and '*sulh* officers' in Selangor Shariah Courts,
- post-mediation activities,
- factors of success and failure.

This chapter is written mainly based on interviews made with

a) 4 mediators with the MMC ; 2 males, 2 females [374]

b) the Chairperson of the Bar Council's Alternative Dispute Resolution Committee [375]

c) 4 '*sulh* officers' in four selected Shariah Subordinate Courts in Selangor ; 2 males, 2 females [376]

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[374] a) The first mediator interviewed was Ms Gunavathi Subramaniam, who is an advocate and solicitor, an accredited mediator with MMC, a member to the Bar Council's Alternative Dispute Resolution Committee since the inception of MMC in 1999 until now and currently a part-time lecturer for Alternative Dispute Resolution course in the Masters programme (LL.M), Law Faculty, University of Malaya (she has been lecturing this course since 1999). She was interviewed on Monday, 27th September 2004, from 11.45 a.m. until 1.00 p.m.

b) The second mediator interviewed was Mr Phee Boon Long, who is an advocate and solicitor with his firm in Pulau Pinang, an accredited mediator with MMC, and one of the trainers in the second part of Alternative Dispute Resolution course in the Masters programme (LL.M), Law Faculty, University of Malaya in 2003 (which involved training and assessing students' Mediation skills; this second part was incorporated in the said course since 2002). He was interviewed through email with his reply sent to me on Friday, 8th October, 2004.

c) Two more mediators were interviewed on the condition of anonymity; Mediator C and Mediator D, who were referred to as Lawyer A and Lawyer B respectively in Chapter 4 of this dissertation. Mediator C was interviewed in Kuala Lumpur on Thursday, 28th October, 2004, from 3.00-4.30 p.m. and Mediator D was interviewed in Johor on Tuesday, 26th October, 2004, from 12.15- 2.30 p.m.
All the above four mediators interviewed were pioneer mediators with the MMC who were accredited as mediators in April 2002.

[375] She was Puan Hendon binti Mohamed, who was interviewed on Friday, 28th January, 2005, from 6.40 p.m. until 7.20 p.m., at the Bar Council's office in Kuala Lumpur.

[376] They were ,
a) Puan Siti Norsuni binti Mohd Ali, a '*sulh* officer' in Shariah Subordinate Court, Gombak Timur (Keramat), who was interviewed at her office on Friday morning, 15th October, 2004
b) Tuan Azmi bin Azlil, a '*sulh* officer' in Shariah Subordinate Court, Shah Alam, who was interviewed at his office on Friday morning, 26th November, 2004.
c) Tuan Saharudin bin Selamat, a '*sulh* officer' in Shariah Subordinate Court, Klang, who was interviewed at his office on Friday morning, 3rd December, 2004.
d) Puan Marlina binti Jailani, a '*sulh* officer' in Shariah Subordinate Court, Hulu Langat (Kajang), who was interviewed at her office on Friday morning, 7th January, 2005.
*Note : All '*sulh* officers' were only available to be interviewed on Fridays.
All the five '*sulh* officers' including the one in Shariah High Court, Shah Alam, are pioneer '*sulh* officers' who were appointed since April 2002 (the same month and year as pioneer mediators in MMC were accredited).

d) one '*sulh* officer' in the Shariah High Court, Shah Alam, Selangor [377]

e) the Chief Registrar of the Selangor Shariah Courts [378]

f) 2 judges in two selected Shariah Subordinate Courts in Selangor [379]

The questionnaires used during the above interviews can be found in Appendices A.

In addition to the above interviews, other relevant data collected, for example statistics of cases conducted by '*sulh* officers' and some relevant seminar papers and articles, were also consulted.

6.2 Comparison between the mediation practice in MMC and Selangor Shariah Court

6.2.1. Qualifications

Mediators in MMC

There are three conditions before an advocate and solicitor in Malaysia can be accredited as a mediator with MMC, namely; [380]

a) he or she must have 7 years of practice [381]; in fact he or she must hold a valid practicing certificate [382]

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[377] He was Tuan Mohamad Ridzuan bin Zainudin, who was interviewed on two different dates, due to his tight schedules. The interviews were held on Friday afternoon, 6th August, 2004 and Saturday, 30th October, 2004. As at the dates of the interviews, he was not only a '*sulh* officer' in Shariah High Court, Shah Alam, but also a Public Relations Officer for the said court and a secretary to the monthly meetings of all '*sulh* officers'.

[378] She was Puan Noor Hadina binti Ahmad Zabidi and was interviewed on Tuesday, 2nd November, 2004 at her office in Shariah High Court, Shah Alam.

[379] They were;
a) Yang Arif Tuan Mohamad Zakuan bin Din, a judge in the Shariah Subordinate Court, Hulu Langat (Kajang), who was interviewed on Friday afternoon, 17th December, 2004, at the Shariah High Court, Shah Alam.
b) Yang Arif Tuan Mohamed Fouzi bin Mokhtar, a judge in the Shariah Subordinate Court, Klang, who was interviewed on Monday morning, 3rd January 2005, at the Shariah High Court, Shah Alam.

[380] See Yong, Yung Choy, *op. cit.*, at p. 107. Mrs Gunavathi Subramaniam then confirmed these conditions, in her capacity as a member of the Bar Council's Alternative Dispute Resolution Committee, through email dated Thursday, 2nd December, 2004.

[381] According to Mediator D, who was interviewed in Johor on Tuesday, 26th October, 2004, the reason for putting this as one of the pre-requisites before a lawyer can be accredited as a mediator with MMC is that a lawyer with at least 7 years of practice has already gained maturity and experience that will help him or her in executing his or her duties as a mediator.

[382] Source obtained from Ms Gunavathi Subramaniam, in her capacity as one of the members of the ADR Committee, her email dated Thursday, 2nd December, 2004.

b) he or she must undergo 40 hours of intensive training with the trainers [383], approved by the Bar Council for that purpose

c) he or she must be successful in the final assessment conducted by the said trainers

All the four MMC's mediators interviewed were advocates and solicitors with more than seven years in practice, and also had successfully completed the training sessions stated above. Two mediators hold LL.B. (Hons.) from overseas, one from New Zealand, the other from United Kingdom. The other two mediators hold LL.B (Hons.) and LL.M from University of Malaya.

'*Sulh* officers' in Selangor Shariah Courts

3 '*sulh* officers' interviewed hold Ijazah Sarjana Muda Pengajian Islam (Shariah) [Bachelor in Islamic Studies (Shariah)] from Universiti Kebangsaan Malaysia and one '*sulh* officer' holds Bachelor in Shariah from University Al-Azhar, Cairo, Egypt and the other one holds a double degree; Bachelor in Laws with Honours and Bachelor in Shariah Laws with Honours from the International Islamic University Malaysia. Of these five '*sulh* officers', four of them hold a Diploma each; Diploma Pentadbiran Kehakiman dan Guaman Islam from Universiti Kebangsaan Malaysia. [384] The minimum qualification of a '*sulh* officer' is equivalent to the qualification of a judge in the Shariah Subordinate Court in Selangor. [385]

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[383] Among the trainers were those from Singapore Mediation Centre, Lawyers Engaged in Alternative Dispute Resolution (LEADR) , Australia, Accord Group (Australia) and University of Florida; see Yong, Yung Choy, *op. cit.*, at pp.107-109.

[384] In the International Islamic University Malaysia, there are two diplomas of this kind; Diploma in Shariah Law and Practice (DSLP) for those intending to practise as Sharia' lawyers and Diploma in Administration and Islamic Judiciary (DAIJ) for those intending to work within the administration of the Shariah Court for example as Shariah officers.

[385] 'Pelaksanaan Sulh di Mahkamah Shariah Sejarah and Perancangan', (Anon.), Jurnal Hukum, Syawal 1424H/December 2003, 65, at p. 82.

By comparing the qualifications of mediators in MMC and '*sulh* officers' in Selangor Shariah Courts, it is clear that MMC requires a higher standard for its mediators. Their qualified mediators must have attained sufficient maturity in dealing with clients/people in mediation session. This is reflected by the requirement of seniority in practice for at least 7 years. It is believed that those with 7 years of practising experience would be capable to deal with the 'people problem' better than the young ones. They must also possess sufficient mediation skills to conduct the mediation session. This is reflected by the requirement of undergoing the 40-hour training and passing the final assessment of such training.

It is observed that Selangor Shariah Courts did not require such a high standard for their '*sulh* officers'. Even young persons like fresh graduates may qualify as '*sulh* officers'. These '*sulh* officers' are young in practice and young in *sulh*/mediation as well. They may encounter difficulties in dealing with the 'people problem', compared to the more experienced mediators in MMC.

However, it should be fairly noted here that the requirement of 'experience' of mediators in MMC relates to the 7 years experience as legal practitioners and not as mediators. Therefore, in the context of mediation practice, they may also be considered as 'young' as the '*sulh* officers'.

The mediation-related training may appear to be a further advantage to the mediators in MMC. Nevertheless, '*sulh* officers' may gain skills in *sulh*/mediation through frequent referral of Shariah court cases to them. Whereas, the mediation skills of mediators in MMC may diminish due to the small number of cases mediated through MMC; the number of which is shown later in 6.2.15 of this dissertation.

6.2.2. Skill trainings

Mediators in MMC

As at April 2001, there were eight Mediation training workshops organised by the Bar Council; [386]

a) Workshop Training (Introductory Level) by Singapore Mediation Centre from 29th to 30th October, 1999.

b) Workshop Training (Advance Level) by Accord Group, Australia from 28th to 31st January 2000.

c) Workshop Training (Introductory and Advance Level) by Lawyers Engaged in Alternative Dispute Resolution (LEADR), Australia from 3rd to 7th May 2000

d) Workshop Training (Introductory Level) by Singapore Mediation Centre from 8th to 9th June 2000

e) Workshop Training (Advance Commercial and Family Mediation) by Dr Don Peters and Dr Martha Peters, University of Florida from 21st to 23rd July 2000

f) Workshop Training (Introductory Level) by Mr Lim Chuan Ren, Melbourne from 4th to 5th August 2000

g) Workshop Training (Advance Level) by LEADR, Australia from 18th to 20th August 2000

h) Workshop Training (Introductory and Advance Level) by LEADR, Australia from 19th to 23rd April 2001

April 2001 seemed to be the last mediation training workshop conducted for the purpose of training MMC's mediators. After the year 2001, the seminars on mediation were quite scarce. Between April 2001 until 17th February, 2005, there was only one Mediation

[386] See Yong, Yung Choy, *op. cit.*, at pp 108-109.

Conference held at the Bar Council Auditorium on 5th August, 2004, which was jointly organised by the Malaysian Bar Council and International Trademark Association. The conference basically focused on mediating Intellectual Property disputes, a specialised area.[387]

It appears from the above list of trainings that mediators with MMC were trained by trainers from foreign countries where mediation has already taken place in the court and also outside court, like Australia and Singapore.[388] In training MMC's mediators, the Bar Council's ADR Committee invited these foreign trainers due to their successful track record in their countries. [389] It was believed that these trainers would help to instil better mediation skills in their trainees / Malaysian lawyers, as mediation is not an alien practice in their countries.

Both Mediator C and Mediator D [390] opined that a good mediator should have a certified training with a certain institution for him or her to appreciate the mediation process. This statement is further supported by Yasmin Shariff, another lawyer mediator with MMC, when she was replying to a negative response of a lawyer participant in a seminar. She said that she did not deny that lawyers did mediate or negotiate in their own ways but these own ways could not be considered 'structured mediation' as the lawyers' individual methods of mediating / negotiating would vary from one to another. [391] It is observed that she had impliedly urged lawyers to undergo a proper training to acquire the

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[387] Source obtained from the MMC through email dated Thursday, 17th February, 2005, sent by Ms Marianna Tan.

[388] For further details on the growth of mediation in these two countries, see Chapter 5 of this dissertation.

[389] See Yong, Yung Chen, *op. cit.*, at p. 106.

[390] Mediator C was interviewed in Kuala Lumpur on Thursday, 28th October, 2004 and Mediator D was interviewed in Johor on Tuesday, 26th October, 2004.

[391] She made this statement in the question and answer session after presenting her paper entitled 'Prospek Mediasi Keluarga'. In Seminar Isu-isu Mahkamah Shariah VII: 'Penyelesaian Konflik Keluarga di Mahkamah Shariah : Peranan Sulh dan Keberkesanannya', Moot Court, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, 29th January, 2005.
I was also one of the participants in this seminar.

mediation skills that are expected from a trained mediator and also to appreciate the values that are present in a 'structured mediation'.

'*Sulh* officers' in Selangor Shariah Courts

Unlike mediation trainings/workshops as organised by the Bar Council, it is observed that '*sulh* officers' attended more "substantive-based seminars"[392] rather than "skills-based workshops"[393] which could help them enhancing their mediation skills. The most recent seminar [394], which discussed not only the practice of *sulh* from the academic's perspective and a personal experience of one *sulh* officer (who is now a judge in the Shariah Subordinate Court, Hulu Langat) but also gave insights on mediation as practised in MMC and the practice of mediation in the Singapore Shariah Court, could also be categorised as one of "substantive-based seminars".

From the list of seminars attended by '*sulh* officers', which was obtained from the Shariah High Court, Shah Alam [395], there were 47 seminars attended by '*sulh* officers' between 15th April 2002 to 8th December, 2004. However, it is found that there was only one mediation-related seminar (which included, *inter alia*, the mediation process, skills

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[392] I define this term to mean seminars with speakers presenting seminar papers followed by questions and answers' session. In this type of seminar, the participants are not actively involved and the speakers dominate the sessions.

[393] I define this term to mean workshops where there is less participation on the speakers' side. The speakers act more as facilitators who guide the participants in being actively involved in the workshops conducted. The activities in these workshops are geared on the aim of improving specific skills of the participants, for example mediation skills, rather than acting as a forum of providing information in the form of seminar papers.
I personally experienced some mediation skills-based sessions, in my capacity as a student, in semester 2 of the Alternative Dispute Resolution (ADR) course during the period between end of 2003 until February, 2004. This ADR course is one of the courses offered in the Masters programme (LL.M) at the Law Faculty, University of Malaya. These mediation skills-based sessions, which I was involved in, emulated the MMC's model in training its mediators. Even the trainers who assessed the students' mediation skills at the end of the course were actually trainers or coaches who had experienced training MMC's mediators. The sessions comprised many simulation exercises where students took turn to play three different roles in the role-plays; the mediator, Party A and Party B. The role-plays were based on simulation exercises conducted by Lawyers Engaged in Alternative Dispute Resolution (LEADR), Australia. At the end of the course, after experiencing many simulation-exercises, students' mediation skills were commented on not only by the trainers but also by their peers.

[394] In Seminar Isu-isu Mahkamah Shariah VII "Penyelesaian Konflik Keluarga di Mahkamah Shariah : Peranan Sulh dan Keberkesanannya", *op. cit.*, refer to the above footnote 391.

[395] The list of the seminars was obtained from Tuan Mohamad Ridzuan bin Zainudin on Friday, 17th December, 2004 at the Shariah High Court, Shah Alam.

expected from a mediator, issues related to ethics of a mediator and simulations of mediation sessions) and this seminar was attended by all these pioneer '*sulh* officers' that was held one week after they were appointed in April 2002. [396] As at 8th December, 2004, the contents of seminars attended by '*sulh* officers' include substantive and procedural matters in various aspects of Islamic family laws, matters relating to Islamic law of evidence, Shariah court administrative matters, courses related to skills as a Sharie judge[397] and courses connected to skills in counselling, for example managing conflict resolutions.

6.2.3. Roles

Mediators in MMC

- Mediator in general

A mediator must be a good listener who appreciates and understands the other side's story. The mediator must help parties to come out with solutions and explore these solutions. Sometimes, the mediator gives suggestions/options to settle when parties are stuck. The mediator must also help parties to see the interests of both parties.[398]

The mediator is neither a judge, who decides for parties, nor a legal adviser, who gives legal advice. In fact, the mediator will rely on the lawyers representing parties to give them legal advice, which they normally do outside the mediation room. The mediator also

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[396] It was a three-day seminar, Kursus Mediasi /Sulh Mahkamah Shariah Selangor, Hotel Quality, Shah Alam, Selangor, 22nd – 24th April, 2002. One of the speakers that specifically talked about areas related to mediation was Salleh Buang, a former lecturer in Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia. He was also one of the Committee members that were involved in the making of 'Manual Sulh' to serve as a guidance to '*sulh* officers' in Selangor . The 'Manual Sulh' was then issued on 17th July 2002 by the Chairman of the said Committee, YAA Dato' Sheikh Ghazali bin Abdul Rahman.

[397] This is due to the fact that the post of the male '*sulh* officers' are equivalent to the post of judges in the Shariah Subordinate Courts in Selangor, information obtained from Tuan Mohamad Ridzuan bin Zainudin in the interview on Friday, 6th August, 2004.

[398] A statement made by Mediator C, who was interviewed in Kuala Lumpur on Thursday, 28th October, 2004.

relies on the respective lawyers to honestly explain to their clients the advantages and disadvantages of an open court trial. [399]

The mediator is actually a facilitator of a communication process [400] between the parties whereby he or she has to create an environment in which the parties are able to discuss their differences in a positive and conducive environment, free from any imbalances of negotiating power. [401]

The mediator must also help parties to change their wrong perception in that they treat their problem and the people involved in the problem as an intertwined problem, which cannot be separated from each other. In solving their problem effectively, parties must be able to separate people involved in the problem from the problem itself.[402] In addition, the mediator needs to guide parties to move from their positions (involving them to insist on WHAT they want without disclosing WHY they want it) to their interests (involving them to share the reasons of WHY they want something that will in turn help one party to understand the needs of the other party) [403], so that they can see a win-win solution or an interest-based solution. [404]

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[399] A statement made by Mediator D , who was interviewed in Johor on Tuesday, 26th October, 2004.

[400] Mediation reduces obstacles to communication between parties. Puan Yasmin binti Shariff, in her seminar paper, Ia Seminar Isu-isu Mahkamah Shariah VII: 'Penyelesaian Konflik Keluarga di Mahkamah Shariah : Peranan Sulh dan Keberkesanannya'., *op. cit.*, see the above footnote 391 *and page 4 of* her seminar paper.

[401] A statement made by Mr Phee Boon Lang in his email dated Friday, 8th October, 2004. this facilitative role of a mediator was also mentioned by two other mediators, Mediator D who was interviewed in Johor on Tuesday, 26th October, 2004 and Mrs Gunavathi Subramaniam, who was interviewed on Monday, 27th September 2004.

[402] Two writers in the United States, Roger Fisher and William Ury explained in their book that ;
"A major consequence of the "people problem" in negotiation is that the parties' relationship tends to become entangled with their discussions of substance. On both the giving and receiving end, we are likely to treat people and problem as "one". Within the family, a statement such as "The kitchen is a mess" or "Our bank account is low" may be intended simply to identify a problem, but it is likely to be heard as a personal attack. Anger over a situation may lead you to express anger toward some human being associated with it in your mind.... Separating the people from the problem is not something you can do once and forget about, you have to keep working at it. The basic approach is to deal with the people as human beings and with the problem on its merits"; see Fisher, Roger, and Ury, William, *op. cit.*, at pp. 20 and 30.

[403] This appears to be similar to what Puan Yasmin binti Shariff said in her seminar paper, Ia Seminar Isu-isu Mahkamah Shariah VII :'Penyelesaian Konflik Keluarga di Mahkamah Shariah : Peranan Sulh dan Keberkesanannya'., *op. cit.*, see the above footnote 391. She talked about mediation to achieve one of its aims in educating parties of each others' needs; see page 4 of her seminar paper.

[404] Statements made by Mrs Gunavathi Subramaniam, who was interviewed on Monday, 27th September 2004. This problem solving skill of separating people from the problem and focusing on interests and not positions are two out of five methods for a 'principled negotiation' as discussed by Fisher, Roger, and Ury, William, *op. cit.*, at pp. 15-106.

- Mediator who mediates family disputes

As a mediator mediating family disputes, one important point should be highlighted to the parties; no party should make any of the children to hate either parent. Parties need to be reminded not to focus on the law but on other non-legal matters like how to work out their relationship, matters relating to the education of their children and matters concerning taking and sending their children to and from the other parent. It is necessary for the family mediator to guide parties to focus on the human relationship. The family mediator should be more sensitive to the feelings of parties, [405] which is contrary to mediating commercial cases, where no emotions are involved. It is also important for the family mediator to stress on parties that when they, as adults, fight, they should never let their children suffer. [406]

The family mediator who mediates family disputes should guide parties to think about the welfare of their children. This can be done through asking questions that will guide parties to talk about the interest of their children. However, to be able to do this, a family mediator must be familiar with the local culture of the disputing parties. Understanding and appreciating different cultures are crucial because different races solve problems differently, influenced by the values in their own distinct cultures. [407]

The family mediator must also refrain from giving counselling or legal advice or any opinion to the parties. [408]

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[405] The mediator must keep outburst in control and calm parties down, but to have this ability, the mediator himself or herself must be calm as well. Puan Yasmin binti Shariff, in her seminar paper, In Seminar Ke-ing Mahkamah Shariah VII "Penyelesaian Konflik Kekuarga di Mahkamah Shariah : Peranan Sulh dan Keberkesanannya"., *op. cit.*, see the above footnote 391 and page 5 of her seminar paper.

[406] A statement made by Mediator C, who was interviewed in Kuala Lumpur on Thursday, 28th October, 2004

[407] Statements made by Mediator D, who was interviewed in Johor on Tuesday, 26th October, 2004.

[408] A statement made by Mrs Ganesathi Subramaniam, who was interviewed on Monday, 27th September 2004.

'*Sulh* officers' in Selangor Shariah Courts

'*Sulh* officers' are involved in cases of family nature. 'Majlis Sulh' which takes place in a Shariah Subordinate Court, for example, discusses issues related to ancillary claims of divorcing couples like maintenance of a wife during *iddah*,[409] maintenance of the children, custody of the children (*hadhanah*), joint properties *(harta sepencarian*) and *mutaah*. [410]

From the interviews conducted with '*sulh* officers'; they regarded their roles to include;

a) providing legal information on the Selangor Islamic Family Law and Hukum Sharak (Islamic Law as a whole) especially in the Shariah Subordinate Courts where most parties are not represented by lawyers and are also ignorant of their legal rights. [411] '*Sulh* officers' also help parties to understand the relevant Shariah court procedures. [412]

b) as a middle person to two disputing parties, guiding them to reach a peaceful settlement and persuading them to re-evaluate the reasonableness of their claims [413]

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[409] *Iddah* or *eddah* refers to the waiting period imposed on a wife who is divorced by the husband, or whose husband has passed away. The waiting period normally lasts for three months and ten days reflecting three menstrual cycles in the case of *iddah* after a divorce. Where the husband has passed away the *iddah* lasts for four months and ten days. If the woman does not menstruate, her *iddah* is only three months; see Mimi Kamariah Majid, *op. cit.* ,(1999), at p. 131.

[410] According to the often-quoted *Kifayah al-Akhyar*, *mutaʿah* is the name of the property that is paid or given by a husband to his wife because of the separation with the wife. It is payable in all cases of divorce, except where the divorce is at the instance of the wife because of the defect on the part of the husband or it is a *fasakh* divorce because of the defect or fault of either party. The Quran did not specify to the effect that *mutaʿah* should be paid, the rich according to his means and the poor according to his means; see Mimi Kamariah Majid, *op. cit.*, at p. 347.

[411] Tuan Azmi bin Aziz , Puan Mazlina binti Jalani and Puan Siti Noraini binti Mohd Ali on the dates of their interviews; see the above footnote 376. This practice of providing legal information on the Selangor Islamic Family Law and also Hukum Sharak (Islamic Law) is also done in the Shariah High Court, Shah Alam, in a minority of cases where parties are not represented by lawyers, thus they lack understanding of the relevant laws; information obtained from Tuan Mohamad Ridzuan bin Zainudin, a '*sulh* officer' in Shariah High Court, Shah Alam, who was interviewed on Friday afternoon, 6th August, 2004 and Saturday, 30th October, 2004.

[412] Information from 'Maklumat dan Kertas Kerja Pegawai Sulh, Mahkamah Shariah Selangor 2002', at p. 3, prepared by Tuan Mohamad Ridzuan bin Zainudin, a '*sulh* officer' in Shariah High Court, Shah Alam.

[413] Puan Mazlina binti Jalani , Tuan Saharuddin bin Sahamat and Puan Siti Noraini on the dates of their interviews; see the above footnote 376.

c) not acting as a counsellor in 'Majlis Sulh' even though they may use some counselling skills in the private caucus [414]

d) simplifying parties' problem with the aim for them to see the solution [415]

e) helping the judges to ease their workload by attempting to reduce the number of cases pending in court and also to reduce the number of cases filed in court [416]

f) helping disputing parties in an assisted negotiation ('Majlis Sulh'), to negotiate and reach an amicable settlement [417]

Similar to MMC's mediators who regard mediation as 'an assisted negotiation, '*sulh* officers' also view their 'Majlis Sulh' as having the features of 'an assisted negotiation'. These '*sulh* officers', equal to the MMC's mediators, also help parties to generate their options for settlement and refrain from acting as counselors. However, they acknowledge that knowledge of some counselling skills, like how to deal with a conflict effectively, are helpful in their pursuit to guide parties to negotiate their own terms of settlement. Other roles of '*sulh* officers' seem to be consistent with the roles of mediators/ family mediators in MMC.

Since '*sulh* officers' can be equated to court-annexed mediators, they also see their role as helping to reduce the workload of judges as well.

As to the point of providing legal advice, the practice of these '*sulh* officers' differs from that of MMC's mediators. This is seen to be the major difference between mediation in MMC and 'Majlis Sulh' in Selangor Shariah Courts. The '*sulh* officers' see themselves

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[414] Tuan Saharuddin bin Selamat, on the date of his interview; see the above footnote 376.

[415] Puan Siti Nuraini binti Mohd Ali, on the date of her interview; see the above footnote 376.

[416] Ibid and also information from 'Maklumat dan Kertas Kerja Pegawai Sulh, Mahkamah Shariah Selangor 2002', at p.3, prepared by Tuan Muhamad Rahman bin Zainudin, a '*sulh* officer' in Shariah High Court, Shah Alam.

[417] Information from 'Maklumat dan Kertas Kerja Pegawai Sulh, Mahkamah Shariah Selangor 2002', at p. 1, prepared by Tuan Muhamad Rahman bin Zainudin, a '*sulh* officer' in Shariah High Court, Shah Alam.

as court staff with the obligation to educate parties concerning their legal rights and duties not only in accordance with the Selangor Islamic Family Law but also in line with Hukum Sharak (Islamic law). It is observed from the interviews with these '*sulh* officers' that ;

a) in providing legal information about the rights and duties to both parties in 'Majlis Sulh', '*sulh* officers' regard themselves as fulfilling their obligations not only as Shariah court staff but also as Muslims. This is due to the fact that Islamic family laws in Malaysia, even though enacted by different State Legislative Assemblies, conform to the basic rules in Islamic law itself. The legal rights and duties in Islamic family law in Selangor particularly, are intertwined with those in Islamic law generally and this fact has prompted '*sulh* officers' to provide parties with the information on their legal rights and duties.

b) most parties in Shariah Subordinate Courts in Selangor are not represented by lawyers, thus they are ignorant of laws relevant to their disputes. Providing both parties with the relevant information on their legal rights and duties will help to empower them in negotiating their terms of settlement, free from any power imbalance.

6.2.4. Categories

Mediators in MMC

MMC's mediators are those qualified mediators in the legal profession. They work outside the court system, upon voluntary reference which parties make through the MMC. There are advocates and solicitors who are still in active practice; therefore, their mediation practice is not a full-time occupation. The Committee within the Bar Council which deals

with the affairs of mediation/mediators is the Bar Council's Alternative Dispute Resolution Committee which set up the MMC. [418]

'*Sulh* officers' in Selangor Shariah Courts

They are similar to the positions of full-time court-annexed mediators. They are required to report to the court of whether the 'Majlis Sulh' they conducted is successful or unsuccessful. Although they are contract staff with the first term of a one-year contract and the current second term with a two-year contract, their qualifications are similar to those who are permanent staff in the same level. They enjoy the same facilities and are subject to the same rules and regulations as those of permanent staff. [419]

6.2.5. Code of Ethics / Code of Conduct and Mediation Rules

Mediators in MMC

MMC's mediators are governed by the MMC's Code of Conduct. [420] There are 8 terms, which contain, *inter alia*, the requirements that

a) the mediator has to be impartial and fair to the parties which includes disclosing the fact that he has acted in any capacity for any of the parties or he has any financial interest in the parties or in the outcome of the mediation or he has any confidential

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[418] For further details, see Chapter 5 of this dissertation, under the heading of '5.6 Development of Mediation in Malaysia; 5.6.1. Bar Council's Malaysian Mediation Centre' and qualifications as MMC's mediators as shown in 6.2.1. above.

[419] Information obtained from the Chief Registrar of the Selangor Shariah Courts, Puan Noor Hadina binti Ahmad Zabidi on Tuesday, 2nd November, 2004 at her office in Shariah High Court, Shah Alam.

She also explained the hurdles of creating permanent posts for '*sulh* officers' in Selangor. One hurdle is due to the fact that the creation of a post for '*sulh* officers' is depended on the respective State. In the State of Selangor, a permanent post for these '*sulh* officers' is yet to be created. Another hurdle is all the 'norms' (she meant this by names of posts, grades and number of employees) for the employees in the Shariah Court are determined by the Department of Judiciary Malaysia [Jabatan Kehakiman Shariah Malaysia (JKSM)] and all Shariah Courts in Malaysia follow these 'norms'. As for the State of Selangor, the creation of any new permanent posts will undergo certain procedures in the State Secretary office [Setiausaha Kerajaan negeri (SUK)]. From the SUK office, it will then be forwarded to the Public Service Commission [Jabatan Perkhidmatan Awam (JPA)]. However, to date, the Selangor Shariah Courts are in the process of restructuring their court system and staff which also involves creating new permanent posts including permanent posts for '*sulh* officers'.

[420] For further details, see Chapter 5 of this dissertation, under the heading of '5.6 Development of Mediation in Malaysia; 5.6.1. Bar Council's Malaysian Mediation Centre'

information about the parties or the dispute under mediation derived from sources outside the mediation. [421]

b) the mediator will act in accordance with the Mediation Rules [422]

c) the mediator must maintain confidentiality of the document and information which he obtained in the course of mediation. Disclosure of such confidential information can only be made if permitted by general law [423] or with the consent of parties or if disclosure is necessary to implement or enforce any settlement agreement. The mediator or any member of his firm is not permitted to act for any of the parties subsequently in any manner related to or arising out of the subject matter of the mediation without the written consent of all the parties. [424]

d) the mediator will ensure that any settlement agreement reached is recorded in writing and signed by the parties. [425]

e) the mediator must withdraw himself upon occurrence of some circumstances. It is observed that there are circumstances that lead to automatic withdrawal of mediator's duty i.e. if he is in breach of any of the terms in the Code or if there is a request to do so in writing by any of the parties or when he is required by any of the parties to do anything in breach of the Code of the MMC's Mediation Rules. [426] However, the mediator has discretion to withdraw himself if any of the parties breaches the MMC's Mediation Agreement or the MMC's Mediation Rules or any

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[421] See terms 2.1, terms 2.1(a), (b) and (c) of the Code of Conduct.

[422] See term 3.1 of the Code of Conduct.

[423] Two examples of where disclosure of such confidential information can be made by the mediator are given in one of the clauses in the MMC's Mediation Agreement as shown in the MMC's Mediation Kit. Clause 7 of the MMC's Mediation Agreement states among others, that such disclosure can be made by the mediator when there is a potential threat of injury to any person or damage to any property.

[424] See terms 4.1 and 4.2 of the Code of Conduct.

[425] See term 5.1 of the Code of Conduct.

[426] See terms 6.1 (a), (b) and (c) of the Code of Conduct.

of the parties acts unconscionably or there is no reasonable prospect in his opinion of a settlement or the parties allege that he is in breach of the Code. [427]

f) the mediator is bound to accept his fees as fixed by the MMC and he should not ask for any additional fees from the parties. [428]

g) the mediator will not evaluate the parties' case unless requested by all the parties to do so, and unless he is satisfied that he is able to make such an evaluation. [429]

In addition to the above Code of Conduct, MMC mediators must also abide by the MMC's Mediation Rules which contain 21 rules. The Mediation Rules explain matters pertaining to the mediation process as a whole, from its initiation [430] until its termination [431]. There are also Rules concerning

- the appointment of mediator [432],
- the disqualification of mediator [433],
- the authority of mediator [434],
- the mediation agreement and settlement agreement [435],
- representation in the mediation [436],

[427] See terms 6.2 (a), (b), (c) and (d) of the Code of Conduct.

[428] See term 7.1 of the Code of Conduct.

[429] See term 8.1 of the Code of Conduct.

[430] See rules 3 and 4 of the Mediation Rules.

[431] See rule 18 of the Mediation Rules.

[432] See rule 5 of the Mediation Rules.

[433] See rule 6 of the Mediation Rules.

[434] See rule 12 of the Mediation Rules.

[435] See rule 7 and rule 13 of the Mediation Rules respectively.

[436] See rule 9 of the Mediation Rules.

- the date, time and place of mediation [437],
- identification of matters in dispute and exchange of information [438],
- privacy and confidentiality of all matters connected to mediation [439],
- mediation not to act as a stay of proceedings (of any legal suit or arbitration) [440],
- expenses related to mediation to be equally shared by parties unless they agree otherwise [441] and
- exclusion of the liabilities of MMC and its mediator for any act or omission in connection with any mediation conducted under the Mediation Rules except for act or omission involving fraudulent or dishonest misconduct. [442]

'*Sulh* officers' in Selangor Shariah Courts

There is only one Code of Ethics, known as 'Kod Etika Pegawai Sulh', which governs the ethics of '*sulh* officers'. There is no Mediation Rules similar to that of the MMC. However, these '*sulh* officers' have the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 to generally guide them in conducting 'Majlis Sulh'. [443] As for the specific guidelines in the stages to be specifically adopted in 'Majlis Sulh', these '*sulh*

[437] See rule 10 of the Mediation Rules.

[438] See rule 11 of the Mediation Rules.

[439] See rule 14 and rule 15 of the Mediation Rules respectively.

[440] See rule 17 of the Mediation Rules.

[441] See rule 21 of the Mediation Rules.

[442] See rule 19 of the Mediation Rules.

[443] For further details, see Chapter 5 of this dissertation, under the heading of '5.6 Development of Mediation in Malaysia. 5.6.2. *Sulh* in the Shariah Courts in the State of Selangor'.

officers' have their 'Manual Sulh' [444], which will be further elaborated in subsequent discussions.

It is submitted that even though the wordings used in the MMC's Code of Conduct and the MMC's Mediation Rules may not be identical to the relevant provisions governing '*sulh* officers', to a large extent, the provisions in both the MMC's Code of Conduct and MMC's Mediation Rules are substantively the same with provisions in the Code of Ethics for '*sulh* officers' together with the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 and 'Manual Sulh', for example the avoidance of financial and personal interests, the avoidance of delaying the settlement of their cases, the requirement of honesty, impartiality and fairness, confidentiality and the prohibition of a mediator/ '*sulh* officer' to testify as a witness to the mediation.

The following paragraphs will specifically show many similarities, with only one difference, between the provisions relating to MMC mediators and '*sulh* officers';

Similarities

Requirement that mediator must be impartial and fair to parties, thus avoiding any kind of interest including financial and personal interests.

- The relevant provisions for MMC's mediators are term 2 (a) and term 2 (b) of the MMC's Code of Conduct and also rule 6.1 and rule 6.2 of the MMC's Mediation Rules.
- Similar provisions, in substance, can be found in item 3 (a), 3 (c), 3 (h), item 5, item 7 (iv), item 7 (viii), item 8 (i), item 8 (ii) and item 8 (iv) of the Code of Ethics for '*sulh* officers' and 'Manual Sulh; Bab 6 (f)'.
- Interestingly, item 3 (i) of the Code of Ethics for '*sulh* officers' also prohibits '*sulh* officers' from taking part in activities held by any political parties. Item 7

[444] Ibid

(iii) of the said Code further disallows '*sulh* officers' from conducting 'Majlis Sulh' in which parties involved are either their enemies or their friends. It is observed that these items 3 (i) and 7 (iii) serve as provisions which attempt to avoid the likelihood of these '*sulh* officers' to have either political bias or personal bias towards parties that appear before them in 'Majlis Sulh'.

The requirement that the mediator refrains from acting dishonestly.

- The relevant provision for MMC's mediators is rule 19.2 of the MMC's Mediation Rules, whereby a mediator with MMC is only excluded from any liability to parties or any other person for any act or omission in connection with any mediation conducted under the Mediation Rules insofar as the act or omission is neither fraudulent nor dishonest misconduct. Therefore, if the said mediator goes beyond these boundaries, then the exclusion of liability will be waived.
- A similar provision, in substance, can be found in item 3 (b) of the Code of Ethics for '*sulh* officers', whereby '*sulh* officers' are prohibited from acting dishonestly or acting in the manner that would tarnish the name of the Shariah Court.

The requirement that the mediator attempts to conduct mediation expeditiously.

- The relevant provision for MMC's mediators is term 1.1 of the MMC's Code of Conduct.
- A similar provision, in substance, can be found in item 4 of the Code of Ethics for '*sulh* officers'.

The requirement that the mediator ensures that the settlement agreement is reduced into writing and then signed by parties.

- The relevant provision for MMC's mediators is term 5 of the MMC's Code of Conduct.
- A similar provision, in substance, can be found in Rule 6 of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001.

The requirement that the mediator maintains confidentiality.

- The relevant provisions for MMC's mediators are term 4 of the MMC's Code of Conduct, Rule 15 and Rule 16 of the MMC's Mediation Rules. Rule 15 and Rule 16 show more detailed provisions with specific examples of matters covered by the confidentiality term, if compared to the relevant provisions in the Code of Ethics for '*sulh* officers' and 'Manual Sulh'.
- Similar provisions, in substance, can be found in item 8 (iii) of the Code of Ethics for '*sulh* officers' and 'Manual Sulh; Bab 3 (g) and Bab 10'.

The requirement that the mediator assists parties to prepare their draft settlement agreement.

- The relevant provision for MMC's mediators is rule 5.3 (c) of the MMC's Mediation Rules.
- Similar provisions, in substance, can be found in Rule 6 of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 and 'Manual Sulh; Bab 8 (b)'.

The prohibition of mediators from being called as witnesses connected to the mediations that they had conducted earlier.

- The relevant provision for MMC's mediators is rule 15.3 of the MMC's Mediation Rules, whereby the prohibition is not only limited to testifying as a witness but also extends to testifying as a consultant, arbitrator or expert in regard to the mediation in any arbitral, judicial or other proceedings.
- Similar provisions, in substance, can be found in item 8 (vii) of the Code of Ethics for '*sulh* officers' and 'Manual Sulh; Bab 3 (i)'. Item 8 (vii) of the Code of Ethics for '*sulh* officers' prohibits '*sulh* officers' from acting as 'witnesses' or 'advisers' to parties, while 'Manual Sulh; Bab 3 (i)' generally states that, at the commencement of 'Majlis Sulh', '*sulh* officers' must inform parties that they cannot be called in any kind of court proceedings which relate to the cases that they handled in 'Majlis Sulh'.
- It is submitted that rule 15.3 of the MMC's Mediation Rules covers a wider scope in the said prohibition; particularly in the capacity of the mediator (which covers his appearance in the capacity of a witness, a consultant, an arbitrator or an expert) and the proceedings in which the mediator is prohibited from participating (which includes arbitral, judicial or other proceedings). While acknowledging that 'Manual Sulh; Bab 3 (i)' confines the prohibition of '*sulh* officers' to appear in any 'court proceedings' related to parties in 'Majlis Sulh' conducted earlier, it can be argued that the word 'adviser/advisers' in item 8 (vii) of the Code of Ethics for '*sulh* officers' may safely cover the role played by a consultant, an arbitrator or an expert; different parties with different capacities as stated in rule 15.3 of the MMC's Mediation Rules.

Although a mediator does not impose a settlement on parties, he is allowed to suggest options for settlement to parties.

- The relevant provision for MMC's mediators is rule 12.1 of the MMC's Mediation Rules.
- A similar provision, in substance, can be found in 'Manual Sulh; Bab 4'.

Difference

The provisions as to stay of proceedings.

- The relevant provision for MMC's mediators is rule 17 of the MMC's Mediation Rules, whereby reference to mediation does not act as a stay of any other proceedings, neither the court proceedings nor the arbitral proceedings. Parties in mediation are free to commence any of the above-mentioned proceedings at any stage of the mediation process.
- A different provision can be found in Rule 3 (a) of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001, whereby reference to 'Majlis Sulh' will act as a stay of court proceedings and the Registrar shall not fix the date for the trial of the case referred to 'Majlis Sulh' within the period of three months from the date of the registration of such case in court. [445]

Another point worth noting is that the bulk of the items in the Code of Ethics of the '*sulh* officers' are similar to that of Code of Ethics for judges in the Shariah Court ['Kod Etika Hakim Sharie'], which was issued by the Director General of the Department of

[445] Rule 3 (a) of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 reads together with YA Drs Atras Mohamad Zin, 'Amalan dan Permasalahan Sulh di Mahkamah Shariah Selangor', *op cit.*, at p. 7. The 3-month period given is for a particular '*sulh* officer' to conduct 'Majlis Sulh'. If parties in the case referred to 'Majlis Sulh' can achieve a mutual settlement at any time before the 3-month period expires, the case will be immediately forwarded to the relevant Shariw judge for endorsement to give effect to a consent judgment, see YA Drs Atras Mohamad Zin, 'Amalan dan Permasalahan Sulh di Mahkamah Shariah Selangor', *op cit.*, at p.7.

Islamic Judiciary ['Ketua Pengarah Jabatan Kehakiman Shariah Malaysia (JKSM)], Dato' Sheikh Ghazali bin Abdul Rahman in year 2000. The general responsibilities of '*sulh* officers' as in item 3 of their Code of Ethics are identical in words as in item 3 of the Code of Ethics for judges in the Shariah Court, under the heading of Code of Ethics outside court. Similarly, the specific responsibilities of '*sulh* officers' as in item 7 of their Code of Ethics are word for word similar to item 4 of the Code of Ethics for judges in the Shariah Court, under the heading of Code of Ethics inside court. [446] It is observed that this is influenced by the fact that the male '*sulh* officers' are equivalent in ranking with the Sharie judges in the Shariah Subordinate Courts. This is by virtue of the appointments or "watikah" made by the current Sultan of Selangor[447], whereby they can perform the duties of the Subordinate Court judges subject to some restrictions.[448] However, as far as the female '*sulh* officers' are concerned, they were not given the same "watikah" empowering them to act as Subordinate Court judges. Perhaps this is due to the fact that there are no female Sharie judges yet appointed in Selangor particularly and in other Shariah Courts throughout Malaysia generally, either to act in the Shariah Subordinate Court or the Shariah High Court.

[446] The Code of Ethics for Sharies judge was obtained from the Shariah High Court, Shah Alam when its Chief Registrar was interviewed; see the above footnote 378.

[447] The said "watikah" was given on the 1st July, 2002; information obtained from 'Pelaksanaan Sulh di Mahkamah Shariah, Sejarah dan Perancangan', Jurnal Hukum , *op. cit.*, at pp.82-83 and also Tuan Mohamad Ridzuan bin Zainudin, a '*sulh* officer' in Shariah High Court, Shah Alam, who was interviewed on Friday afternoon, 6th August, 2004 and Saturday, 30th October, 2004.

[448] The limited jurisdictions upon which a male '*sulh* officer' can act as a Subordinate Court Judge were laid down in 'Pekeliling Ketua Hakim Sharie 9/2002 Bidang Kuasa Pegawai Sulh (Hakim)' Bil. (30) dlm. MTS.Sel.0211 (hereinafter the 'circular'), which was issued by the Chief Sharie Judge for Selangor Shariah Court. The issuance of the 'circular' was made in pursuance to a meeting of all Sharie judges and Registrars on 6th August, 2002 at Kleberg Beach Resort, Malacca. One example of such limited jurisdictions is that a male '*sulh* officer' cannot hear cases which he has heard in 'Majlis Sulh'.

6.2.6. Mediation agreement

Mediators in MMC

All parties submitting themselves to the MMC's mediation are also bound by the Mediation Agreement as adopted by the MMC. The Mediation Agreement is entered into by parties before mediation is carried out. This Mediation Agreement is also referred to as an agreement for the appointment of Mediator by rule 7 of the MMC's Mediation Rules.

The Mediation Agreement, with 14 clauses therein, is actually an agreement made by three parties; party A, party B and the mediator that both parties appointed. It begins with the names of the three parties and ends with the signatures of the said three parties with the dates of the signatures. The Mediation Agreement contains the clauses related to;

a) the appointment of the mediator by both parties [449]

b) the MMC's Mediation Rules to govern the conduct of the mediation [450]

c) the non-binding effects of any comments, suggestions, advice, opinions, statements or recommendations of the mediators on the parties in dispute [451]

d) the mediator may meet any of the parties or their advisers jointly or separately [452]

e) the requirement for the parties and their advisers to co-operate in good faith [453]

f) the requirement as to parties attending the mediation to have full authority to settle the dispute, failing which, the mediator will be immediately informed [454]

[449] See Clause 1 of the MMC's Mediation Agreement.

[450] See Clause 2 of the MMC's Mediation Agreement.

[451] See Clause 3 of the MMC's Mediation Agreement.

[452] See Clause 4 of the MMC's Mediation Agreement.

[453] See Clause 5 of the MMC's Mediation Agreement.

[454] See Clause 6 of the MMC's Mediation Agreement.

g) the requirement of the mediator to maintain confidential information which he has obtained in private unless in some exceptional cases [455]

h) save for the purpose of any party to enforce the terms of the settlement agreement by judicial proceedings [456], some information, communications, documents and the like are considered to be privileged and will not be disclosed in any proceedings whether or not the proceedings relate to the dispute. [457]

i) either any party or the mediator can terminate the mediation after consultation with the mediator or the parties respectively. [458]

j) the exclusion of mediator's liability to a party for any statement, act or omission in assisting the parties to settle their dispute unless for fraudulent or dishonest act or omission. [459] Save for fraudulent or dishonest act or omission on the part of the mediator, the parties together and separately must indemnify the mediator and the MMC against any claim for any statement, act or omission in assisting the parties to settle their dispute. [460]

k) the parties together and separately will be liable to MMC for the administrative charge and room rental and to the mediator for the mediator's fees and disbursements as prescribed by the MMC. The parties must share equally the payments for such charges, disbursements, rental, catering and other costs. [461]

[455] For further details as to the exceptional cases, see Clause 7 and Clause 8 of the MMC's Mediation Agreement.

[456] See Clause 10 of the MMC's Mediation Agreement.

[457] The list of such privileged information is expressly stated in Clause 9.1 until Clause 9.7 of the MMC's Mediation Agreement.

[458] See Clause 11 of the MMC's Mediation Agreement.

[459] See Clause 12 of the MMC's Mediation Agreement.

[460] See Clause 13 of the MMC's Mediation Agreement.

[461] Clause 14 of the MMC's Mediation Agreement.

It is observed that since reference to MMC's mediation is made voluntarily by parties, without any legislation to formally govern matters related to such reference, the MMC's Mediation Agreement is seen as a mechanism to ensure that parties abide by the terms of MMC's Mediation Agreement which also incorporates the terms of the MMC's Mediation Rules as in Clause 2 of the MMC's Mediation Agreement.

'*Sulh* officers' in Selangor Shariah Courts

Contrary to the MMC's mediators, '*sulh* officers' have no any Mediation Agreement that they would be required to sign with the parties. For all cases in the Selangor Shariah Court except for applications for divorce and further proceedings in respect thereof, reference to 'Majlis Sulh' is mandatory, as a pre-trial process before any date of trial is fixed. [462]

Only for cases related to applications for divorce for example in section 47 [463] and section 57 [464] of the Islamic Family Law (State of Selangor) Enactment 2003 that the reference to 'Majlis Sulh' is made voluntarily, with the consent of both parties. Parties can choose either to make such reference or not. Before parties decide to make such reference or not, the explanation on the features of 'Majlis Sulh' is made over the relevant Shariah court's counter. [465] However, if parties need further clarification or detailed explanation,

[462] See Rule 1 (2) and Rule 3 of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 and also interview with Puan Noor Hadina binti Ahmad Zabidi, the Chief Registrar of the Selangor Shariah Courts on Tuesday, 2nd November, 2004 at her office in Shariah High Court, Shah Alam.

[463] Divorce by *ruling* or by *order*.

[464] Registration of divorces outside the Court.

[465] This only applies to the Shariah Subordinate Courts since any kinds of divorce applications are within the jurisdiction of the said Courts; information obtained from various interviews as shown in the above footnotes 376, 377, 378 and 379.

they can request to meet any Shariah Court officers to help them in the said matter. [466] If parties in the applications of divorce agree to refer their case to 'Majlis Sulh', they are required to fill up a standard form in Shariah Subordinate Courts, known as 'Borang Persetujuan Menghadiri Majlis Sulh'. [467]

It is observed that it is unnecessary for the Selangor Shariah Court to adopt any Mediation Agreement, as in the MMC, because 'Majlis Sulh' is part of its pre-trial process. There are adequate laws and regulations to protect a '*sulh* officer' in performing his or her duties and also at the same time to protect the interests of parties, for example;

a) section 131 of the Shariah Court Civil Procedure (State of Selangor) Enactment 2003 provides that judgments by confession or consent of the parties, including *sulh*, may be recorded by the Court at any time.

In fact, the practice of the judges in the Selangor Shariah Courts is to allow endorsements of cases successfully settled in 'Majlis Sulh' to be made in between periods of hearing cases scheduled for that particular day. These Sharie judges have positively supported the expeditious settlement of parties in 'Majlis Sulh' by allowing such settlement agreement to be brought before them on the same day it is concluded in 'Majlis Sulh'. [468]

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[466] Information obtained from interviews with
(a) Puan Noor Hudina Binti Ahmad Zabidi, the Chief Registrar of the Selangor Shariah Courts on Tuesday, 2nd November, 2004 at her office in Shariah High Court, Shah Alam; and
(b) Puan Siti Norani binti Mohd Ali, a '*sulh officer*' in Shariah Subordinate Court, Gombak Timur (Keramat), at her office on Friday morning, 15th October, 2004.

[467] This is one of some requirements to be fulfilled before any application for divorce is referred to 'Majlis Sulh' since Rule 1 (2) of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 clearly states that any application for divorce under the Islamic Family (State of Selangor) Enactment 2003 (SIFL 2003) falls outside the ambit of 'Majlis Sulh'. Other requirements include ;
a) 'Majlis Sulh' can only be conducted for cases in which parties mutually agree to divorce (as in section 47 of SIFL 2003) and one party does not intend to remarry the former spouse when the judge confirms that divorce has taken place (section 57 of SIFL 2003);
b) the discussion held in 'Majlis Sulh' only involves ancillary claims after divorce and not the divorce itself.
c) the terms in settlement agreement derived from the discussion in 'Majlis Sulh' cannot be automatically endorsed as a consent judgment unless and until the divorce is granted by the trial judge.
-The above sources are obtained from YA Dra Aznin Mohamad Zin, 'Amalan dan Permasalahan Sulh di Mahkamah Shariah Selangor', *op cit.*, at pp. 10-11; see the above footnote 367.

[468] Yang Arif Tuan Mohamed Fouzi bin Mokhtar, a judge in the Shariah Subordinate Court, Klang, who was interviewed on Monday morning, 3rd January 2005, at the Shariah High Court, Shah Alam, revealed that he usually took the maximum period of 10 minutes for each case to endorse such settlement agreement as a consent judgment.

b) section 94 of the Shariah Court Civil Procedure (State of Selangor) Enactment 2003 provides, *inter alia*, that once the settlement agreement of parties is recorded by the Court, the record of such settlement shall afford a defence by way of *res judicata* [469] to subsequent proceedings for the same, or substantially the same, cause of action.

c) Rule 4 of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 states that failure of any party to appear on the date fixed for *sulh* after the relevant notice is served, as required by Rule 3 (c) of the same Rules, shall be treated as a contempt of court.

6.2.7. Model of mediation adopted

Mediators in MMC

The model of mediation adopted by MMC is the facilitative model [470], whereby the mediator will facilitate negotiations between parties and steer the direction of the discussion with the aim of finding a mutually acceptable solution. [471] However, it is observed that this facilitative model may shift to an evaluative model on the request of parties. The front page of the MMC's Mediation Kit states that the mediator will not make a ruling or finding unless expressly requested by all parties involved. The possibility of shifting from facilitative model to that of evaluative model upon the request of parties is then reiterated in rule 5.3 (d) of the MMC's Mediation Rules and term 8 of the MMC's Code of Conduct.

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[469] According to Elizabeth A. Martin (ed.), *res judicata* are Latin words which literally mean "a matter that has been decided". In legal context, they mean "the principle that when a matter has been finally adjudicated upon by the court of competent jurisdiction, it may not be reopened or challenged by the original parties or their successors in interest. It does not preclude an appeal or a challenge to the jurisdiction of the court. Its justification is the need for finality in litigation"; see Martin, Elizabeth A. (ed.), A Dictionary of Law, (3rd ed., 1994), at p. 346.

[470] As stated at the front page of MMC's Mediation Kit and also mentioned in the interviews with Puan Hendon binti Mohamed, Ms Gunavathi Subramaniam and Mr Phan Shoon Long; see the above footnotes 374 and 375.

[471] Rule 5.3 (d) of the MMC's Mediation Rules.

Nonetheless, in practice, the MMC's mediators interviewed had never adopted the evaluative model in the mediations they conducted. [472]

'*Sulh* officers' in Selangor Shariah Courts

The Selangor Shariah Courts' model of 'Majlis Sulh' appears to share the features of a facilitative model of mediation. However, this facilitative model is modified to the extent of allowing '*sulh* officers' to provide legal information on the Selangor Islamic Family Law and Hukum Sharak (Islamic Law) as discussed in detail earlier. [473]

Similar to the point on the model of mediation in the MMC, 'Manual Sulh; Bab 5 (b)' also seems to suggest that the evaluative model may be adopted by '*sulh* officers'. It is stated that in the joint session with parties, a '*sulh* officer' will inform parties of his or her evaluation on the strengths and weaknesses of parties' case based on the conflict map and he or she will try to persuade parties to accept his or her evaluation. The conflict map is made by a '*sulh* officer' for the purpose of identifying the scope of parties' dispute. 'Manual Sulh; Bab 4(c)' states that the '*sulh* officer' will use the conflict map to identify and to list down all matters which parties have disputed, the reason/reasons why the conflict arises between them, things which hinder parties to settle and actions to be taken in order to reach a settlement. 'Manual Sulh; Bab 4(d)' further provides that the '*sulh* officer' will then arrange the information, which he has obtained from the conflict map, in the following sequence; the issues or problems to be solved, parties' respective positions, interests of both parties and options for settlement. The conflict map is usually drawn for a

[472] See the above footnote 374.

[473] Information obtained from the interviews held with '*sulh* officers'; see the above footnotes 376 and 377.

complicated case that involves a lot of issues, which usually applies to cases in the Shariah High Court, Shah Alam. [474]

Nonetheless, in practice, '*sulh* officers' will usually play their evaluative role in the private caucus. These '*sulh* officers' will evaluate parties' case in the joint session when there is a power imbalance for example, one of the parties is not aware of the strengths and weaknesses of his or her case (usually out of ignorance of the Islamic Family law). The '*sulh* officers' also play their evaluative role after they have considered the circumstances of the cases before them and think that it is prudent to shift to evaluative role in the presence of both parties, so that parties have equal bargaining power to negotiate and most importantly, no disputant feels that he or she has more bargaining power over the other. [475]

6.2.8. Stage of reference

Mediators in MMC

Mediation can be commenced at any stage of proceedings. The MMC may accept cases at any stage, whether the pre-trial, commencement of legal proceedings, during proceedings etc. [476] One mediator experienced mediating two divorce cases before divorce petitions were filed in court. [477]

Mediation in MMC can be initiated either jointly by both parties (known as 'the Joint Submission') or by one party only (known as 'the Request'). [478]

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[474] Information obtained from Tuan Mohamad Ridzuan bin Zainudin, who was interviewed on Friday afternoon, 6th August, 2004 and Saturday, 30th October, 2004, see the above footnote 377.

[475] Ibid and interview with Puan Siti Norazri binti Mohd Ali on Friday morning, 15th October, 2004, see the above footnote 376.

[476] See the front page of the MMC's Mediation Kit.

[477] Ms Gunavathi Subramaniam, a statement made in her email dated Thursday, 2nd December, 2004.

[478] For further details, see Rule 3 and Rule 4 of the MMC's Mediation Rules.

'*Sulh* officers' in Selangor Shariah Courts

Similarly, 'Majlis Sulh' can be held at any stage of the Court proceedings. Section 99 of the Shariah Court Civil Procedure (State of Selangor) Enactment 2003 states that the parties to any proceedings may, at any stage of the proceedings, hold *sulh* to settle their dispute in accordance with such rules as may be prescribed or, in the absence of such rules, in accordance with Hukum Sharak / Islamic Law.

In practice, 'Majlis Sulh' can take place ; [479]

(a) once divorce is filed but before the trial judge hears the case

(where parties voluntarily submit themselves to 'Majlis Sulh' by filling in 'Borang Persetujuan Menghadiri Sulh'; this can be equated to a voluntary mediation), [480]

(b) during trial of the case, when the trial judge so directs, [481]

(c) after divorce is granted by the court. [482]

(Both (b) and (c) can be equated to a mandated mediation)

6.2.9. Choice of mediators

Mediators in MMC

In MMC's mediation, parties can choose their mediator. However, if parties cannot reach an agreement as to the choice of mediator, the MMC will intervene. Rule 5.1 of the MMC's Mediation Rules provides that upon the parties agreeing to submit to mediation, the MMC will forward a list of mediators on the panel and in the event the parties not

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[479] Information obtained from Puan Siti Norainni binti Mohd Ali and Tuan Muhamad Ridzuan bin Zainudin, see the above footnotes 376 and 377 respectively.

[480] Only practised in Shariah Subordinate Courts in Selangor and known as "*sulh kecil*".

[481] Ibid.

[482] As practised in both courts: Shariah Subordinate Courts and Shariah High Court, Shah Alam, Selangor and known as "*sulh besar*".

having agreed upon a mediator on MMC's panel within seven days, the MMC shall appoint a person on the MMC's panel to act as the mediator.

'*Sulh* officers' in Selangor Shariah Courts

Unlike parties referring their case to MMC's mediation, parties who either voluntarily submit themselves to 'Majlis Sulh' or are mandated to attend 'Majlis Sulh' do not have the opportunity to choose their '*sulh* officer'. There is one '*sulh* officer' in each Shariah Subordinate Court throughout Selangor and two '*sulh* officers' for two Courts in the Shariah High Court, Shah Alam. However, in practice, if parties do not want a particular '*sulh* officer' to conduct the 'Majlis Sulh' for a valid reason, they can request for another '*sulh* officer'.[483] Similarly, if a '*sulh* officer' has any conflict of interest or likelihood of bias either in the dispute or the parties in dispute, exchange of '*sulh* officer' from Shariah Court in another district can be internally arranged. [484]

6.2.10. Lawyers' presence in mediation sessions

Mediators in MMC

Lawyers are allowed to attend mediation sessions [485] even though with some ground rules to be observed like they can only speak when their respective client asks for legal advice and the legal advice should take place outside the mediation room. [486]

[483] Information obtained from Tuan Saburudin bin Salamat, a '*sulh officer*' in Shariah Subordinate Court, Klang, who was interviewed at his office on Friday morning, 3rd December, 2004, see the above footnote 376.

[484] Information obtained from Puan Siti Norasni binti Mohd Ali, see the above footnote 376.

[485] Information obtained from the interviews of some MMC's mediators, see the above footnote 374.

[486] A statement made by Mediator D, who was interviewed in Johor on Tuesday, 26th October, 2004, from 12.15- 2.30 p.m. see the above footnote 374.

According to the current Chairperson of the Bar Council's ADR Committee, lawyers in Peninsula Malaysia are averse to mediation.[487] As at 14th February, 2005, there were 101 mediators accredited with the MMC. [488] If the number of MMC's mediators is compared to the number of lawyers throughout Peninsula Malaysia as at 28th January, 2005 i.e. approximately 12,000 lawyers [489], the number of MMC's mediators represented 0.84% of the total number of members of the Malaysian Bar.

It should be noted here that since mediation is a new process for members of the legal profession in Malaysia, if lawyers do not undergo mediation-related-trainings, they will not gain understanding about the mediation process itself. Knowledge of the practical aspects of mediation process may only be obtained from mediation-related-trainings, such as the eight training workshops organised by the Bar Council, as discussed earlier. These mediation-related-trainings are not only important for qualifying lawyers as mediators accredited with the MMC but also for imparting knowledge about mediation to lawyers who attend mediation session as legal representatives.

Therefore, it is opined that lawyers must change their negative perceptions towards mediation, if any, before they attend any mediation session with their client. It is crucial for them to appreciate that they cannot 'hijack' the mediation session from either their respective client or the mediator; one example of 'hijacking' the mediation session is by being active speakers.

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[487] A statement made by Puan Hendon binti Mohamed, the Chairperson to the Bar Council's ADR Committee in an interview on 28th January, 2005.

[488] Source obtained from a tele-conversation, on 14th February, 2005, with Ms Marianna Tan, the person in charge of the MMC's administrative matters.

[489] Source obtained from an interview with Puan Hendon binti Mohamed, the Chairperson to the Bar Council's ADR Committee on 28th January, 2005.

'*Sulh* officers' in Selangor Shariah Courts

Rule 5 (2) of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 specifically prohibits any Sharie lawyer from attending 'Majlis Sulh' except with the leave of the Chairman (this refers to the '*sulh* officer' who conducts 'Majlis Sulh'). The said Rule provides that in a 'Majlis Sulh', "every party shall appear in person and no Peguam Sharie (Sharie lawyer) may appear or act as such for any party and no party shall be represented by any person without the leave of the Chairman." It is observed that even though the wordings used in the said Rule 5 (2) indicates that Sharie lawyers can attend 'Majlis Sulh' if the '*sulh* officer' conducting 'Majlis Sulh' allows them in, the practice is Sharie lawyers have never been permitted to attend 'Majlis Sulh'. They can only perform their duties, in advising their clients, outside 'Majlis Sulh'.[490] They are also allowed to check the draft of their clients' settlement agreement at the end of 'Majlis Sulh'. [491]

The '*sulh* officers' strongly believed that it will be the Sharie lawyers who will do the talking for their clients, if they are allowed to attend 'Majlis Sulh', which will defeat the purpose of conducting 'Majlis Sulh' as a venue for parties to talk to each other with the help of '*sulh* officers' .

6.2.11. Mediation process involved

Mediators in MMC

The MMC's mediation process involves the following steps; [492]

a) pre-mediation process – where parties sign a mediation agreement indicating their submission to mediation.

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[490] As told by '*sulh* officers' interviewed; see the above footnotes 376 and 377.

[491] See 'Manual Sulh, Bab 8 (d)'.

[492] As stated at the front page of the MMC's Mediation Kit.

This actually involves making arrangements for mediation. [493]

b) preliminaries – an introduction to mediation,

c) mediator's opening [494] – ground rules are laid down by the mediator for the session; Mediators are provided with a brief statement of facts. No prior in-depth knowledge of the issues at dispute are required,

d) joint session – parties are invited to state their respective cases in each other's presence, [495]

e) caucuses [496], optional and usually exercised to enable the parties to vent emotions and to speak freely. A private caucus allows mediator to pick out common issues and hidden messages,

f) settlement agreement [497] – parties sign a settlement agreement witnessed by the mediator. Parties are at liberty to pursue court action should the outcome be unsatisfactory. Either parties' solicitors may draw up the agreement or the mediator may do so if assistance is required.

Normally, a mediator with MMC will generally follow the above stages in mediation session. [498] However, the mediator can exercise his or her discretion to vary the sequence of stages in a mediation session if the circumstances of the case demand him or her to do so. For example, in mediating family cases, if the wife starts crying at the

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[493] A statement made by Puan Yasmin binti Shariff in her seminar paper, In Seminar Ke-tiga Mahkamah Shariah VII "Penyelesaian Konflik Keluarga di Mahkamah Shariah : Peranan Sulh dan Keberkuatkuasaan,, *op. cit.*, at p.3.

[494] This was referred to as Mediator's Opening Statement by Puan Yasmin binti Shariff, *ibid.*

[495] In the joint session, the mediator's opening is then followed by parties' statements, mediator's summaries, identification of issues and agenda setting, and finally clarification and exploration of issues. All these stages are focused on past problems of parties; see *ibid.*

[496] This is the starting point to focus on future solutions. Caucus is also known as a private session; see *ibid.*

[497] In fact this stage can be accurately referred to as 'mediation outcome', which may either be an agreement concluded, or an adjournment of agreement or even a termination without any agreement. A stage after the private caucus but prior to mediation outcome is the stage where the mediator will facilitate negotiation of parties when the joint session after the private caucus is resumed; see *ibid.*

[498] Information obtained from the interviews of some MMC's mediators; see the above footnote 374.

beginning of the session, the mediator may postpone the joint session and begin with a private session with the wife in an attempt to allow her to vent her feelings. The decision to vary the sequence of stages in the mediation will depend very much on the nature of the dispute and the needs of disputants. [499]

It was observed from the interviews of the four MMC's mediators that there is no pre-screening stage to filter any cases not suitable to be mediated. It is opined that this was influenced by the fact that parties voluntarily refer their dispute to MMC's mediation, thus parties are those who decide the suitability of their case for reference to mediation.

'*Sulh* officers' in Selangor Shariah Courts

The mediation process as adopted in 'Majlis Sulh' is substantially the same as that adopted in MMC's mediation. 'Manual Sulh' explains the whole process in 'Majlis Sulh'. The stage where the '*sulh* officer' introduces the features of 'Majlis Sulh' to parties', as in the 'Manual Sulh; Bab 3' is identical to the stage of preliminaries in MMC's mediation. The opening statement of a '*sulh* officer' (referred to as 'Kenyataan Awal (Al Ta'arruf) Pegawai Sulh' in 'Manual Sulh; Bab 3') whereby the '*sulh* officer' lays down, *inter alia*, the ground rules in 'Majlis Sulh', resembles the 'mediator's opening statement' in MMC. The sequence of stages in 'Manual Sulh; Bab 4 and Bab 5' are substantively identical to MMC's mediation i.e. the mediator's summaries, identification of issues and agenda setting and clarification and exploration of issues. The stage of having private caucus/private caucuses are similarly adopted by the '*sulh* officer' conducting 'Majlis Sulh', as in 'Manual Sulh; Bab 7'. Finally, 'Manual Sulh; Bab 8' is similar, in substance, to the stage of settlement agreement in MMC's mediation.

[499] Information obtained from Ms Gunaratni Subramaniam on Monday, 27th September 2004, see the above footnote 374.

Similar to the practice of MMC's mediators, the above stages are generally followed by '*sulh* officers'. Equally, they may also vary the sequence of stages to suit each case before them. There was one case, for example, which was experienced by the '*sulh* officer' in the Shariah High Court, Shah Alam, where he could not avoid but to vary from the sequence of stages laid down in the 'Manual Sulh'. In that case, the wife had the history of trying to stab her husband outside court by using a knife, which she carried in her handbag. Knowing this fact, when the case was referred to 'Majlis Sulh', the said '*sulh* officer' started the session with a private caucus with the wife first, then followed by the joint session between the wife and the husband. By doing this, the said '*sulh* officer' could actually help to calm the wife down since she had vented her feelings in the earlier private caucus before the joint session was commenced.

The sequence of stages in 'Majlis Sulh' may also be varied if one party attends 'Majlis Sulh' while the other does not. To effectively utilise the time of the party who has made the effort to attend 'Majlis Sulh', the '*sulh* officer' can begin conducting a private caucus with the party attending 'Majlis Sulh', followed by a private caucus of the absent party on a later date and only when both parties are present for discussions in 'Majlis Sulh', the joint session is commenced. [500]

It is also possible to vary the sequence of stages in 'Majlis Sulh' at the request of parties, for example, at the end of the opening statement of the '*sulh* officer' ('Manual Sulh; Bab 3), the husband asks the '*sulh* officer' to start 'Majlis Sulh' with a private session with his wife and the wife does not object to this. [501]

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[500] This was experienced by Tuan Saharudin bin Salamat, a '*sulh* officer' in Shariah Subordinate Court, Klang; see the above footnote 376.

[501] This was experienced by Puan Siti Noraini binti Mohd Ali, a '*sulh* officer' in Shariah Subordinate Court, Gombak Timur (Keramat) ; see the above footnote 376.

Another example where variance of the sequence of stages in 'Majlis Sulh' is possible is in the case of 'wali enggan' (the 'wali', in this case the father refused to give permission for his daughter to get married). Since the case was already filed by the daughter against the father in court, the '*sulh* officer' commenced 'Majlis Sulh' with a private caucus with the daughter first, then the father, followed by a joint session of both parties. [502]

In Selangor Shariah Courts, the so-called 'pre-screening stage' is to be conducted by either the Assistant Registrar or any clerk who is in charge of registration of new court cases. It seems that the practice of one Shariah Subordinate Court to another varies. Some Shariah Subordinate Courts adopt a pre-screening stage where for example cases involving domestic violence or child abuse will proceed to court trials without undergoing 'Majlis Sulh'.[503] However, in some Shariah Subordinate Courts [504], cases involving domestic violence and the like are still referred to 'Majlis Sulh'. It will be the relevant '*sulh* officer' that decides whether there is any imbalance of power in negotiations between parties, which warrants 'Majlis Sulh' to be terminated, thus the case will then proceed to court trial. As for Shariah High Court, Shah Alam, the so-called 'pre-screening stage' is only practised to the extent of exempting certain cases that need orders of the court like cases involving interlocutory injunction and *ex-parte* application; a similar practice was adopted in Shariah Subordinate Court, Hulu Langat.

[502] This was experienced by Tuan Azmi bin Aziz, a '*sulh* officer' in Shariah Subordinate Court, Shah Alam; see the above footnote 376.

[503] As practised in Shariah Subordinate Court, Gombak Timur (Kerama).

[504] For example Shariah Subordinate Court, Shah Alam.

6.2.12. Issues related to costs

Mediators in MMC

The costs of a mediation in MMC, which include administrative charge of RM300 per case, room rental rates at RM350 for a full day and RM175 for half a day (which is defined as a period of 3 hours or less), refreshments/catering and secretarial service, are prescribed by the MMC. There is also a standard mediator's scale of fees, which is subject to change from time to time. The mediator's fees will depend on the quantum of claim in the case he or she mediates; [505]

MMC's Scale of Mediator's Fees

Quantum of Claim	Mediator's Fee Per Party
RM100,000 and below	RM 500 per day or part thereof
RM 100,001 – M250,000	RM 750 per day or part thereof
RM250,001 – M500,000	RM 1,000 per day or part thereof
RM500,001 – RM750,000	RM 1,250 per day or part thereof
RM750,0001 – RM 1,000,000	RM 1,500 per day or part thereof
RM1,000,000 – RM 2,000,000	RM 2,000 per day or part thereof
RM2,000,001 – RM 3,000,000	RM 2,500 per day or part thereof
RM3,000,001 – RM5,000,000	RM 3,000 per day or part thereof
RM5,000,001 – RM 10,000,000	RM 4,000 per day or part thereof
Above RM 10,000,000	RM 5,000 per day or part thereof

[505] See MMC's Mediation Kit, at the second page.

As for mediator's fees for family disputes, the MMC would gauge, principally, by looking at the matrimonial properties of the parties. [506]

The expenses incurred in mediation are cheaper than expenses incurred in court litigation. According to Mediator D, who is also a family law practitioner, there are three kinds of expenses incurred by parties in court; the legal costs (lawyer's fees), the disbursements (court fees) and the service tax.[507] Mediator D said;

> "1. the legal costs (lawyer's fees)
> There is no fixed scale on the lawyer-client fees. I will not disclose my fees here; only my client will know. However, my legal fees would depend on these factors;
> a) the difficulty of the matter in the case
> b) the novelty of the question of law involved
> c) the time taken for the case
> d) the amount of work involved
>
> 2. the disbursements (court fees)
> They are fixed in amount and are governed by the Rules of High Court, 1980. Examples of disbursements are fees in filing a case, affidavit fees, search fees (e.g. in the event that the marriage certificate is lost and the husband's whereabouts is not known, then search has to be made in the Registration office, or if immovable properties are involved, search will be made in the Land office), fees for witness' subpoena and service fees when service involves a substituted service)
>
> 3. the service tax – 5% of the legal fees
> This tax has to be paid to Customs Department. "

Mediator C, who is also a family practitioner, gave a divorce case as an example of expenses incurred by parties in a family litigation. Mediator C said;

> " In non-contested divorce or joint petition, disbursement will amount to RM 600 in total. While, in contested divorce, disbursement will cost between RM 1,000 to RM 3,000.
> In non-contested divorce or joint petition, the legal fees will cost between RM 2,000 to RM 3,000. However, in contested divorce, the legal fees will vary between RM 5,000 to RM 20,000.

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[506] Information obtained from a tele-conversation with Ms Gunavathi Subramaniam, on Tuesday, 22nd February, 2005.

[507] Mediator D was interviewed in Johor on Tuesday, 26th October, 2004. see the above footnote 374.

For each appearance in court, whether it involves full hearing, which takes the whole day, or half day, a family practitioner will charge RM 2,000. For every meeting with the client, RM 500 will be charged. " [508]

'*Sulh* officers' in Selangor Shariah Courts

Reference to 'Majlis Sulh' is free of charge. Rule 9 of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 states that no costs shall be charged for 'Majlis Sulh' proceedings. No matter how much are the legal fees of Sharie lawyers, 'Majlis Sulh' is undoubtedly a cost-effective choice for litigants in the Selangor Shariah Courts. [509]

6.2.13. Specific skills for mediators mediating family disputes

Mediators in MMC

It is necessary for a mediator involved in mediating family disputes to have a different training. There should be more role-plays on family disputes that can help a person trained to be a family mediator to relate these role-plays to family problems. Focus should be made on how the family mediator asks clarifying questions, identifies issues, expresses empathy and acknowledges feelings of parties. [510]

The specific training of family mediators should cover different aspects of family matters for example psychology of children. The said mediator has to know how to deal with family matters. [511]

The family mediator must also know how to deal with parties' emotions. An example of dealing with parties' emotions is that the family mediator must allow parties to

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[508] Statement made by Mediator C who was interviewed in Kuala Lumpur on Thursday, 28th October, 2004; see the above footnote 374.

[509] According to Puan Rafizah Abu Hassan, a Sharie lawyer in Selangor and Wilayah Persekutuan, Kuala Lumpur, who was interviewed in September 2004, there is no fixed scale provided for a Sharie lawyer to charge legal fees. A Sharie lawyer usually charges a minimum legal fees of RM2,000 excluding the expenses incurred in disbursements like payment for filing the claim, court attendance and miscellaneous.

[510] Statements made by Ms Gunavathi Subramaniam on Monday, 27th September 2004; see the above footnote 374.

[511] Statements made by Mediator C, who is also a family law practitioner, and was interviewed in Kuala Lumpur on Thursday, 28th October, 2004; see the above footnote 374.

vent their feelings. This is important because in court, the judge will overrule parties who talk about non-legal matters, which are considered to be irrelevant. Whereas, in mediation, parties can talk about anything. [512]

'*Sulh* officers' in Selangor Shariah Courts

All '*sulh* officers' interviewed in the selected Shariah Subordinate Courts [513] indicated that the special skills they want to improve are family mediation skills and counselling skills. Counselling skills are important to '*sulh* officers' who deal with mostly family cases and the said skills can help them, among others, in controlling parties' emotions, in persuading parties to tolerate and in knowing various methods to adopt in a conflict resolution.

It is submitted that the special skills needed for '*sulh* officers' as people playing similar roles of mediators mediating family disputes are, to a large extent, consistent with those expressed by MMC's mediators interviewed.

6.2.14. Support from the Government/legislature and from the judiciary

Mediators in MMC

The Federal government / legislature and most members of the Malaysian judiciary are yet to positively embrace MMC's mediation or the idea of any court-annexed mediation through legislation or Practice Directions or even judges' own initiatives to promote the use of mediation by parties appearing before them.

[512] Statements made by Mediator D, who is also a family law practitioner, and was interviewed in Johor on Tuesday, 26th October, 2004, see the above footnote 374.

[513] See the above footnote 376.

'*Sulh* officers' in Selangor Shariah Courts

The Selangor State Legislative Assembly has incorporated reference to 'Majlis Sulh' by inserting relevant provisions in its Islamic Family Law Enactment and also Shariah Civil Procedures. Further Rules, guidelines and circulars were made by the Chief Judge of the Selangor Shariah Court and also the Director General of the Department of Islamic Judiciary Malaysia, in attempts to specifically guide the conduct of 'Majlis Sulh'. [514] The support from Sharie Judges in Selangor is also evidently displayed by their willingness to endorse settlement agreement from 'Majlis Sulh' in between hearings of other cases scheduled for a particular day. [515]

6.2.15. Statistics of cases mediated

Mediators in MMC

As at 31st January, 2005 [516], the number of cases referred to MMC is 71 cases; with

a) 2 cases in 2000
b) 26 cases in 2001
c) 7 cases in 2002
d) 8 cases in 2003
e) 27 cases in 2004
f) 1 case in January, 2005

[514] For further details, see Chapter 5 of this dissertation, under heading "5.6 Development of Mediation in Malaysia"; see "5.6.2 *Sulh* in the Shariah Courts in the State of Selangor".

[515] As said by 2 judges in two selected Shariah Subordinate Courts in Selangor, see the above footnote 379.

[516] Source obtained from the MMC, through Ms Marianna Tan in her email dated Thursday, 17th February, 2005.

Out of these 71 cases;

i) 12 cases were closed without going through mediation

ii) 36 cases were still pending

iii) 7 cases were unsuccessful, to date

iv) only 16 cases were successfully mediated.

Therefore, in term of percentages of cases successfully mediated, cases unsuccessfully mediated, cases which were still pending settlement and cases which did not go through mediation are as follows;

a) percentage of cases successfully mediated = 22.5%

b) percentage of cases unsuccessfully mediated = 9.9%

c) percentage of cases which were still pending settlement = 50.7%

d) percentage of cases which did not go through mediation = 16.9%

'*Sulh* officers' in Selangor Shariah Courts

As for the Selangor Shariah Courts, the following statistics were obtained; [517]

a) Between May 2002 until December 2002,

-806 cases were registered

-510 cases reached settlements in 'Majlis Sulh', representing 63%

-223 cases proceeded to trials, representing 28%

-73 cases were still pending, as at 31st December, 2002, representing 9%

[517] Source obtained on 2nd November, 2004, from Tuan Khairul Azwadi bin Mohamed Noor, a 'sulh officer' in Shariah Subordinate Court, Subak Bernam , the 'sulh officer' in charge of statistics of cases referred to 'Majlis Sulh' in the Selangor Shariah Courts.

b) Between January 2003 until December 2003.

-1746 cases were registered and 73 cases were carried forward from the previous year

-1237 cases reached settlements in 'Majlis Sulh', representing 68%

-443 cases proceeded to trials, representing 24%

-142 cases were still pending, as at 31st December, 2003, representing 8%

c) As at August 2004,

-the total of 1492 cases were registered and carried forward from the previous year

-855 cases reached settlements in 'Majlis Sulh', representing 57%

-431 cases proceeded to trials, representing 29%

-206 cases were still pending, as at August, 2004, representing 14%

Looking at the statistics in 2002 and 2003, even though the total number of cases registered and carried forward in 2003 increased, there were more cases settled through 'Majlis Sulh' and there was a gradual increase (increase by 5%, if the percentages of successful cases were compared in 2002 and 2003) of cases successfully settled in 'Majlis Sulh' by the end of year 2003.

As at August 2004, even though the number of cases registered and carried forward was lesser than year 2003, the cases successfully settled in 'Majlis Sulh' recorded a decrease of 11%. However, one should note that this may not be a fair analysis since the decrease in percentage is analysed over the 8-month period in 2004 compared to the 12-month period in 2003.

It is opined that the number of successful cases mediated in MMC, from 2000 to 31st January 2005 (16 cases to represent 22.5%), is trivial, if compared to Selangor Shariah Courts, where hundreds to more than a thousand cases were successfully settled in 'Majlis

Sulh", representing more than 50 % each year over the period between May 2002 to August 2004.

Even the number of cases referred to MMC over the period of approximately 5 years (71 cases) is a paltry figure, what more with the bulk of cases which were still pending, cases unsuccessfully mediated and cases which did not go through mediation at all (but have made the initial non-refundable payment to the MMC as its administrative fees) ; a total of 55 cases out of 71 cases, representing 77.5%. Perhaps a mandated mediation will help to improve the number of cases referred to MMC and as more people realise the special features of mediation as offered by the MMC, more cases successfully mediated may be recorded.

6.2.16. Types of cases mediated

Mediators in MMC

It was discovered through all interviews connected to MMC [518] that most cases mediated were cases of commercial nature and only few cases were related to family matters. [519] One of the mediators, Ms Gunavathi Subramaniam had mediated three cases related to divorce; two through reference by MMC and the other one based on a voluntary basis. Another MMC mediator interviewed, Mediator D, only mediated one family case, involving a dispute over land between close relatives which had been pending in the High Court for 16 years.

[518] See the above footnotes 374 and 375.

[519] Source also obtained from MMC through email dated Thursday, 17th February, 2005, sent by the clerk in-charge of matters related to MMC, Ms Marianna Tan.

'*Sulh* officers' in Selangor Shariah Courts

As at 7th January, 2005 when the last '*sulh* officer' was interviewed, there were no commercial cases which had been referred to 'Majlis Sulh' yet, even those which relate to Islam like Islamic banking and Islamic insurance. This is due to the fact that Islamic commercial cases were yet to fall within the jurisdiction of the Shariah Courts.[520] Cases which were referred to 'Majlis Sulh' were of family nature like ancillary claims arising from a divorce, polygamous marriage and refusal of a father (*wali*) to give consent to his daughter's marriage.

6.2.17. Minimum and Maximum Period of Settlement

Mediators in MMC

As stated earlier, there were two mediators; Ms Gunavathi Subramaniam and Mediator D, who had experienced mediating family cases. The minimum period experienced by Ms Gunavathi was one day and the maximum period was two days; on two different dates. As Mediator D only experienced mediating one case of family disputes, the minimum period for that case was half a day.

'*Sulh* officers' in Selangor Shariah Courts

From the interviews held with five '*sulh* officers'[521], in attempts to help parties reaching mutual settlement in 'Majlis Sulh';

- two of them experienced the minimum period of 15 to 30 minutes [522],

[520] See sections 61 and 62 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 for the jurisdiction of Shariah High Court and Shariah Subordinate Court respectively.

[521] See the above footnotes 376 and 377.

[522] Puan Saharudin bin Selamat and Puan Siti Norainy binti Mohd Ali, see the above footnote 376.

- the other two experienced the minimum period of half a day [523],and
- all five '*sulh* officers' mentioned 3 months to be the maximum period. [524] However, this three-month period can further be extended at the request of both parties in 'Majlis Sulh'. [525]

6.2.18. Numbers of mediators accredited with MMC and '*sulh* officers' in Selangor Shariah Courts

Mediators in MMC

As at Friday, 28th January, 2005 [526], there were 101 mediators accredited with MMC. As at Friday, 28th January, 2005 also, the total number of lawyers throughout West Malaysia was close to 12,000; with 6005 lawyers in the Klang Valley, under the auspices of the Kuala Lumpur Bar. [527] The 101 mediators may be considered as part-time mediators since they work as full-time lawyers and their mediation practice will usually come into picture once cases were referred and then mediated through MMC.

'*Sulh* officers' in Selangor Shariah Courts

As at 7th January, 2005 [528], there were 13 full-time '*sulh* officers' (9 males and 4 females) with two years contract; from 15th April 2003 until 14th April, 2005. Previously,

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[523] Tuan Azmi bin Aziz and Puan Maslina binti Jailani, see the above footnote 376.

[524] This is in line with Rule 3 (a) of the Shariah Court Civil Procedure (Sulh) Selangor Rules 2001 as earlier explained.

[525] Information obtained from Tuan Muhamad Ridzuan bin Zainudin, see the above footnote 377.

[526] When the Chairperson of Bar Council's ADR Committe, Puan Hendon binti Mohamed was interviewed, see the above footnote 375.

[527] Ibid.

[528] When Puan Maslina binti Jailani, the last '*sulh officer*' was interviewed, see the above footnote 376.

there were 11 pioneer *sulh* officers' (8 males and 3 females) with one year contract; from 15th April, 2002 until 14th April, 2003. [529]

6.2.19. Post-Mediation Activities

Mediators in MMC

It is entirely up to parties to enforce their settlement agreement by court proceedings or not. The use of the word 'may' in Clause 10 of the MMC's Mediation Agreement connotes the discretion of any party to proceed to court proceedings for the purpose of enforcing the settlement agreement concluded in the mediation session. [530] In fact, the authority of the mediator is terminated by the execution of a written and signed settlement agreement by parties. [531] In addition, the mediator or any member of his firm cannot act for any of the parties at any time in connection with the subject matter of the mediation. [532] That explains why one of the mediators interviewed, Ms Gunavathi Subramaniam, had no knowledge whether subsequent petitions were filed in the two divorce cases that she mediated; the two cases were mediated before parties filed their petitions in court. However, there was one case that she mediated after proceedings for a divorce was filed in court. For that case, after the mediation was concluded, a consent judgment in respect of the terms of the settlement agreement was subsequently recorded in court. [533]

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[529] Source obtained from two 'sulh officers', Tuan Mohamad Ridzuan bin Zainudin and Puan Siti Noraini binti Mohd Ali; refer to their dates of interviews at the above footnotes 377 and 376 respectively.

[530] Clause 10 of the MMC's Mediation Agreement states that any party may enforce the terms of the settlement agreement by judicial proceedings.

[531] Rule 18 (a) and Rule 13 of the MMC's Mediation Rules are hereby read together.

[532] Rule 5.4 of the MMC's Mediation Rules.

[533] Statements made in her email dated Thursday, 2nd December, 2004.

'*Sulh* officers' in Selangor Shariah Courts

As 'Majlis Sulh' is a court-annexed procedure, when parties reach their settlement in 'Majlis Sulh', the Shariah Court will then record the terms of their settlement agreement as a consent judgment. By reading section 131 together with section 94 of the Shariah Court Civil Procedure (State of Selangor) Enactment 2003, it is understood that;

a) it is the Court's discretion whether to record or not the terms of the settlement reached in 'Majlis Sulh'. The use of the word 'may' in both sections connotes discretion of the Court.

   The Court's discretionary power in this matter is further supported by the interviews held with 2 Sharie judges in two selected Shariah Subordinate Courts [534], where both of them would never record the settlement agreement reached in 'Majlis Sulh' if;

   i. any of the parties disagreed with the settlement terms they had agreed earlier when asked by the judge in the open court;

   ii. the settlement terms were either inconsistent with Selangor Islamic Family Law or Hukum Sharak (Islamic Law) or both.

b) both parties must consent to the terms of their settlement before it could be recorded as a consent judgment.

[534] See the above footnote 179

6.2.20. Factor of Success and Failure

Mediators in MMC

Success	Failure
1.The mediator must himself be skillful in conducting mediation. The mediator must be well-trained mediator who understands his or her role. [535]	1.Unskilled mediator. [536]
2. Parties must come to mediation with open mind and are prepared to hear the other side's story. [537]	2.Contrary to the factor of success in number 2. [538]
3.Parties must be reasonable in what they want and are also willing to tolerate. The lawyer should help the client to see the reasonableness of his or her claim. [539]	3.Contrary to the factor of success in number 3. [540]
4. Parties must negotiate in good faith. [541]	4. Parties are not bona fide. [542]
	5.There exists power imbalance for example difficulty of expressing one's feeling or fear of the other party. [543]

[535] A combined statement made by Mediator D and Mr Phee Boon Leng; see the above footnote 374.

[536] Ibid.

[537] A statement made by Mediator D; see the above footnote 374.

[538] Ibid.

[539] A combined statement made by Mediator C and Ms Gunavathi Subramaniam; see the above footnote 374.

[540] A statement made by Mediator C; see the above footnote 374.

[541] A combined statement made by Mr Phee Boon Leng and Ms Gunavathi Subramaniam; see the above footnote 374.

[542] A statement made by Ms Gunavathi Subramaniam; see the above footnote 374. She explained this by giving examples of how can parties act with bad intention. Parties use mediation forum as a 'fishing expedition' i.e. fishing for useful information. They maximise their self-interest and refuse to compromise. They are more interested to know the other side's offer and withhold theirs. They also use mediation as a delaying tactic; mediation is adding further to the existing delay of settlement in court.

[543] A statement made by Ms Gunavathi Subramaniam; see the above footnote 374.

Success	Failure
1.Parties give their full commitment to settle. [544]	1.Either one party or both parties does not/do not give full commitment. [545]
2.Parties are ready to give and take, to negotiate in good faith, with no bad intention. [546]	2.Either one party or both parties does not/do not want to make any decision or cannot arrive at a mutual settlement. [547]
3.Parties realise that their mutual settlement is for their own interests in the future. [548]	3.Either one party or both parties is/are not ready for 'Majlis Sulh' or does not/do not have enough preparation to settle. [549]
4.Parties are aware of the advantages and disadvantages of taking their case for a court trial. [550]	4.Either one party or both parties does not/do not have any information in making a decision. [551]
	5. Either one party or both parties is/are influenced by a third party. [552]

[544] Brochure explaining about *Sulh* issued by Selangor Shariah Court; source obtained from Shariah High Court, Shah Alam, Selangor on 6th August, 2004 when Tuan Muhamad Ridzuan bin Zainudin, a '*sulh* officer' in Shariah High Court, Shah Alam, was interviewed.

[545] Ibid.

[546] Ibid.

[547] Ibid.

[548] Ibid.

[549] Ibid.

[550] Ibid.

[551] Ibid. This is due to lack of knowledge about Islamic Family Law in Selangor and/or Hukum Shara' (Islamic Law); information obtained from Tuan Saharudin bin Selamat on the date of his interview; see the above footnote 376.

[552] Ibid. Examples of a third party can be the party's lawyer or the party's parent-in-law or the party's present spouse. The examples were given by Puan Marlina binti Jailani; see the above footnote 376.

Success	Failure
	6.Non-attendance of one party on the date of 'Majlis Sulh' being held. [553]
	7.There is power imbalance for example one party is afraid of the other party or one party has difficulty in expressing her feelings. [554]

It is observed that the similar factors of success in MMC's mediation and 'Majlis Sulh' are; parties negotiate in good faith free from any bad intention and they are willing to tolerate or compromise and the reverse of these factors are factors of failure.

In addition, two more factors that have led parties to fail in settling their dispute through MMC's mediation and 'Majlis Sulh' are the existence of power imbalance and also parties lack preparation when they attend the mediation session / 'Majlis Sulh'.

Other additional factors that hinder parties to settle in a court-annexed mediation like 'Majlis Sulh' are lack of parties' commitment and non-attendance.

[553] This factor was similarly expressed by Tuan Muhamad Ridzuan bin Zainudin, Puan Siti Noraini binti Mohd Ali and Tuan Saharudin bin Sufanat on the dates of their interviews respectively; see the above footnotes 376 and 377.

[554] This statement was made by Puan Siti Noraini binti Mohd Ali; see the above footnote 376.

6.2.21. How has 'Majlis Sulh' helped judges and also parties in the Selangor Shariah Courts

From the interviews held with 2 Sharie judges [555] as stated earlier, the followings are the contributions of 'Majlis Sulh' to judges' workload;

1. Reducing the judge's workload by reducing the number of cases registered in court. Taking divorce cases for example, previously, ancillary claims for divorce had to be filed separately. Now, with the existence of 'Majlis Sulh', these supposedly separate files in court can be combined in one file for the purpose of discussion in 'Majlis Sulh'. If parties can settle these ancillary claims in 'Majlis Sulh', they need not file their ancillary claims separately but their settlement agreement in 'Majlis Sulh' will then be forwarded to the trial judge to be recorded as a consent judgment.
2. Expediting the settlement of a case in court. When parties have reached agreement in 'Majlis Sulh', the court's function is only left with endorsing their settlement agreement as a consent judgment. Five normal terms for such endorsement that are maintenance of children, maintenance of wife during *iddah, mutaah*, custody of the children (*hadhanah*) and distribution of joint properties (*harta sepencarian*) [556] will usually take the maximum period of 10 minutes for each case.
3. Saving the court's time as well as parties' time.
   The court's time can be saved when cases can be settled quickly. Parties need not come frequently to court for the purpose of attending their court trials.

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[555] See the above footnote 379.

[556] According to the two Sharie judges, *hadhanah* and *harta sepencarian* are two matters under the jurisdiction of the Shariah High Court, Shah Alam. Therefore, as judges in the Shariah Subordinate Courts, they will not endorse these two matters. These two matters will be forwarded to the Shariah High Court, Shah Alam for the purpose of endorsement and then will be returned to the Shariah Subordinate Courts for parties to have their complete consent judgment. This procedure is known a *'rujluk'* and it is an internal administrative procedure, thus parties are not required to appear in the Shariah High Court, Shah Alam. Parties will only wait for their consent judgment to be issued by the respective Shariah Subordinate Court once the *'rujluk'* procedure is duly completed.

4. Saving expenses related to court proceedings for example cost related to filling a case in court, costs to be paid to a lawyer, travelling cost and expenses to be paid to witnesses who appear in court. [357]

5. Providing a venue for a win-win situation that will benefit both parties who have settled their dispute through their mutual agreement.

6. In any case where 'Majlis Sulh' fails to help parties reaching their mutual agreement, parties will still benefit in term of understanding their rights and duties in accordance with Islamic Family Law in Selangor and Hukum Sharak (Islamic Law) since the '*sulh* officer' on duty has already explained these to them in 'Majlis Sulh'. The fact that 'Majlis Sulh' has educated parties of their rights and duties will also help them in their subsequent court trials and will then assist the court in dealing with parties who are aware of their rights and duties.

6.3 Conclusion

The practices of MMC's mediation and 'Majlis Sulh' in the Selangor Shariah Courts have more similarities than differences as shown above. Although there are some differences in their mediation practices as highlighted, it should be fairly acknowledged that these two different bodies with their own mediation forums share similar aims of providing parties in dispute with a private and confidential forum to discuss their dispute, helping parties to save cost and time and avoid the negative effects associated with an open court trial.

[357] A statement made by Puan Noor Hadina binti Ahmad Zahidi, Chief Registrar of Selangor Shariah Court, see the above footnote 378.

CHAPTER 7

7.1 Introduction

Chapter 7 will first answer research questions as earlier posed in Chapter 1 of this dissertation. This chapter will then list down some key research findings, followed by suggestions for reforms in bringing about mediation as part of the High Court process. Finally, the chapter will end with conclusion of the overall chapters of this dissertation.

7.2 Answers to Research Questions in Chapter 1 [558]

1. It is observed from various interviews conducted with some Deputy Registrars and Senior Assistant Registrars in selected High Courts and also two experienced family law practitioners that there are internal and external factors that contribute to the delay in disposing civil cases including family cases in the High Court; taking divorce cases as one example of family cases. [559]
2. There is a potential that family mediation may reduce the number of family cases litigated in the High Court if parties manage to reach their settlement agreement in the mandated mediation without proceeding to court trials. However, the mediated settlement agreement can only result in the expeditious disposition of the case if it is then supported with;
   a) the role of the judge to endorse the said settlement agreement as quickly as possible, even to the extent of allowing such endorsement to be made in

[558] To see the list of these research questions, refer to Chapter 1, under heading 1.2 : Objective of Study, of this dissertation.

[559] The details on these factors can be found in Chapter 4, under headings 4.4 : Factors for Delay in Disposing Divorce Cases, of this dissertation.

between the period of hearings for other cases scheduled for the day, as practised in Selangor Shariah Courts, and

b) the ability of lawyers representing parties to appear in court at the time of such endorsement.

3. Subject to the above roles played by judges and lawyers, the proposed court-annexed mediation in the High Court can act as an alternative mechanism for parties in family disputes to avoid open court litigation.

4. It is observed that 'Majlis Sulh' / Islamic mediation, as a pre-trial procedure in solving family disputes for Muslims filling cases in Selangor Shariah Courts, was proven to be effective in avoiding lengthy court trials, *inter alia*, because the two factors relating to the roles of judges and the lawyers (as shown in the above answers to research question 2) were present in Shariah Courts in Selangor.

5. It is possible to adopt some features of mediation as practised in the MMC and Selangor Shariah Courts into the proposed family mediation in the High Court. As far as the practice of family mediation in foreign countries is concerned, Singapore may be a good guide to turn to since it is an Asian country with some similar cultures and values as in Malaysia and also due to the fact that family mediation exists in Singapore's dual family law system; for non-Muslims in Singapore Family Court and for Muslims in Singapore Shariah Court.

7.3 Key Research Findings and Recommendations

Taking into account some differences in mediation practices in MMC and Selangor Shariah Courts as discussed in detail in Chapter 6 of this dissertation, policy decisions have to be made to adopt which practices deemed to be suitable for the proposed mediation in the High Court.

7.3.1. Type of cases

Research Finding 1

Mediation in MMC deals with various types of civil cases, commercial cases and family cases. Whereas, 'Majlis Sulh' in Selangor Shariah Courts deals with cases of family nature depending on the jurisdictions of Selangor Shariah High Court and Selangor Shariah Subordinate Courts. [560]

Recommendation 1

It is submitted that the High Court needs to commence a pilot project of certain cases to be referred to mediation before mediation can effectively be introduced to all types of civil cases in the High Court. It is opined that such pilot project should commence with cases of family nature. Family units are seen to be the most important segments to be preserved in a society. Maintaining good values and good relationships in families are equivalent to maintaining a harmonious society. Contrary to disputes of commercial nature where parties can choose not to deal with one another in the future, parties in family disputes do not have such a choice. Blood relations in family remain no matter how serious the disputes between parties are. Divorcing couples with children, for example, cannot avoid but to maintain their post-divorce relationship for the sake of their children. Family mediation is the best venue

[560] See Chapter 6, under heading 6.2.10 : Types of cases mediated, of this dissertation.

for people to preserve their relationship and discuss about their interests; something that a family litigation cannot offer because the court confines itself to what are parties' legal rights and duties.

It is observed from the interviews held with some MMC's mediators that similar stages were adopted in mediation sessions for family cases and commercial cases. However, it transpired from the interviews held with some MMC's mediators and also '*sulh* officers' in selected Selangor Shariah Courts that a mediator mediating family disputes needs to possess additional skills related to counselling techniques, for example skills to deal with various types of emotions displayed by parties in the mediation session / 'Majlis Sulh'. In contrast, a mediator mediating commercial cases is not expected to possess these additional skills since no emotions are involved in commercial cases.

Therefore, it is submitted that introducing mediation as a pilot project for family cases in the High Court is a wiser choice than introducing it either to all types of civil cases or to commercial cases only. This is due to the fact that a family mediator who adopts similar stages in mediation as in commercial mediation and who is also equipped with the above-mentioned additional skills will face less difficulty when asked to mediate commercial cases, if mediation is subsequently introduced to commercial cases.

7.3.2. Nature of reference

Research Finding 2

Mediation in MMC is a kind of private and voluntary mediation with mediator's fees and mediation-related facilities to be equally paid by the disputing parties. Whereas, 'Majlis Sulh' in Selangor Shariah Courts is a kind of court-annexed

mediation, which is a free-of-charge service. In Selangor Shariah Courts, there are two types of reference to 'Majlis Sulh'; voluntary reference to 'Majlis Sulh' and mandated reference to 'Majlis Sulh'. [561]

Recommendation 2

Based on the trivial number of cases referred to the MMC from its inception on 6th November, 1999 until 31st January 2005 (71 cases) and the paltry figure of cases successfully mediated during that period (16 cases), coupled with the fact that only 2 cases out of these 16 cases were family cases while the rest were commercial cases [562], it is observed that mediation in family disputes will not take off in the Malaysian society if it is to be referred to on parties' voluntary basis.

It is, therefore, timely (in reality it is actually long overdue) for a mandated mediation to take place as a pre-trial process in the non-Muslims' family law matters. It should be reminded that what is mandated is parties' attendance and not parties' settlement agreement.

The next question to be asked is, does a mandated family mediation result in parties relinquishing their control over the mediation outcome to the mediator? It is acknowledged that there are disadvantages of a mandated mediation if compared to a voluntary mediation.[563] It is submitted that despite the disadvantages that exist in a mandated mediation, parties in the proposed family mediation in the High Court are still in control of their mediation outcome. Parties can never be compelled to settle if they are not happy with anything connected to the mandated family mediation, be it

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[561] See Chapter 6, under heading 6.2.8 : Stage of Reference, of this dissertation.

[562] For further details, see Chapter 6, under heading 6.2.15 : Statistics of cases mediated, of this dissertation.

[563] The disadvantages of such mandated mediation were already discussed in Chapter 3, under heading 3.4 : Disadvantages of Mediation , of this dissertation.

with the mediator himself or with the way the mediation session is conducted. They can always opt not to agree to any kind of settlement, if they so wish.

Even if a mandated family mediation fails to result in a settlement agreement between parties, the mediation can still be viewed as a success. In a family mediation, parties would have identified the issues in their dispute together with their underlying causes. This may help them to decide on what they can agree and disagree that will in turn assist in the expeditious process in court as far as documentations of agreed and disagreed facts are concerned.

7.3.3. Stage of Reference

Research Finding 3

Mediation in MMC can be commenced at any stage of the dispute / case; be it before or after the case is filed in court. Whereas, 'Majlis Sulh' in Selangor Shariah Courts can only be commenced once a case is filed in court and 'Majlis Sulh' may be held at any stage of Selangor Shariah Courts' proceedings since it is part of the court process. [564]

Recommendation 3

The proposed family mediation in the High Court may possibly be adopted at two stages ;

- Firstly, it can be adopted at the stage after cases are filed in court, which can either be at the pre-trial stage (case-management stage) or after the commencement of court proceedings or even during trials, if the trial judge deems necessary. For this first stage to be adopted in divorce cases, for

[564] See Chapter 6, under heading 6.2.8 : Stage of Reference, of this dissertation.

example, provisions for a court-annexed family mediation need to be added to the Rules of High Court, 1980 and the Law Reform (Marriage and Divorce) Act 1976 as part of a mandatory process once a divorce petition is filed.

- Secondly, family mediation can also be made available at any time before any cases of family nature are filed in court. As for this second stage to be adopted, family mediation should be made available for any parties to refer any kinds of family disputes even before their cases are filed in court.

The above family mediation service, at the pre-filling stage and the post-filling stage, has already been adopted by the Singapore Family Court [565], and this is also a parallel practice of the MMC's mediation. [566]

7.3.4. Model of mediation

Research Finding 4

There are various models of mediation.[567] The mediation in MMC and 'Majlis Sulh' in Selangor Shariah Courts are mainly facilitative in nature.

Recommendation 4

It is opined that the most suitable model of family mediation in the High Court is the facilitative model as adopted by the MMC and Selangor Shariah Courts. [568]

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[565] As discussed earlier in Chapter 5 under heading 5.4 : Development of Mediation in Singapore (emphasis on family disputes), of this dissertation.

[566] As considered earlier in Chapter 6, under heading 6.2.8 : Stage of Reference, of this dissertation.

[567] As explained earlier in Chapter 2, under heading 2.6 : Different types or models of mediation, of this dissertation.

[568] In Chapter 2, under heading 2.6 : Different types or model of mediation, of this dissertation, this facilitative model resembles the features of "process oriented" model as discussed by Brunet and Craver while Fisher and Brandon referred it as a "problem solving approach".

Nevertheless, the elements in the evaluative mediation may also be adopted, for instance, the mediator can provide some information to both parties on the contents of their negotiations in mediation in an attempt to help them to reach equal bargaining power and to eliminate the possibility of any imbalance of power between parties. This will help reduce the dilemma that may be faced by the mediator in a pure facilitative model. The said dilemma may occur in cases where parties are not represented by lawyers, therefore they may not be aware of some information which may open ways for them to settle their dispute. This information is within the knowledge of the mediator, who, if not prohibited from giving advice or providing information that will help parties to settle their disputes, as in a pure facilitative model, will be able to share such information with the unrepresented party in the private caucus.

However, one feature that exists in an evaluative mediation and should not be adopted is for the mediator to assume a high interventionist role that will result in lessening parties' control over the outcome of the mediation. The proposed family mediation model in the High Court should mainly be facilitative in nature but a mixture of an evaluative mediation should be allowed to the extent of providing information or giving opinion or making evaluation, either at the request of parties or at the mediator's own initiative if such evaluation will assist parties to reach their agreement.

7.3.5. Pre-screening stage

Research Finding 5

There is no pre-screening stage to determine the suitability of cases referred to mediation in MMC since parties make reference voluntarily. Whereas, in Selangor Shariah Courts, a stage similar to a pre-screening stage in mediation is adopted differently by different Shariah Subordinate Courts and Shariah High Court. Some Shariah Subordinate Courts do practise this stage to filter cases not suitable for reference to 'Majlis Sulh', while some do not. Some Shariah Courts in Selangor only exempt cases requiring court orders from being referred to 'Majlis Sulh'. [569]

Recommendation 5

In view of some cases not being suitable to be mediated,[570] it is recommended that the proposed family mediation in the High Court adopt a pre-screening stage before any family cases are referred to mediation. It is opined that the most suitable person to do this is the Registrar of the respective High Court.

Alternatively, the respective Registrar may administratively delegate this duty to a clerk who is specifically in charge of cases at this pre-screening stage. However, it is opined that the said Registrar should clearly provide a list of situations for cases not suitable to be mediated to serve as guidance to the said clerk, thus such cases will proceed to trials without undergoing the mediation stage. To help the said clerk in his or her duty, he or she must also be given mediation-related-training for him or her to gain understanding of the mediation process. In case the clerk has any doubt as to whether any particular case should waive the mediation stage or not, he or she must immediately consult the Registrar.

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[569] For further details, see Chapter 6, under heading 6.2.11 : Mediation process involved, of this dissertation.

[570] As discussed in Chapter 3, under heading 3.6 : Cases Not Suitable for Mediation, of this dissertation.

7.3.6. Categories of mediators–private or court-annexed

Research Finding 6

MMC's mediators are part-time private mediators, who are full-time legal practitioners, with at least 7 years of practice. Whereas, '*sulh* officers' in Selangor Shariah Courts are full-time court-annexed mediators. [571]

Recommendation 6

Taking into account the small number of cases referred to and successfully mediated by the voluntary-based mediation as in the MMC[572] and the possible additional costs incurred by parties if parties fail to settle their dispute in mediation, which will be dealt later under heading 7.3.10. of this Chapter, it is recommended that mediators in the proposed family mediation in the High Court should be full-time court-annexed mediators who are newly appointed for that purpose, as practised in the Selangor Shariah Courts. This type of mediators is different from the practice of Singapore Family Court, which has in its mediators' lists judges who are trained as mediators. [573]

7.3.7. Trainings of mediators

Research Finding 7

The trainings conducted for MMC's mediators were 'skills-related trainings', which stressed on mediation skills. The trainers who trained these MMC's mediators were trainers from foreign countries like United States, Australia and Singapore, and they have experiences in mediation as practised in their countries.

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[571] Detailed explanations were made in Chapter 6, under heading 6.2.4 : Categories and under heading 6.2.1 : Qualifications, of this dissertation.

[572] As discussed earlier in Chapter 6 under heading 6.2.15 : Statistics of cases mediated, of this dissertation.

[573] As stated in Chapter 5, under heading 5.4 : Development of Mediation in Singapore (emphasis on family disputes), of this dissertation.

Whereas, in Selangor Shariah Courts, their '*sulh* officers' were exposed to more 'substantive-related courses' pertaining to Islamic law matters in the Shariah court. These '*sulh* officers' have less 'skills-related training', and there was only one three-day seminar relating to mediation skills which they attended during the first year of their service. [574]

Recommendation 7

The mediators for the proposed family mediation in the High Court should be given more 'skills-related trainings'. Perhaps the mediators' training skills in the proposed family mediation in the High Court should emulate the mediation skill trainings as practised by the MMC[575], which concentrate on 'skills-related trainings'. It is important for mediators to be properly trained in executing their duties to avoid the possibility of parties having unskilled mediators; which is one of the disadvantages of mediation. [576]

7.3.8. Lawyers' presence in mediation sessions

Research Finding 8

Lawyers representing parties are allowed to attend mediation sessions in MMC with their clients. Whereas, in Selangor Shariah Courts, the practice is that their '*sulh* officers' have never given permission to Sharie lawyers representing parties to attend 'Majlis Sulh' with their clients.[577]

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[574] As discussed earlier in Chapter 6, under heading 6.2.2 : Skills trainings, of this dissertation.

[575] Ibid.

[576] See Chapter 3, under heading 3.4 : Disadvantages of mediation, of this dissertation.

[577] Further details on this point can be found in Chapter 6, under heading 6.2.10 : Lawyers' presence in mediation sessions, of this dissertation.

Recommendation 8

Subject to lawyers' awareness of their role in the mediation session, they should be allowed to be present throughout the mediation session for two main reasons;

i) to give legal advice to their respective client, when necessary.

ii) to ensure that the mediator conforms to the mediator's Code of Conduct/Ethics, if any.

Lawyers with no or little knowledge of mediation will inevitably harm the mediation process since they will not eschew from their adversarial mindset. Therefore, before the mediation session commences, the mediator should meet lawyers for both parties only to brief them on their roles and to remind them that mediation is a venue for their clients to speak to each other with the assistance of the mediator. The mediator can also caution them that the mediator may ask them to leave the mediation session if they try to 'hijack' the process from the client / the mediator.

7.3.9. Support from all organisations

Research Finding 9

The rise of mediation in other countries like United States, Australia and Singapore was a result of support from all segments in their societies; the legislature, the court, the legal profession, the academics, the media and the community as a whole.[378] If Malaysia is to adopt mediation in the High Court, different organisations must play their roles to keep the ball rolling.

[378] See Chapter 4, under heading 4.2 : The History of ADR and/or mediation in the United States, heading 4.3 : Development of Mediation in Australia (emphasis on family disputes) and heading 4.4 : Development of Mediation in Singapore (emphasis on family disputes), of this dissertation.

Recommendation 9

a) Educational institutions

For the purpose of introducing family mediation in the High Court, educational institutions here are confined to universities since these are places where students specifically take courses leading to a specified degree; be it a single degree or a double degree. A course that relates to 'mediation advocacy' should be introduced to the final year law students since it is believed that the final year is the year where law students would be exposed to courses stressing on the practical side of the legal profession to equip them with skills expected from them in the working world. In addition, it is opined that final year law students are more mentally ready to learn a skills-related subject like 'mediation advocacy' since they have gained sufficient substantive knowledge in their preceding three years which is believed to have helped them in gaining enough maturity.

b) Legislature

The role of the legislature is to insert provisions pertaining to mediation in the Rules of High Court, 1980 and the Law Reform (Marriage and Divorce) Act 1976. When need arises later after the High Court's pilot project of family mediation is successful and mediation is to be used in all kinds of civil cases, the legislature may consider passing an Act which governs the mediation practice in the High Court as well as the private sector like the MMC.

c) Judiciary

When the provisions related to mediation are inserted by the legislature in relevant legislations, the Chief Justice will then be empowered to make efforts in drafting Mediation Rules and Code of Conduct/Ethics for the court mediators. In doing this, he may refer to various countries in the world that had mandated family

mediation in their courts and he may also take the practices of mediation in MMC and Selangor Shariah Courts as examples of local mediation practices.

The members of the judiciary should also positively embrace mediation by playing their role in endorsing mediated agreements once disputing parties have successfully reached their agreements and duly signed such agreements at the end of the proposed High Court family mediation. The willingness of judges in Selangor Shariah Courts to endorse settlement agreements from 'Majlis Sulh' in between hearings of other cases scheduled for the day had been proven to contribute to the expeditious disposition of cases successfully settled in 'Majlis Sulh'.[578]

d) Legal profession

From the observation of the Chairperson of the ADR Committee of the Bar Council, some members of the legal profession in Peninsula Malaysia are averse to mediation.[580] It is acknowledged that it is rather difficult for a majority of lawyers to change their litigation mindset since the kinds of trainings at the university level and in their working environment are adversarial in nature. However, members of the legal profession need to change their negative perceptions toward mediation practice since they will also play an important role when they attend the mediation session with their clients. Although in a court-annexed mediation, lawyers will not act as mediators, their knowledge of mediation is beneficial not only for them to realise that their advice to their clients is confined to legal advice, when asked by their respective client, but also for them to be able to assist the court mediator in facilitating their clients to negotiate with each other, if the facilitative model of mediation is adopted by the proposed family mediation in the High Court.

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[578] This was highlighted earlier in Chapter 6, under heading 6.2.14 : Support from the Government / legislature and from the judiciary, of this dissertation.

[580] As discussed earlier in Chapter 6, under heading 6.2.10 : Lawyers' presence in mediation session, of this dissertation.

It is strongly believed that with support from the legislature and the judiciary for a mandated family mediation to take place in the High Court, lawyers will be compelled to change their negative attitude, thus there will be efforts to prepare themselves for mediation-related training in order to effectively play their supporting role in a mediation session, which will help not only their own client but also the court mediator.

Since there are no rigid rules and procedures governing mediation sessions as in court trials, the lawyers need to educate their clients of the advantages of mediation and also the stages involved in mediation sessions. However, before lawyers can educate their clients, they should first educate themselves and maintain positive attitudes toward mediation practice.

e) Media

The media also plays a crucial role in disseminating information on the advantages of using mediation as a dispute resolution mechanism. It is believed that with more information on mediation available in various types of media, it will help educate the public about mediation, thus will promote the use of mediation among members of the public.

7.3.10. Issue related to the cost of mediation

Research Finding 10

Although a mandated mediation with a private mediator attached with a private organisation like the MMC may also help parties to save their costs and time, there is a drawback when mediation fails to help parties to settle. The drawback is the costs that parties will incur in a mediation that has failed to result in a settlement agreement, in addition to the litigation costs that they will continue to pay in the court

proceedings that follow.[581] There is no problem of additional costs on the part of parties who either voluntarily submit themselves to 'Majlis Sulh' or are mandated to refer their dispute to 'Majlis Sulh' in Selangor Shariah Courts since such 'Majlis Sulh' is a free-of-charge service.

Recommendation 10

These additional costs will not be incurred if the mediators are full-time court-annexed mediators, who are High Court staff. No mediators' fees are payable and no facilities-related costs, like room rental, fax and telephone, will be incurred since facilities used are High Court's facilities. Hence, it is suggested that the proposed High Court family mediation should be free-of-charge, similar to the practice of Singapore Family Court and Selangor Shariah Courts.

7.4 Conclusion

It is impossible to say that ADR mechanisms like family mediation can solve all existing problems associated with a family litigation. Family mediation should be seen to work like rules of equity that serve as a supplementary to the common law system due to some injustice caused by the rigidity of rules and procedures in the common law. In fact, the proposed court-annexed family mediation in the High Court should be complimentary rather than supplementary to the family law system in Malaysia.

It should be fairly noted here that there are a risk and an opportunity in mediation. There is an opportunity for parties to save cost and time if mediation so attempted is successful in bringing about a settlement. However, in mediation with a private body (hereinafter a private mediation) like the MMC, there is equally a risk that parties will incur additional costs if mediation fails to help them reach a settlement. In a private mediation,

[581] The costs in the MMC's mediation are shown in Chapter 6, under heading 6.2.12 : Issues related to costs, of this dissertation.

parties will not only bear the costs related to a failed mediation but also will have to pay the costs of litigation in court as well. Nevertheless, it is opined that even in a private mediation, the risk of additional costs incurred if mediation fails is a risk worth taken by parties. It is strongly believed that a failed mediation is still a success, wherein parties have identified and discussed in detail the issues and the underlying causes of their dispute. Consequently, parties will know clearly what they are ready to tolerate and what they are ready to fight when they appear in court.

Another opportunity that parties may gain from mediation is that even though parties cannot agree on a full settlement at the end of the mediation, there is a possibility that they may be able to reach a partial agreement. Therefore, only matters that they partially disagree to settle will be brought to the court. The truth is that there is also a risk and an opportunity in court litigation itself. Only one party will win, the other party will lose. The risk and opportunity lie in the fact that at the end of the trial, the losing party will be ordered to pay the costs of the winning party (in the area of civil procedure, this is known as party to party cost) and *vice versa*.

Mediation, in general, and family mediation specifically, should never be regarded as a lesser forum for dispute resolution than the court merely because parties' discussions are not based on their legal rights and duties. There is a danger to confine the resolution of family disputes to a 'rights-based' settlement. There are other important non-legal issues that need to be addressed freely by both parties, which cannot be possibly made in the courtroom, where these non-legal issues may be overruled by the trial judge as irrelevant.

As to the criticism that mediation may not guarantee fairness as in the court, for example with the existence of representation of trained and skilled advocates in court, it can be equally argued that there is no guarantee that both advocates representing parties respectively possess the same level of advocacy skills. One advocate may be more

experienced than the other, thus may charge more expensive legal fees. The disparities in experiences and advocacy skills between the advocates representing each party may also adversely affect the interest of any party with a less experienced advocate. Hence, the court as a forum of dispute resolution does not seem to guarantee fairness, compared to mediation, in this aspect.

It transpired from the various interviews with some Deputy Registrars and Senior Assistant Registrars in selected High Courts visited that the delaying problem in divorce cases, for example in cases of joint petitions, where both parties did not contest the divorce, was the result of either the non-availability of lawyers' time or the court's time. These Deputy Registrars and Senior Assistant Registrars revealed the fact that there were cases of joint petitions that were settled in just one sitting of the court but had to take a minimum waiting-period of one month due the non-availability of lawyers' time or the court's time. It is hereby acknowledged that even mediation cannot counter this type of time-delay factor.

It is strongly believed that the problem of delay in some family cases in the High Court may be resolved by the proposed family mediation if :

a) judges are willing to reduce their role to that of endorsing parties' settlement agreement in the court mediation as a consent judgment at any time in between hearings of other cases scheduled for the day, as already practised in the Selangor Shariah Courts for the settlement agreements made in 'Majlis Sulh', and

b) for parties who are represented by lawyers, lawyers are able to adjust their timetables to enable them to appear in court at the time of the endorsement of their clients' settlement agreement by the trial judge.

Nevertheless, it had been proven that there are other types of family disputes that can be expeditiously settled through mediation. It transpired from one family case mediated by Mediator D, who was interviewed on Tuesday, 26th October, 2004 in Johor that communication breakdown between parties in dispute is the main hurdle to expeditious settlement in court. The case was already pending for 16 years in the High Court. Communications between parties were made through their respective lawyers. Surprisingly, when they were guided by the mediator to talk to each other, without the interference of their lawyers, they could finally settle their 16-year family feud in a half-day period. It is observed that parties would have tremendously saved their time and litigation-related costs incurred for 16 years if they had attempted mediation at a much earlier stage of the trial. It is also observed from this case that once parties' communication barriers are lifted, they begin to see the underlying causes of their dispute that will then help them to craft their own settlement.

Last but not least, it is submitted that mediation should take place in the High Court not mainly for the purpose of expeditious disposition of cases of family nature but to provide a venue for disputing parties:

a) to communicate freely in an informal and a private setting.

b) to air their grievances in the presence of the other party, with the guide of a mediator and with less interference from their lawyers (these grievances may be considered as irrelevant by the court , thus parties are denied chances to vent their feelings in court).

c) to learn to appreciate the grievances of the other party.

d) in divorce cases, to help parties with children to work towards preserving their post-divorce relationship for the best interest of their children.

e) to educate parties to negotiate their own agreement; a settlement that may not be of 'rights-based' but 'interests-based' in nature, and free from a court-imposed settlement which may mainly be the result of their lawyers' negotiations.

f) to have a full control over the outcome of the mediation; whether a full settlement or a partial settlement or a non-settlement.

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Interview with Puan Che'Noralashiken binti Abdul Razak, Senior Assistant Registrar, High Court, Kota Bharu on Thursday, 10th June, 2004

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Interview with Puan Jumirah binti Marjuki, Deputy Registrar, High Court, Muar on Wednesday, 6th October, 2004

Interview with Tuan Mohamad Haldar bin Abdul Aziz, Deputy Registrar, High Court 2, Johor Bharu on Tuesday, 12th October, 2004

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2.The Bar Council's Alternative Dispute Resolution Committee (ADR) and Mediators in Malaysian Mediation Centre (MMC)

Interview with Ms Gunavathi Subramaniam, an accredited mediator with MMC and a member to the Bar Council's ADR Committee, on 27th September 2004

Interview with Mr Phee Boon Leng, an accredited mediator with MMC, on 8th October, 2004 (through email)

Interview with Mediator D, who is also a family law practitioner, on 26th October, 2004, in Johor

Interview with Mediator C, who is also a family law practitioner, on 28th October, 2004, in Kuala Lumpur

Interview with Puan Hendon binti Mohamed, the Chairperson to the Bar Council's ADR Committee, on 28th January, 2005

3. '*Sulh* Officers' in Selangor Shariah Courts

Interview with Tuan Mohamad Ridzuan bin Zainudin, a '*sulh* officer' in Shariah High Court, Shah Alam, on 6th August, 2004 and 30th October, 2004

Interview with Puan Siti Noraini binti Mohd Ali, a '*sulh* officer' in Shariah Subordinate Court, Gombak Timur (Keramat), on 15th October, 2004

Interview with Tuan Azmi bin Aziz, a '*sulh* officer' in Shariah Subordinate Court, Shah Alam, on 26th November, 2004

Interview with Tuan Saharudin bin Selamat, a '*sulh* officer' in Shariah Subordinate Court, Klang, on 3rd December, 2004

Interview with Puan Mazlina binti Jailani, a '*sulh* officer' in Shariah Subordinate Court, Hulu Langat (Kajang), on 7th January, 2005

4.Other Court Officials in Selangor Shariah Courts

Interview with Puan Noor Hadina binti Ahmad Zabidi, the Chief Registrar of the Selangor Shariah Courts, on 2nd November, 2004

Interview with Yang Arif Tuan Mohamad Zakian bin Dio, a judge in the Shariah Subordinate Court, Hulu Langat (Kajang), on 17th December, 2004

Interview with Yang Arif Tuan Mohamed Fouzi bin Mokhtar, a judge in the Shariah Subordinate Court, Klang, on 3rd January 2005

5.Sharie lawyer

Interview with Puan Rafizah Abu Hassan, a Sharie lawyer in Selangor and Wilayah Persekutuan, Kuala Lumpur, in September 2004

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APPENDICES A

Appendix A-1

Questionnaires used in interviewing 4 MMC's mediators

1. Please state your qualifications and years of practice as a legal practitioner.
2. How long have you been accredited as a mediator with MMC?
3. How many cases and what types of cases have been referred to MMC so far?
4. How many cases have you mediated?
5. What was the type of cases you mediated?
6. What were seminars that you attended which were connected to mediation?
7. What type of skills training as a mediator did you undergo?
8. How would a mediator be notified of his appointment as a mediator to mediate a dispute referred to MMC?
9. How far did you follow the stages in mediation session in the model adopted by MMC?
10. Should there be any difference in the stages in mediation session between commercial cases and family cases and why?
11. What are potential problems, encountered by a) parties and b) mediator, in a family mediation?
12. Were there any different problems faced in commercial disputes mediated, compared to family disputes?
13. Should there be any different kinds of training for a mediator involved in mediating family disputes and your suggestions?
14. From your experience, describe your role and function as a mediator.
15. How do you see your role and function to be different in mediating family disputes and commercial disputes?

16. Since mediation involves skills that may diminish or rather fade without consistent practice, how have you tried to maintain or enhance your skills as a mediator when there are no cases referred to you over a long period of time?

17. What is your view on the following points?
    -which one is preferred; a court-annexed mediation OR a voluntary / party-referral mediation, in the context of Malaysian culture
    -if mediation is to be introduced as part of a pre-trial process in the High Court, which is the most suitable type of cases to begin with ; commercial cases or family cases or all types of civil cases
    -based on your experience, what are the factors for the
        -success of mediation
        -failure of mediation

18. Since you are a lawyer/mediator, how do you see your role as a lawyer in a mediation session?

19. Your comment on the Chief Justice's press statement in Putrajaya on Tuesday, 13th July 2004 about mediation to be introduced in resolving civil cases soon; with the pilot project to start in the High Court
    (He made this statement in view of the increase of number of new cases in the Magistrates Court, the Sessions Court and the High Court)

20. Any rooms for improvement as far as the use of mediation is concerned in Malaysia?

APPENDICES A

Appendix A-2

Questionnaires used in interviewing the Chairperson of the Bar Council's ADR Committee

1. What model of mediation has MMC adopted?

2. What are the stages involved from the time a case is referred to MMC until the mediation is concluded?

3. When was the first case being referred to MMC?

4. How many cases have been referred to MMC since its inception until now?
Kindly provide the number of cases by yearly references.

5. From the number of cases mediated through MMC, please state the breakdown of commercial cases and family cases so mediated.
Kindly provide the breakdown of the above cases by yearly references.

6. Kindly state the number of seminars on mediation that had been conducted by the Bar Council's ADR Committee.
Please provide information on the dates of those seminars, their objectives, the number of participants, speakers and brief contents.

7. How many mediators are currently accredited with MMC, compared with the number of lawyers throughout Peninsular Malaysia?

8. When was the proposal made by the Bar Council to the Chief Justice to insert mediation in Order 34 of the Rules of High Court?
Kindly provide the wordings of such proposed amendment.

APPENDICES A

Appendix A-3

Questionnaires used in interviewing 5 '*sulh* officers in selected Selangor Shariah Courts

1. State your qualifications and years of practice as a '*sulh* officer'.
2. How many cases do you hear in a day?
3. What types of cases have been referred to you?
4. Is there a pre-screening stage made by the Registrar or the Assistant Registrar before parties are referred to 'Majlis Sulh'?
5. Who would notify you that a case is to be referred to you?
6. From your experience, what are the minimum and the maximum period for parties to reach a settlement in 'Majlis Sulh', to be calculated from the date on which a case is referred to you?
7. To what extent do you follow the stages in 'Majlis Sulh'; any situations / conditions that had justified you to vary from these stages?
8. To what extent should a '*sulh* officer' follow the Code of Ethics for '*sulh* officers'?
9. What were problems, encountered by a) parties and b) a '*sulh* officer', in 'Majlis Sulh', which may hinder a settlement from being reached?
10. From your experience, describe your role and function in 'Majlis Sulh'.
11. Your opinion on the following points;

    -is there any possibility of Islamic commercial cases to be referred to 'Majlis Sulh'
    -what are the factors for the;
        -success of 'Majlis Sulh'
        -failure of 'Majlis Sulh'

12. What is your view about the fact that Sharie lawyers are not allowed to be present at 'Majlis Sulh', as practised in Selangor Shariah Courts?
13. (a)Do you, in your capacity as a sulh officer, give legal opinion to parties in 'Majlis Sulh'?
    (b)If parties want to know how would their case be in the court, in case the matter proceeds to court, how would a '*sulh* officer' react to this?

14. How are the appraisal assessments of all '*sulh* officers' conducted by the end of each year? Will the criteria used in the such appraisal assessments put a pressure on '*sulh* officers' to indirectly force parties to settle in 'Majlis Sulh'?

15. Do you think that 'Majlis Sulh' in the Shariah Courts in Selangor is mandatory or voluntary?

16. How has the existence of 'Majlis Sulh' helped the trial judge in disposing cases in court?

17. To what extent would a '*sulh* officer' use counseling skills to console an emotional spouse? What is the limitation?

18. Is a '*sulh* officer' under a duty to ensure that a settlement agreement complies with the Islamic Family Law in Selangor?
If the answer is yes, how is this done?
If the answer is no, whose duty is this? Is it the duty of the judge when endorsing the settlement agreement as a consent judgment?

19. Rooms for improvement?

APPENDICES A

Appendix A-4

Questionnaires used in interviewing the Chief Registrar of Selangor Shariah Courts

1. How many courts are there in the Shariah High Court, Shah Alam?

2. How many judges hear civil cases in the Shariah High Court, Shah Alam?

3. What is the average number of cases that a judge hears in a day?

4. What are the factors for a disposition of a divorce case to be delayed?

5. What is the minimum and the maximum period for divorce cases to be disposed off in this Court, to be calculated from the time a divorce case is referred to the court until the final disposition of the case?

6. How has Majlis *Sulh* helped divorcing parties in saving their monetary expenses and their time as well?

7. What have the Shariah Courts in Selangor done in educating the public at large about 'Majlis Sulh'?

8. As known, all '*sulh* officers' are contract staff of the court;
   - will this fact hinder them from achieving the objectives in 'Majlis Sulh'?
   - what are the obstacles encountered in employing them as permanent staff of the court?

9. How are the appraisal assessments for all these '*sulh* officers' be conducted by the end of each year? Will the criteria used in such appraisal assessments put a pressure on them to indirectly force parties to settle in 'Majlis Sulh'?

10. Do you think that 'Majlis Sulh' in the Shariah Courts in Selangor is mandatory @ voluntary?

11. How has the existence of 'Majlis Sulh' helped the trial judge in disposing cases in court?

12. What are the future plans of the Shariah Court, Selangor, in enhancing the skills of '*sulh* officers'?

13. What is your opinion regarding the possibility of Shariah Court, Selangor to work closely with the MMC to exchange ideas in handling mediation sessions?

APPENDICES A

Appendix A-5

Questionnaires used in interviewing 2 Sharie judges in two selected Shariah Subordinate Courts in Selangor

1.How long have you been appointed as a Sharie judge? Which court are you attached to?

2.What is a judge's role after parties have concluded a settlement agreement in 'Majlis Sulh'?

3.Describe how would the judge in the Shariah Court endorse a settlement agreement in 'Majlis Sulh'.

4.
i.Before endorsing the settlement agreement in 'Majlis Sulh' which was brought before you, did you check whether the terms therein were consistent with the principles of Islamic Family law in Selangor and Hukum Sharak/Islamic Law?

ii.If you noticed any inconsistencies as said above, how would you react?

5.
i.In your court, did you ever experience a situation where parties suddenly disagreed with the terms of settlement agreement that was earlier concluded in 'Majlis Sulh'?

ii.How would you as the trial judge react to that?

6.Would you as a trial judge, at your own motion, question any of the terms of the settlement agreement for appearing to favour one party even though parties agreed to it?

7.
i.If parties failed to reach a settlement agreement in 'Majlis Sulh', were reasons of the failure made known to the judge?

ii.If the reasons were NOT disclosed, what is the rationale behind it ?

iii.If the reasons WERE disclosed, how would it affect you, as a judge, in forming your judgment? Would you be prejudiced to the party who has contributed to the failure of reaching an agreement?

iv.Do you think the reasons should or should not be disclosed and why?

8.How has 'Majlis Sulh' helped a judge in resolving cases in court?

9.Was there any difference between 'Majlis Sulh' conducted by the Registrar or the Assistant Registrar before the appointment of '*sulh* officers' with 'Majlis Sulh'conducted by a '*sulh* officer' in each of Shariah Court in the State of Selangor?

10.Do you think a '*sulh* officer' needs more training, in addition to what they have now? If the answer is yes, what kind of training would that be?

11. In your court;

i.What is the average number of cases that you hear in a day?

ii. What type of cases do you hear?

iii.What are the factors for a disposition of a divorce case to be delayed?

iv. What is the minimum and the maximum period for divorce cases to be disposed off in your Court, to be calculated from the time a divorce case is referred to you until the final disposition of the case?

12.Anything else you want to add on 'Majlis Sulh' in Selangor Shariah Court?