

The Role of *Sulh* Towards the Process of Reducing the Rate of Divorce in the Kadhis' Courts in Zanzibar: Following the Malaysian Model

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Abstract: It is an undeniable fact that the issue of divorce is very crucial in Zanzibar as its rate increases day after day. However, a significant number of spouses in the islands want chiefly to air their difficulties before some authoritative body which would identify the basic problems for all spouses concerned and offer advice on how they could be solved short of termination of their marriage. Despite the fact that divorce is a common practice in Zanzibar, there is certain number of marital problems where the spouses are willing to give their marriage another chance by relying greatly on *Sulh* but failure of having this mechanism in the Kadhis' Courts results in many marital conflicts ending with the dissolution. Therefore, this paper at the outset seeks to examine the rate of divorce in Zanzibar. This is made purposely in order to get the clear picture concerning the aspect of divorce in Zanzibar. The second part of the paper will focus on observing the current procedures applied in solving the marital disputes in Zanzibar. The last part of the paper will focus on showing the importance of introducing *Sulh* process before the Kadhis' Courts in Zanzibar as a mechanism to reduce the rate of divorce. Thus, in order for the *Sulh* process to be effective, this paper seeks to show the relevancy of the Malaysian model for the intended changes in Kadhis' Courts in Zanzibar.

Key words: *Sulh*, Divorce, Kadhis' Court, *Shari'ah* Court, Malaysian model.

INTRODUCTION

Under Islamic law, the process of reconciliation has been given proper consideration for dispute resolution. Whenever it happens that the parties to the marriage are engaged in dispute among them which might result in the dissolution of their marriage, efforts must be taken either by the court or the parties' relatives to reconcile them. Generally, divorce is indeed allowed when it is necessary and when all efforts to reconcile the spouses had failed (Rateb, 1988). Abu Hanifa has declared that divorce is forbidden unless there is a need for it to be issued. Divorce without such need is an act of folly, an abuse of discretion and sheer ingratitude for a blessing; it is simply an act intended to annoy the wife, her people and her children (Shukri, 1966). Therefore, efforts must be taken to restore communication between the parties who are in dispute. While some Muslim communities enjoy the benefit of institutionalizing and practicing *Sulh* mechanism in their systems, the situation is different in the Kadhis' Courts in Zanzibar. Though it is argued that, the issue of divorce is at an alarming rate in Zanzibar, the failure of the Kadhis' Courts to have *Sulh* program piles more pressure in this problem. Thus, it is high time now for the Kadhis' Courts to institutionalize *Sulh* mechanism so as to meet the needs of the Muslim community in Zanzibar.

MATERIALS AND DISCUSSION

The Trend of Divorce Rate in Zanzibar:

Divorce is extremely common in Zanzibar as elsewhere on the Swahili coast (Stiles, 2005; Middleton, 1992). The dimension of gender disparity in Zanzibar is manifested in the peculiarity of divorce where men have the right to unilaterally divorce their wives by way of *talaq* without the wife's consent (Majamba, 2008). This practice is quite different compared to other countries like Malaysia, Singapore, Tunisia and Egypt where particular laws are enacted in order to limit the right of men to divorce their wives through *talaq* without the involvement of the court (Horowitz, 1994). Generally, *talaq* is permitted in Islam as the last resort when all other avenues of dispute resolution fail to resolve the issue. Although either spouse has the right to seek divorce, in most cases, it is the man who concludes the divorce by pronouncing a *talaq* to the woman.

Though many religious scholars are of the opinion that men are not permitted to divorce their wives through *talaq* without a just cause, in practice, this is not the case in Zanzibar, as majority of husbands divorce their

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wives without having reasonable grounds. The issue of divorce can also be viewed on the involvement of Kadhis' Courts which grant *khulu'* and *fasakh* being the common methods applied for by the women to terminate their marriages. Women in Zanzibar like other women in other countries where Islamic law is applied have become aware of their rights and use Kadhis' Courts to transform the religious traditions that have for long time undermined their destitution position (Majamba, 2008).

On the rate of divorce in Zanzibar, the involvement of the Office of Registrar General cannot be over emphasised as the office is compelled to register marriages and divorces. The graph below shows the number of marriages and divorces in Unguja Island as collected by the office of Registrar General from 2006-August, 2010 and the rate of divorce. From this graph, it is observed that from 2006 up to August 2010 the rate of divorce had gradually increased. This observed rate may possibly not be exact, as there could be some divorced marriages that did not follow the proper procedures of issuing and returning of marriage and divorce registries by the office.

The following graph shows the number of marriage and divorce per year.

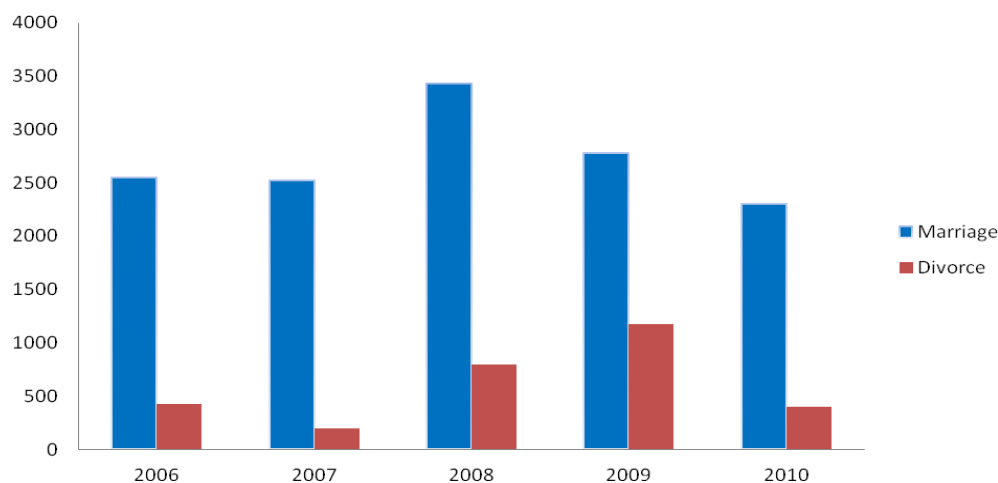


Fig. 1.1: Shows number of marriage and divorce per year in Unguja Island

As it is argued above, that the number and rate of divorce shown above from Unguja Island might increase but there are many factors which are reported by the office of Registrar that hinder the idea of obtaining the correct figure of divorce in the society. For example, it is reported that there was a time the individual Kadhis patronize fake registry books from individuals instead of the Registrar Office (Haji, 2010). Which in turn lead to non-notification of the registries of some marriages and divorce. It can be observed that the happening of this tendency was caused due to the lack of proper measures to control those registrars of marriage and divorce in Zanzibar districts, particularly after the revolution of 1964. Though the Marriage and Divorce (Muslim) Registration Decree, 1936 shows the best methods to collect the data of marriage and divorce from the registrars, these methods were only followed by the pre-revolutionary government. For example, section 17 and 18 of the Decree require every registrar in a particular district to forward the certified copies of all entries made by him in the marriage register to the District Commissioner at the end of every month. As to the issue of divorce, this Decree gives three months period for the registrar to submit the certified copies of all entries made by him in the divorce register to the District Commissioner. The wisdom behind this law to give the three months period for the registrar to submit the divorce register to the District Commissioner is due to the fact that for the repudiation made by the husband there is a room under Islamic law for the husband to revoke the *talaq*. This is shown in section 11 of the Decree. Upon submission of the registers to the District Commissioner, he will forward them through the senior Kadhi of the district to the Registrar General's office where alphabetical indexes of the marriages and divorces will be prepared. But now-a-days an individual registrar submits the marriage and divorce registers to the office of Registrar General at his own pleasure without going through any supervision

Generally, this has prevented the office from getting the correct data concerning marriage and divorce. This also reduces the revenue of the government. Another cause is the behaviour of some Kadhis in keeping the registers for a longer time without submitting them to the Registrar Office (Haji, 2010). This has been an obstacle, as the office cannot fill the information concerning some marriages and divorces at the appropriate time, be it monthly or annual indexes as was needed (Haji, 2010).

However, the returning of registers from the Kadhis' Courts in Unguja is prompt to the extent that approximately every month, the Office of Registrar General receives marriage and divorce registers from every District Kadhis' Court. Though the registers from Kadhis' Courts are used to determine the number and rate of divorce in Zanzibar particularly Unguja Island as mentioned above, yet there is a need to review the practices of the Kadhis' Courts on issues including divorce. Table 1.1 presents the percentage of claims (issues) brought before the Kadhis' Courts in Unguja Island by demographic characteristics.

Table 1.1: Percentage of claims (issues) brought before the Kadhis' Courts in Unguja Island

| Type of claim | Frequency | Percentage % |
|--|-----------|--------------|
| Wife seeks maintenance | 136 | 3.1 |
| Wife seeks divorce | 3135 | 72.3 |
| Husband seeks wife's return or restoration of marriage right | 94 | 2.2 |
| Woman seeks registration of divorce | 131 | 3.0 |
| Child custody | 174 | 4.0 |
| Declaration of legality of marriage | 6 | .1 |
| Daughter seeks permission to marry | 164 | 3.8 |
| <i>Hibbah</i> | 3 | .1 |
| Legitimacy of a child | 3 | .1 |
| <i>Wakf</i> | 6 | .1 |
| Claim for deferred <i>mahr</i> | 58 | 1.3 |
| Inheritance | 143 | 3.3 |
| Woman seeks husband's obedience | 13 | .3 |
| Debt and recovery of Household goods | 3 | .1 |
| Claim for <i>Mahr</i> and divorce | 13 | .3 |
| Wife claims for compensation for desertion | 9 | .2 |
| Unidentified Claims | 242 | 5.6 |
| Total | 4334 | 100% |

*Source: Authors' on construction based on percentage of claims filed before the Kadhis' Courts in Unguja Island.

The data indicated that about three quarters (72%) of the claims entertained before all the Kadhis' Courts in Unguja Island deal with the issue of divorce as filed by the women through *khulu'* and *fasakh*, followed by child custody and seeking of permission by girls to marry (4% each), while that of wives claims for maintenance and registration of divorce is about 3%.

The percentage of divorce as mentioned above reflects the awareness of Muslim women in Zanzibar regarding the process of approaching the court to exercise their rights to terminate their marriages as propagated by Islamic law. Muslim women in Zanzibar have increasingly been sensitized by human rights organizations, civil societies and NGO's to the need to be awakened to their constitutional rights.

Essence of Marriage and Sulh in Islam:

Marriage from Islamic perspective is considered to be an essential unit for a better social organization. Thus, in Islam, the bridal couples are united as husband and wife in the presence of witnesses seeking Allah's blessings to increase them in mutual love, compassion and agreeing to care for each other in sickness and adversity (Doi, 1992). This fundamental principle of Islamic marriage, when understood and observed by the spouses, is the basis of the institution of Muslim marriage (Doi, 1992).

Islamic law emphasises the need to strengthen the bond of marriage as far as possible. Therefore, and all efforts should be taken to keep the marital union intact (Maududi, 1983). Most jurists consider marriage to be sacred and a social contract as it is declared and regulated by the injunctions of Allah. Even the constitution and well being of the society depends on it (Kamaruddin, 1993). The contract undoubtedly has spiritual and moral overtones and undertones, but legally, it remains a contract between the parties, which can be dissolved for a good cause (Mannan, 1974). To affirm the importance of marriage, the Holy Qur'an regards it as a firm and strong covenant:

"And how could ye take it when ye have gone in unto each other, and they have taken from you a solemn covenant?" (Qur'an, 4: *ayah* 21).

Through a proper marriage relationship, many rights and responsibilities can be upheld and protected (Malek, 2010). Once this institution is safeguarded, it is believed that the society as a whole will reap the benefits (Ibid). From this point of view, it can be said that in Islamic law, marriage stands as a corner stone of the development and prosperity of human beings and there is a need to protect this sacred institution. Despite the fact that the marriage contract is supposed to be a permanent one, and despite the sacredness, the Islamic religion recognises the necessity of keeping open its dissolution if the parties concerned have made their decision that they can no longer live together as husband and wife (Hoballah, 2006). Islam does not recommend the sacramental nature of marriage that renders marriage indissoluble which in turn could cause great hardship to both parties if the marriage proved to be incompatible (Manzoor, 1962).

It can be observed that nothing is more harmful to an individual and society than forcing couples to live under the same roof pretending that they are finding 'ease of mind' in one another (Hoballah, 2006). Though

divorce can often be misused by the stronger party (most of the time by male-dominated society), its total absence can also be problematic when the relationship between husband and wife gets strained beyond any possibility of reconciliation (Engineer, 2004).

Although divorce could be regarded as a necessary evil, it also stands as a preventive measure to avoid more tension and danger among the couple. However, divorce should not be a weapon used against spouses, but a humane practice, which is resorted to in exceptional circumstances; *i.e.* when it is feared that the limit of Allah will be transgressed (Kamaruddin, et. al., 2007). Under such circumstances, Islam discourages the couples to rush for divorce and insists upon resolution of problems in order to save the marriage (Khatib, 1350 A. H).

Unlike the Western approach to conflict which lays more emphasis on the problems to be abstracted and resolved, Islamic approaches consider conflicts as matters of communal and not just individual concern, and highlight the importance of repairing and maintaining social relationships (Gulam, 2003). The term '*al-sulh*' is a well-known terminology in Islamic law. This term means reconciliation, discontinuance or stoppage of dispute or dissension and contention. In the legal connotation, *al-Sulh* means the termination or avoidance of a dispute or law suit between two parties (Rashid, 2000).

Under Islamic law, the purpose of *Sulh* (compromise, settlement or agreement between parties to a dispute) is to end conflict and hostility among believers so that they may conduct their relationships in peace and amity (Rashid, 2000). In Islamic law, *Sulh* is a form of contract, legally binding on both at the individual and community levels (Gulam, 2003). Although the concepts of compromise, settlement, reconciliation, and agreement as encapsulated in *Sulh* are not unknown to the modern Western intellect, the process through which *Sulh* is reached may differ in Western and Islamic systems (Walid, 2001). In the Islamic tradition, regular courts and ADR mechanisms are essentially intertwined and, historically, the legal systems that have relied on this traditional model have dispensed justice much more efficiently than those departing from the Islamic spirit (Walid, 2001). Similarly, the Islamic system of resolving disputes places emphasis on duty to the community. The good of the community is far more important than that of the individual (Gulam, 2003). The concept of self includes others. Relationships are governed by notions of mutual respect, interdependence, harmony, reciprocity and holism, as opposed to individualism, confrontation and competition (Russell, 1999).

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

From the above discussion, it can be observed that Islam shows more concerns on relational issues like restoring peace, harmony, unity and maintaining the respect and prestige of individuals and groups. Thus, under Islamic law, there is the need to lay emphasis on reconciliation due to the facts that it not only breeds hatred between the parties but also conveys religious blamelessness on both the Qadhi and the parties in dispute. Therefore, whenever a misunderstanding or difference arises between the parties to the marriage, Islam enjoins an attempt to reconcile them. Generally, this attempt at arbitration is served by the institution of *hakam*. The first recommendation in resolving problems associated with marriage is reconciliation. This advice is laid down in the Qur'an when it is stated to the effect that:

"And if you fear a breach between the two (husband and wife), appoint an arbiter from his (husband's) people and an arbiter from her (wife's) people. If they desire agreement, Allah will effect harmony between them, surely Allah is knowing and aware." (Qur'an, 4: *ayah* 35).

There are different opinions on this verse. The differences emerged as to whom the said verse is addressing. Some scholars argued that the power to appoint arbiters from the families of husband and wife is granted to the ruler while others think that it refers to the spouses themselves. The role of the two arbiters is also a matter of dispute. Muslim jurists are in disagreement on the role of the arbiters appointed as to their decision being recommended or binding in nature. Imam Shafi'i maintains that the decision reached by the arbiters will be binding while Imam Abu Hanifa is of the opinion that the decision is only a recommendation. But majority of the Companions of Prophet (s.a.w) are of the view that the right of the two arbiters is absolute either in securing reconciliation or divorce and a Kadhi should approve the decision arrived at by the two arbiters (Ibrahim, 1980).

From the above arguments among the Muslim scholars, it can be said that both recognise the foremost responsibility of the two arbiters which is to find ways of bring about reconciliation among the spouses.

The essence of reconciliation as a tool to protect marriage which is enshrined in the Islamic principles is a borrowed man made law where the Report of the Royal Commission on Marriage and Divorce of United Kingdom states:

"Starting from the conviction that the nation's well-being depends largely upon the quality of married life among its members, we are naturally led to consider the means by which harmony and union, once threatened, could be maintained and restored. Thus the various efforts that are being made to give guidance and promote reconciliation came under review, together with the influence upon them of the divorce law and its administration. Successful marriage and the maintenance of the unity of the family life are so important that,

where husband and wife have become estranged, an attempt should be made wherever possible to bring them together again.” (Siraj,1965; Cornblatt, 1984-85).

From the above discussion, it is observed that the idea of attempting to find peaceful means to resolve the conflicts among the married parties is something which has been given special weight by Islam (Khan, 2005). This has been made purposely in order to enable parties to a marriage overcome marital conflict without having to go through the bitter experience of divorce and to enable the couple reach some form of a compromise (Kamaruddin, 1989). Thus, the process of reconciliation as propagated by Islam emphasises the importance of marriage and the gravity of divorce (Hussein, 1989).

Sulh/Reconciliation as Practiced in Zanzibar:

For Muslims in Zanzibar, reconciliation of marriage disputes pass through different stages before they reach the level of Kadhis’ Courts. The marital disputes in the society particularly in rural areas were first dealt with by the family members from each party who are well respected by them. The involvement of these members is very important since they are required to be sincere and truthful towards the welfare of their own family members (Malek, 2010).

Unfortunately, in today’s world, including Zanzibar, the role of family members especially those who live in urban areas seem to be decreasing due to many factors (Ibid). This problem has been discussed earlier where parents fail to play their roles towards solving the problem of their children’s marriage. Most times, they even encourage the parties to terminate the marriage instead of initiating reconciliation.

The practice in the rural areas seems to be more reconciliatory as efforts are made by the family parents to bring about reconciliation. In situations where this is unproductive, there is the involvement of *sheha* at this level. The Regional Administration Authority Act No. 1, 1992 does not give the direct meaning of the term *sheha*. But what can be established from this Act especially in section 2 and 15 is that, *sheha* is a local leader of a particular area within the region appointed by the Regional Commissioner with advice of the District Commissioner. If however *sheha* fails to reconcile the parties or the nature of the conflict involves legal complications, the couples will approach a Kadhi of the district (Kerefu, et. al., 2003). The involvement of *sheha* in urban areas is very rare as most often the husband issues *talaq* or either party will directly approach the court for further steps possibly divorce once the reconciliatory move fails.

Normally, before the parties formally file a case under the Kadhis’ Court, a Kadhi must be consulted by them and most of the Kadhis will use this opportunity to find a room for reconciliation. Often a Kadhi listens to the arguments of both sides and often, he postpones the matter for some weeks after the date of the first hearing. This trend causes the possibility of settlement to take place between the spouses. This act is not a mandatory since there is no law in Zanzibar that sets out conditions and procedures to be followed by the court in its administration of divorce. There is no growing recognition by the legislatures in Zanzibar for the desirability and feasibility of conciliating marital problems. As it is mentioned earlier that, the Marriage and Divorce (Muslim) Decree of 1936 only gives general principles as to the registration of marriage and divorce. No information is available on the extent in which Kadhis have to attempt conciliation before the formal filing of a case. The good work done by some Kadhis to assume the responsibility of reconciling the parties before going for divorce is their own initiative after witnessing the increasing number of divorces in Zanzibar.

Due to the absence of this law together with the lack of marriage counseling skills and heavy case-loads, some Kadhis have the feeling that reconciliation is not part of their duties so they only encourage the parties in dispute to file a case based on the particular issue in dispute (Mcintyre, 1964).

Meanwhile, it is very interesting to note that the Office of Mufti in Zanzibar also plays a very pivotal role on the issue of reconciliation among the disputing parties. The functions and powers of the Mufti are clearly stipulated under section 9(1) of the Mufti Act, 2001. These are to:

- (a) give “*fatwa*” on any issue raised to him relating to any Islamic question, which need to be decided;
- (b) keep record of all “*fatwa*” issued by his office;
- (c) settle any religious dispute arising among Muslims and any religious dispute arising between Muslims and other religions in consultation with other leaders of that other organs;
- (d) organize Islamic research and prepare curriculum of education for Ulamaa in Zanzibar;
- (e) approve lecturers of Islamic religion from outside Zanzibar;
- (f) coordinate and supervise the preparation of lectures, workshop, seminar and other Islamic activities;
- (g) control and approve the importation, supply and translations of all Islamic books;
- (h) coordinate the activities of various Islamic groups within Zanzibar;
- (i) coordinate and announce the sighting of a new moon;
- (j) coordinate and supervise the activities of all mosques of Zanzibar and to keep records of all mosques and Ulamaa of Zanzibar; and
- (k) approve the registration of Islamic Societies in accordance with the Societies Act of 1995.

By virtue of section 9 (1)(c), some couples bring their matters before the Mufti's office and the office encourages them to reconcile so as to continue with their marriages. When it happens that the parties are not satisfied with the proposed settlement, the office writes to explain in detail to the Kadhis' Court for further steps. But it can be argued that, the above section, which is said to give power to the Mufti to deal with the issue of settling religious disputes arising among Muslims is not so comprehensive as to involve the issue of reconciliation among the couples.

Even though this arrangement involves the issue of reconciliation among the couples, yet it can be seen that, there is no proper procedure or better arrangement between the Office of Mufti and Kadhis' Courts on *modus operandi*. Hence, there is a need to establish comprehensive procedures to be followed when it comes to the issue of reconciliation of marital disputes. It is observed that the Mufti Act insists on the need of having a firm co-operation between the Mufti, the Office of Chief Kadhi and also the Executive Secretary of the *Wakf* and Trust Commission.

In Zanzibar, however, the Mufti and the Chief Kadhi are not co-operating and Muslims in Zanzibar are only witnessing the tandem of war between these two offices. But it can be argued that, this problem is caused by the Office of Mufti who stands as the leading authority of all Muslims in Zanzibar. For example, the Mufti Act gives powers to the Mufti to give "*fatwa*" on any issue raised relating to any Islamic question, which needs to be decided. In doing so, the Mufti is given an advisory body *i.e.* '*Ulamaa Council*' whose main function is to advise the Mufti on various Islamic issues submitted to him for the purpose of issuance of *fatwa*. Despite the powers granted to the Mufti, there is no single *fatwa* given by this office regarding any Islamic issue while in reality there are many issues to be ascertained in Zanzibar including the administration of ancillary matters after divorce.

Due to that failure, many Muslims in Zanzibar consider the establishment of the Mufti Office as a political agenda that aims to control Islamic movements in Zanzibar. This argument can be supported by examining the powers and enforcing mechanism of the Mufti's directives. To this effect, section 14 (1) of the Mufti Act provides two types of offences. Firstly, it is an offence to fail to comply with the summons of the Mufti issued under the law and when convicted, one is liable to a fine of not less than one hundred thousand shillings or to imprisonment for a term of three months or both. Secondly, according to section 14 (2) of the Mufti Act, whoever fails to comply with the order, directive or prohibition or conditions given by the Mufti commits an offence and shall be liable to a fine of not less than two hundred shillings or to imprisonment for a term of six months or both. From these powers and enforcement mechanism granted to the Mufti, one could expect the same powers or even more to be given to the Kadhis' Courts in order to enhance the administration of justice in Zanzibar.

It can be learnt from the above discussion that though the occurrence of divorce seems to be very common in Zanzibar, there are certain marital problems that the parties are willing to give their marriage another chance after reconciliation. However, failure of Kadhis' Courts to initiate and practice *Sulh* mechanism to a large extent increases the problem.

Historical Background of Sulh in Malaysia:

Islamic conflict resolution systems are growing in popularity and awareness in Malaysia as in other Islamic societies. This is part of the growing phenomena of the application of the Shariah (Syed, et. al., 1997). Generally, in Malaysia, this has occurred much in the family context. Though Malay society readily recognises the unavoidability of disputes, mainly within the family context, there are religious and cultural principles on how disputes should be managed. Within the society, the emphasis is given for the disputes to be resolved quickly and efficiently (Ibid). This attitude towards disputes stems from a core belief held by most Malays that hostility and destructive behaviour can undermine both the family and community solidarity and undermine the central values of togetherness and happiness that have been forged by custom (*adat*) and Islam (Syed, et. al., 1997).

At the outset, it must be understood that Malaysia has two distinct but parallel judicial systems, secular and Islamic. The latter is exercised through the *Shari'ah* Courts. The jurisdiction of the *Shari'ah* Courts extends to cases involving Islamic law and applies only to Muslims (Azahari, 2005). The development of family dispute resolution in Malaysia may be chronologically divided into three different phases. These are the pre-colonial era, from the time of the Malay Sultanate of Melaka until 1786, when the British established their first settlement in Malaya; the colonial era, from 1786 to 1957, when the British court system which applied litigation was in force; and the post-colonial era, from 1957 to the present, when the courts and other formal institutions, such as the police and Islamic religious authorities, became the primary referees in dispute resolutions (Azahari, 2005).

Pre-Colonial Era:

During the pre-colonial period, the informal dispute resolution was conducted where conciliation and mediation were the traditional practices among the Malays. Thus, in order to effect reconciliation, Islamic

principles and customs were employed in both methods. This situation is not strange. As at that time, all aspects of the Malay society were influenced by Islam and Malay customs (Azahari, 2010). In principle, provisions for mediation (known as *Sulh*) existed in old Malay laws. For example, article 32 of the Melaka Code of Law set forth the procedures for mediation.

The same provision can be found in article 28 of the Pahang Code of Law. In the Pahang Code, however, *Sulh*/mediation is stated as *sileh*. The provisions for *Sulh* in these codes were basically adaptations of the *fiqh* rules of the Shafi'i sect (*al-sulh*) (Azahari, 2010). In the Malay Muslim social system, pressure is placed on disputing parties to resolve their dispute quickly. This is due to the fact that Malay Muslims are reluctant to involve outsiders out of desire to avoid publicity. An open resolution process, such as that being currently done before a court of law, is something they try to avoid (Syed, et. al., 1997).

Besides, the parties themselves engage in consultation, a common method in dispute resolution is to refer to a third party (Ibid). Usually, close members of the family, respected elders such as parents, or individuals who are close to the family take the initiative to act as mediators to resolve the dispute (Azahari, 2010). It must be known that in the traditional Malay social structure, the family represents the most important instrument in regulating individuals' lifestyles. Therefore, in all actions, whether positive or negative, the family will be involved in contributing advice, caution and guidance. Thus, in Malay customary practices, issues, which involve marriage and divorce, are not just matters between husband and wife but they involve the members of the entire family. Therefore, when a dispute among the spouses occurs, both families intervene and attempt to resolve it (Azahari, 2010). Generally, it is very rare for the members of the families to expose the dispute to outsiders. They consider this to be very important particularly in saving the honour of both families.

Besides, referring disputes to those with family ties, the parties in dispute may also refer to the *Imam*, village headman or *penghulu* who acts as a mediator in resolving disputes. In addition to the village headman, *penghulu* or *imam*, the kathi is another third party who is often consulted to resolve family disputes (Ibrahim, 1995). The kathi resolves disputes through consensus rather than trial. It is submitted that in matrilineal societies, divorce proceeding must follow predetermined customary rules and procedures (Azahari, 2010). When a husband decides to divorce his spouse, he must undergo an arbitration session. He holds a simple feast and invites his own and his spouse's siblings and informs them of his intention so that they can arbitrate in the matter (Ibid). Such arbitration is known as *bersuarang* (Mohamad, 1964). During the process of arbitration (*bersuarang*), the husband will be required to put forward the causes of the dispute. The mediators will try to resolve the dispute and reconcile the parties in dispute. In most cases, the disputes can be resolved, thereby preventing a divorce. Where the arbitration (*bersuarang*) process fails, all of the parties agree to allow the divorce. However, before the divorce takes effect, the distribution of matrimonial property is carried out. Such distribution is usually based on compromise and these generally accepted customary principles (Azahari, 2010).

Colonial Era:

Generally, it is a well-known fact that in many third world countries which were colonised by British, the introduction of English laws and British court system was something indispensable. In doing so, the British considered their legal system to be very just, systematic, and universal. Thus, any other legal system contrary to English legal system was considered to be very primitive and barbaric. In Malaysia, even though the English legal system administered by English judges was introduced, the local communities diligently continued to practise Islamic law and local customs (Azahari, 2010). For example, it is argued that whenever a dispute based on property arose between a husband and wife, they would resort to friends and neighbours to mediate between them. In other circumstances, the village headman, *penghulu* or kathi, would be consulted for advice and to resolve the dispute among the parties. Upon discharging their responsibilities, the kathi and *penghulu* would examine the evidence given before them and would usually recommend the parties to settle their dispute amicably (Azahari, 2010). It is reported that in many cases, couples were able to resolve disputes through consensus without having to resort to litigation. Thus, the property would then be divided in accordance with the consensus opinion reached among the parties. If the case involved *penghulu*, he would then report to the District Officer the positive outcomes of the matter (Azahari, 2010).

From the above discussion, it can be said that though there was the introduction of British laws and British court system during the colonial era, the trend of resolving disputes by consensus through direct negotiations between the parties or mediators gained popularity among the Malays. Ideally, the process became effective due to the fact that there was the involvement of family members, the village headman or a kathi who have direct connection with the dispute. In *Ramah v. Laton* (FMSLR 6 1927), the kathi of Hulu Langat, Selangor, acting as a witness for the defence, gave evidence that the division of a small plot of land in the state had been made by the collector of land revenue on the basis of a certificate issued by the kathi's office. In his 22 years of service, the kathi had settled between 500 and 600 cases involving shared property or jointly acquired property, which had been claimed five or six times over but had never been approved because of the absence of procedures or methodology acceptable to the collector of land revenue. During cross-examination, the kathi stated that he had mediated in a case where the wife, after her divorce, had claimed the joint property. The kathi, however, had

proposed that the matter be amicably settled by dividing the property into two halves or three parts whichever best suited the parties.

Though the process became effective, there is no much evidence concerning the methods applied by family members, *penghulu* and *kathi* to affect the mediation process at that time.

Post-Colonial Era:

This is a very crucial period for the development of *Sulh*/mediation in Malaysia. Malaysia became independent of the British in 1957. However, it can be noted that these political changes did not affect the legal system of Malaysia. English laws continued to be applied in all areas except in family matters (Ibrahim, 1986). As it has been explained above, since the colonial era *kathis* (district *kathis*) were given the mandate to adjudicate disputes involving Muslims in the *kathi's* district of administration. This continued even after independence. *Kathis* were given extended jurisdiction beyond the exercise of administrative functions (Azahari, 2010). Laws were enacted to provide judicial powers to district *kathis*, who were then authorised to act officially as mediators in Shariah Courts (Syed, et. al., 1997).

The above discussion shows that during the post-colonial period, conflict resolution by using mediation was provided for in the court's procedures. With regard to matrimonial dispute, the procedures to be followed aimed at reconciliation, and court proceedings followed only when reconciliation failed (Azahari, 2010). What is not available, however, is a clear indication of the methodology applied by the *kathis* in resolving matrimonial disputes. In most cases, it is said that the *kathis* relied on social pressure, not the power of the courts, to resolve disputes through conciliation rather than by making decisions as to which party is right or wrong (Azahari, 2010).

Through that process, efforts are made to return the good understanding among the spouses. Generally, the *kathi* lends an ear to the husband and wife and acts as a mediator. Sometimes, the *kathi* takes an active part by advising the parties to reconcile. His role is to guide the community to the 'right' path, not to impose his decisions on them. In other words, the *kathi's* role is that of a counsellor, not a judge (Azahari, 2010). Thus, the objective of dispute resolution is to foster responsibility in the minds of the disputing parties and to assist them to resolve their dispute amicably (Syed, et. al., 1997). Consultation is another method employed by the *kathi* to effect reconciliation. This method is engaged when either party (usually the wife) makes the complaint. In this case, instead of rushing to litigation, the *kathi* advises the complainant to resolve the dispute that has arisen (Syed, et. al., 1997). In the 1970s, the post of Women Counsellor was created. The idea was to assist the *kathi* in handling matrimonial disputes (especially in cases in which the wife is the complainant) and cases in which a member of the Muslim community has family problems. In other words, the *kathis* and the Women Counsellors are fully responsible for handling pre-trial processes. When a Women Counsellor receives a complaint or an application for divorce from a married woman, the counsellor, as in the case of the *kathi*, tries to counsel the wife to withdraw the application for divorce. If the complainant has strong ground for divorce, the counsellor summons the husband for investigation or reconciliation. During the investigation, the counsellor attempts to reconcile the parties. The parties also advised of their rights subsequent to a divorce. If reconciliation fails, the matter is referred to the *kathi*.

Meanwhile, the reforms, which were made to the administration of Islamic Family Law during the period from 1980 to 1990, extended the jurisdiction of the *Shari'ah* Courts by incorporating provisions, which intend to implement mediation. Furthermore, all Islamic Family Law Enactments of the states of Malaysia now provide for the appointment of a Conciliatory Committee and *hakam* in order to resolve *syiqaq* (disputes) among the parties. Nonetheless, the provisions in the enactments remain focused on mediation to avoid a divorce.

Sulh Practice in Malaysia:

In Malaysia, the Islamic Family Law (Federal Territories) Act 1984 (hereinafter referred to as the IFLA) recognises the role of reconciliation where it incorporates sections to deal with marital disputes. To this effect, section 47 (5) and section 48 of the IFLA portray how the particular dispute among the parties will be dealt with. To start with section 47 (5), it is provided that where the other party does not consent to the divorce or it appears to the Court that there is reasonable possibility of reconciliation between the parties, the Court shall as soon as possible appoint a Conciliatory Committee consisting of a Religious Officer as a Chairman and two other persons, one to act for the husband and the other for the wife, and the case will be referred to the Committee. Thus, the Chairman will be assisted by the representatives who are usually the close relatives of both the husband and the wife. It must be known that whenever the conciliatory committee is formulated, the parties to the case will be asked to present the name of their representatives as soon as possible (Ahmad, et. al., 2010). However, whenever there is unavailability of relatives, the court can appoint respected people within the community such as *Imams* to represent the parties in dispute (Ahmad, et. al., 2010). Arguments have been raised with respect to the appointment of female relative as a representative. It has been argued that women are allowed to be chosen as a party's representatives to the committee since the court does not put restriction on this issue. However, a line must be drawn with the appointment of female relative in the conciliatory committee and

hakam. Majority of Muslim jurists agree to the appointment of female arbitrators. Their argument is based on the notion that in order for the arbitrator to qualify, he must possess the same qualifications as a *qadi* (Ahmad, et. al., 2010). After submission of names of the parties' representatives, the appointment of chairman of the committee becomes indispensable. The representatives will be informed about their appointment through letters, which will specify the date for them to attend the briefing session with the court. In order to have a smooth process of reconciliation, the court will highlight the necessary instructions in conducting an effective reconciliation. In doing so, the court will brief the committee on the background and the progress of the case (Ahmad, et. al., 2010). Again, the court will draw attention of the committee to the issues, which need special consideration.

The worthy point to note is that in order to have an effective process, these representatives are given guidance concerning the conduct of conciliation by the court itself. Procedurally, the committee is given six months to settle the dispute. However, if the settlement could not be achieved or the court is not satisfied with the performance of the committee, another committee will be appointed. It is observed that the period of six months given to the committee is quite sufficient to settle the dispute or to suggest proper ways to the court on how to finalise the disputes among the parties. Though the law puts a minimum period to effect the reconciliation, it fails to state the maximum period whenever the need to extend the time becomes an issue (Ahmad, et. al., 2010).

Whenever the parties are successfully reconciled, they will resume their marital relationship and the court will dismiss the divorce application (Majid, 1999). On the other hand, according to section 47 (14) of the IFLA, if reconciliation among the parties failed to materialise, the committee will inform the court about the proceeding by issuing a certificate. In this circumstance, the court will ask the husband to pronounce one *talaq*. If the presence of the husband is not procured, the case will be referred to *hakam* (Majid, 1999).

Generally, the essence of forcing the parties in dispute particularly husband to comply with section 47 of the IFLA is to discourage the pronouncement of *talāq* outside the court. This stand can be seen in *Razimah Haneem v Yusuf Hasbullah* (1993) 9 JH 237 where the husband petitioned for divorce according to section 47 and the court appointed the conciliatory committee to deal with the dispute. While the committee continued to proceed with the matter, the husband decided to pronounce *talaq* outside the court. Though the pronouncement of *talaq* was witnessed, the wife came to know about it two month later. The trial court confirmed the *talaq* after neglecting the evidence of the wife and solely relying on the statement of the husband that he has divorced his wife. This decision was set aside by the *Shari'ah* Appeal Court where the retrial was ordered for the purpose of ensuring that the requirements of section 47 are fulfilled.

The application of section 47 (5) of IFLA will also not be complied with in some circumstances. These include cases where the applicant alleges that he or she has been deserted by and does not know the whereabouts of the other party; where the other party is imprisoned for a term of three years or more; where the applicant alleges that the other party is suffering from incurable mental illness, etc. However, it is argued by Nora that it is very difficult to ascertain the proper meaning and context of the term 'exceptional circumstances' as it is highly vague and not well defined (Abdul Hak, 2008). Therefore, she suggested for the provision either to be deleted or redefined in order to avoid uncertainty as far as the application of these circumstances are concerned (Abdul Hak, 2008).

The above discussion concerning the application of section 47 (5) of the IFLA reveals that one of the purposes of introducing the conciliatory committee is to curb the rate of divorce among the Muslims within the community. This is done purposely once it appears that there is likelihood to reconcile the parties in dispute so as to maintain the principle of 'marriage permanency' as proclaimed by Islam. However, the discussion shows that the law not only fails to lay specific and detailed provisions on maintaining the conduct and ethics of the members appointed to the conciliatory committee but also neglects to impose particular qualifications upon them. Thus, the problem might arise when the members of the committee mostly the representatives of the parties fail to carry out their responsibilities in the reconciliation process so as to hinder the objectives of the committee. Therefore, in order to overcome these problems there is a need to awaken the conciliatory members to their responsibilities so that the sole aim of the committee i.e. reconciliation is reached.

On the other hand, the appointment of *hakam* is provided under section 48 of the Act where it is stated that if satisfied and there are still constant quarrels (*shiqaq*) between the parties to the marriage, the Court may appoint in accordance with *Hukum Syarak* two arbitrators or *hakam* to act for the husband and wife respectively. This provision goes hand in hand with the principles of Islamic law where to be permanent is the fundamental principle behind the marriage contract in Islam (Kamaruddin, 2005). Thus, whenever misunderstandings arise among the parties, Islam enjoins an attempt to reconcile them. The application of section 48 has drawn further discussions particularly with the involvement of the words 'the court may appoint'. Some argue that the literal and contextual interpretations of these words indicate that the appointment of *hakam* is within the discretion of the court. Therefore, in order to get the clear interpretation of the section, it is suggested that the word 'may' be substituted with the word 'shall' (Abdul Hak, 2008). However, in a practical sense, the courts in Malaysia

consider the application of this section in a serious way and in many cases they have succeeded in effecting reconciliation among the disputed parties.

The power to appoint *hakam* is given to the court where the court itself will give directions to the *hakam* based on the conduct of the arbitration. Many arguments have been raised concerning the person who has power to appoint the *hakam*. On one side, they consider only the relatives of the parties who may appoint the *hakam*. However, the majority of Muslim jurists argue that it is the duty of the judge to appoint the arbitrators (Ibid). They substantiate their argument by insisting that in today's life, the court is the only recognised institution, which has the mandate to administer the disputes among the spouses (Abdul Hak, 2008).

As it is applied in section 47 (5), section 48 (2) of the IFLA reveals that due to the nature and the essence of the proceeding, no person or *Peguam Syarie* is allowed to be present or represent any of the parties in the presence of the *hakam* unless he is a close member of the family of the parties. Thus, the first priority for the appointment of *hakam* must be given to the close relative. However, these close relatives must be qualified in order for them to be appointed as arbitrators. Therefore, whenever no close relatives are available or are available but unqualified, in this circumstance, the court has been given power to appoint non-relatives who have qualifications to be *hakams*. It can be learnt that though the law emphasises much for the appointment of the *hakam*, in a real sense, it fails to give more details concerning the specific qualifications, which someone must possess in order to qualify as a *hakam*. The only qualifications provided (which are not conclusive) by section 48 (2)(3) of the IFLA are based on the preference given to the close relatives who must have the knowledge of the nature of the case and for the *hakams* to conduct the case according to the directions given by the court and *Hukum Syarak*.

From the above discussion, it is observed that the law puts more emphasis on the involvement of *hakams* but fails to incorporate the detailed provisions on the qualifications that a person must possess in order for him to qualify as a *hakam*.

As it is emphasised above, in order to sort out the problem among the parties effectively, the *hakam* will be given the directions as to the conduct of the arbitration based on *Hukum Syarak*. If the *hakam* are unable to agree, or the court is not satisfied with their conduct of the arbitration, the court may remove them and appoint another *hakam* (Majid, 1999). However, it must be known that the appointment of *hakam* for the second time will be made regardless whether the husband or wife agrees or disagrees with that appointment (Ibrahim, 1997). The *hakam* will endeavour to obtain from their respective principals full authority. This means that if the *hakam* is representing the husband, he must have authority to pronounce the *talaq* or accept the redemption. If the *hakam* is representing the wife, he must have authority to accept the *talaq* or pay the redemption (Ibrahim, 1997).

It must be emphasised that the steps taken by the *hakam* must be made in the presence of the court which shall record the step taken accordingly and transmit a certified copy of the record to the relevant Registrar to be registered (Kamaruddin, 2005). If the *hakam* are of the opinion that the parties should be divorced but are unable for any reason to order a divorce, the court will appoint another *hakam* and should confer on them authority to order a divorce (Majid, 1999). If the *hakam* orders a divorce, it will be the duty of the court to record it and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration (Majid, 1999).

From the above discussion, the simple observation that can emerge from the application of these two sections (section 47 (5) and 48 of the IFLA 1984) is that section 47 (5) talks about the appointment of the Conciliatory Committee while section 48 provides for the appointment of the *hakam*. The question that bothers one's mind is the essence of having these two organs (Conciliatory Committee and *hakam*) in one law. It is an undeniable fact that among these two sections, section 48 is seen to be made in accordance with the requirements provided in the *Qur'an* which insists on the need to appoint two arbitrators from the two families of husband and wife. (*Qur'an*, 4: *ayah* 35). As to the idea of appointing the Conciliatory Committee, it is argued that even though it is not stated anywhere in the *Qur'an* or the *Sunnah*, it gets its recognition from the *al-siyasah al-shariyyah* (*Shari'ah* oriented policy) in order to investigate further the causes of conflict between the parties (Abdul Hak, 2008). Concerning the issue of relationship among these two sections, it is further argued that, section 47 (5) is for the cases where application for divorce is filed by either husband or wife, and there is reasonable possibility of a reconciliation while section 48 applies to the cases where *shiqaq* (marital discord) between the parties is persisting (Ibid). Practically, it can be observed that the application of section 47 (5) leads to non-application of section 48. This is due to the fact that most of the time, the courts prefer to resolve the dispute through the Conciliatory Committee instead of *hakam*, as it is very difficult to get people who have the qualifications of *hakam* (Abdul Hak, 2002).

How to Have an Effective Sulh in Zanzibar:

Though the introduction of *Sulh* programme in Kadhis' Courts might be a new thing, its importance cannot be underestimated. However, it is proposed that in order to have an effective and successful change in any public sector, three key principles need to be observed. These include for the programme to have legitimacy and

support of the authority; to have the necessary public value and outcomes; and lastly, to have the capability of being implemented. It cannot be denied that *Sulh* has played very crucial role of reducing the rate of divorce in many jurisdictions particularly Malaysia. Thus, *Sulh* has got a public value in Zanzibar as many people who are in marital disputes are ready to give their marriage a second chance. This can be substantiated with the large number of people who approach the Kadhis' Courts to seek for reconciliation. The efforts taken by some Kadhis to initiate *Sulh* among the disputed parties (though not formal) is another factor which encourages the essence of introducing this *Sulh* programme before the Kadhis' Courts in Zanzibar. Thus, once this programme is introduced it will bind all Kadhis to implement it and not just few Kadhis as it is experienced now-a-days.

On the question whether a *Sulh* programme can be implemented in the Kadhis' Courts, this question gains a positive affirmation and the practices in other jurisdictions particularly Malaysia can work as a springboard towards that process. This principle emphasises for the availability of required resources and support. This involves the presence of skilled personnel to deliver the programme. Thus, the availability of resources will allow these personnel to be given the necessary skills. In deed, to ensure better implementation of the *Sulh* programme in the Kadhis' Courts the importance of training cannot be overlooked. This will start by appointing specific *Sulh* mediators for the programme. The *Sulh* mediators must not only obtain the Shariah law but also must have the basic training in handling mediation. In this respect the family mediators requires an understanding of family dynamics, communications and other theories of human behaviour and an understanding of bargaining and negotiation theories.

Therefore, acquiring training must be made as a prerequisite for appointments of mediators. Thus, unequipped mediators may fail to assess and deal with the matter, which would led to a denial of justice to the parties, and could create a major safety concerns for both the parties and mediators themselves. Mediators therefore must be properly trained as one of the safeguards against allegation of denial of justice and safety. Meanwhile, to avoid the aspect of biasness, there is a need to introduce the code of ethics and mediation rules, which will govern the ethics of *Sulh* officers together with the rules which will guide them generally in conducting *Sulh*. Consequently, to ensure the availability of good mediators and better implementation of this programme there is a need for the Kadhis' Courts to have a good co-operation with the Mufti Office which stands as one of the important organs for the development of Muslims in Zanzibar. In the meantime, to gain the legitimacy and support of the authority is another important factor, which can guarantee the success of this programme. With the increasing of divorce rate in Zanzibar, the government has tried in many ways to find the better solutions to this problem. This can be proved with the involvement of *sheha* (who are government officers) and even the Mufti Office towards reconciling the disputing parties. Nonetheless, these efforts taken by the government did not pay dividends. Therefore, there is a need for the government to recognise and implement *Sulh* programme before the Kadhis' Courts particularly with the cases, which may result in the dissolution of the marriage. Again, taking into consideration the *Sulh* experience in other jurisdictions, there is a clear rationale for having the programme installed and implemented in the Kadhis' Courts in Zanzibar. This programme will bring forward better improvement of justice within the society.

From the above discussion, it can be learnt that the above three principles are very important due to the fact that even with the best intentions and propositions, if any one of these elements is missing, effective change and reforms will fail to materialise. Therefore, in order for the *Sulh* programme to be implemented particularly in its initial phase in the Kadhis' Courts in Zanzibar, there is need for these three principles to be well observed.

Conclusion:

It cannot be denied that the issue of divorce particularly for the Muslim community in Zanzibar is at an alarming rate. Many steps and proposals might have been suggested and taken by the government in solving this problem; however, the rate seems not to decrease. Due to this situation, there is a need to find out the mechanism to cure this problem where the introduction of *Sulh* program to the Kadhis' Courts is viewed as the best alternative. In order this proposal to be effective, the Malaysian law and practices have been taken as the springboard towards that process. This has been done purposely due to the fact that the provisions which deal with dispute resolution within the IFLA, 1984 are going hand in hand with the principles of Islamic law. Again, the *Sulh* mechanism conducted in the Shariah Courts in Malaysia has played a pivotal role in reducing the rate of divorce and solving other marital problems. Therefore, it is imperative that *Sulh* program should be established and practiced in the Kadhis' Courts in Zanzibar as it is one of the methods recognised within the Islamic law in solving disputes among the spouses. By virtue of institutionalising this program in the Kadhis' Courts in Zanzibar, it will be a model for other Muslim communities within the region and in Africa at large.

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