Mediation in resolving marital conflicts: An appraisal of classical fiqh and contemporary application

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ABSTRACT
Mediation as a method of conflict management has recently emerged as the most workable institutionalised technique, among others, to resolve marital disputes in the Western jurisdictions. In Islamic Law though *ipso facto* it was given legislative recognition centuries ago under the principle of *sulh*, its potential as a viable reconciliation technique was somewhat obscured by juridical technicalities. Indisputably, mediation was the underlying *ratio legis* for the institution of *hakam* (arbitration) according to classical *fiqh*. In practice, however, mediation was not the sole prerogative of arbitration. It was instituted and carried out through numerous culturally specific methods both formally and informally. In the Malaysian scene, mediation in family disputes is part of the day-to-day job of the Shari`ah lawyers, judges and officers in the religious departments. However, critiques believe that neither the agents under traditional *hakam* nor the shari`ah practitioners of the Shari`ah bodies have the necessary training and soft skills to act as effective go-betweens in resolving the marital conflict in the contemporary setting. The alternative to do the job, therefore, is by creation of a body such as ``Conciliatory Committee`` under the pattern of the Western model. Thus, the aims of this paper are : First, to articulate the classical concept and framework for marriage reconciliation (sulh). Second, to highlight the alleged inefficacy of the mediation by the Shari`ah bodies in the local scene. Finally, to propose steps for improving the situation consistent with Islamic legal methodology.

Introduction

Recent ensuing marriage conflicts leading to the escalating rate of divorce[1] and its ensuing post-divorced court battles for child custody and other reliefs through the adversarial system of litigation, where one party emerge as victorious and another as the loser, have impelled Western legal jurisdiction to think of alternative ways of satisfactory dispute resolution.[2] Among the ranges of such mechanisms, mediation has proved to be the most effective alternative. In the Islamic view, mediation (*al-Islah fi al-khilafat al-*

[1] Divorce increases at the rapid rate the world over. Malaysian situation is not different in this respect. See, http://www.malaysianbar.org.my/content/view/11894/99/(retreived,25.04.2008).
[2] Tania Sourdin,*Alternative Dispute Resolution* (Sydney : Lawbook Co,2005),pp.ix-xi.

zawjiyyah)[3] traditionally has been attempted within the framework of arbitration *tahkim*).[4] In this context, the most pertinent question is: How does *hakam* mediate marital conflicts *in* Islamic Law? To address this and other incidental issues, this paper first offers an overview of the concept. Then it proceeds to identify its legislative foundation in the Islamic view. Lastly, it critically examines the application of mediation in the Shari`ah court in the local scene with the aim of making some recommendations for improvement.

Conceptual framework

Mediation literally denotes the idea of "assisted negotiation." Negotiation may be thought of as "communications for agreement." Hence, mediation is "assisted communications for agreement." [5] In the legal parlance, it signifies a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavours to reach an agreement.[6] As such, its main feature is that a mediator has no advisory role as to the content or outcome of the negotiation. It is different from conciliation as a conciliator may suggest a solution. It is also different from arbitration since an arbitrator, similar to a judge, will finally make a determination.[7]

According to Taylor, a mediator to succeed in his task must know four areas: family law, mediation and conflict resolution theory, family, adult and child development, and information about the specific disputes. He also must adhere to five basic principles of ethics in the course of his work. They are: do no harm; try to do good; be fair and promote justice; client self-determination; fidelity to promises. Other requirements are that the mediator must be sensitive towards gender, sexual, class and racial identity in changing the way a family will respond to mediation.[8]

Mediation may be undertaken voluntarily, under a court order, or subject to any existing contractual agreements. But for the client, according to James Melamed, its **key** qualities are as follows[9] :

- *it is a voluntary* undertaking - you can leave at any time for any reason, or no reason.

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[3] `Abd al-Salam Muhmmad Darwish al-Marzuqi,`` Tajrabat al-Islah al-Usuri bi Da`rat al-`Adl bi Dubay n : Waqi` wa Tumuh ``,a paper presented at International Conference on ‚*Zahirat al-Talaq,al-Asbab al- `Athar al- `Ilaj,al-Shariqah* , 21-22,April,2004,pp.1-16.

[4] Sharifah Zaleha & Sven Cederroth, *Managing Marital Disputes in Malaysia* (Great Britain : Curzon Press Ltd,1997), pp.130-131.

[5] James Melamed, at http://www.mediate.com/articles/what.cfm#top(retrieved at 20.04.2008)

[6] This is a definition adopted by National Alternative Dispute Resolution Advisory Council of Sydney. See see Charlton & Dewdney ,*The Mediator`s Handbook* (Sydney : Lawbook Co,2004),2nd ed,p.30.

[7] Ibid,pp.31-37.

[8] Allison Taylor ,***The Handbook of Family Dispute Resolution***. See at, http://www.crinfo.org/booksummary/10195/ (retrieved ,20.04.2008).

[9] Ibid.

- *it is collaborative* - you are encouraged to work together to solve your problem(s) and to reach what you perceive to be your best agreement.

- *it is a controlled* process - you have complete decision-making power and a veto over each and every provision of any mediated agreement. Nothing can be imposed on you.

- *it is confidential* - it is confidential, to the extent you desire and agree, be that by statute, contract, rules of evidence or privilege. Mediation discussions and all materials developed for mediation are not admissible in any subsequent court or other contested proceeding, except for a finalised and signed mediated agreement. Your mediator is obligated to describe any exceptions to this general confidentiality of mediation.

- it is an informed process - the mediation process offers a full opportunity to obtain and incorporate legal and other expert information and advice. Mediators are bound to encourage parties to obtain legal counsel and to advise them to have any mediated agreement involving legal issues reviewed by independent legal counsel prior to signing. Whether legal advice is sought is, ultimately, a decision of each mediation participant.

- *it is an impartial, neutral, balanced and safe* mechanism- the mediator has an equal and balanced responsibility to assist each mediating party and cannot favour the interests of any one party over another, nor should the mediator favour a particular result in the mediation. Your mediator is ethically obligated to acknowledge any substantive bias on substantive issues in discussion. The mediator's role is to ensure that parties reach agreements in a voluntarily and informed manner, and not as a result of coercion or intimidation.

- *It is self-satisfying* **-** based upon having actively resolved your own conflict, participant satisfaction, likelihood of compliance and self-esteem are found by research to be dramatically elevated through mediation.

Moreover, to Taylor, mediation, as compared to other methods of dispute resolution stands unique in the following ways[10]:

- Economical decisions **-** Mediation is generally less expensive when contrasted with the expense of litigation or other forms of fighting.

- Rapid settlements **-** In an era when it may take as long as a year to get a court date, and multiple years if a case is appealed, the mediation alternative often provides a more timely way of resolving disputes. When parties want to get on with business or their lives, mediation may be desirable as a means of producing rapid results.

- Mutually satisfactory outcomes - Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker.

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[10] Ibid.

- High rate of compliance - Parties who have reached their own agreement in mediation are also generally more likely to follow through and comply with its terms than those whose resolution has been imposed by a third party decision-maker.

- 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.

- Greater degree of control and predictability of outcome - Parties who negotiate their own settlements have more control over the outcome of their dispute. Gains and losses are more predictable in a mediated settlement than they would be if a case is arbitrated or adjudicated.

- Personal empowerment - People who negotiate their own settlements often feel more powerful than those who use surrogate advocates, such as lawyers, to represent them. Mediation negotiations can provide a forum for learning about and exercising personal power or influence.

- Preservation of an ongoing relationship or terminations of a relationship in a more amicable way - Many disputes occur in the context of relationships that will continue over future years. A mediated settlement that addresses all parties' interests can often preserve a working relationship in ways that would not be possible in a win/lose decision-making procedure. Mediation can also make the termination of a relationship more amicable.

- Workable and implementable decisions - Parties who mediate their differences are able to attend to the finer details of implementation. Negotiated or mediated agreements can include specially tailored procedures on how the decisions will be carried out. This fact often enhances the likelihood that parties will actually comply with the terms of the settlement.

- Agreements that are better than simple compromises or win/lose outcomes - Interest-based mediated negotiations can result in settlements that are more satisfactory to all parties than simple compromise decisions.

- Decisions that hold up over time - Mediated settlements tend to hold up over time, and if a later dispute results, the parties are more likely to utilise a cooperative forum of problem-solving to resolve their differences than to pursue an adversarial approach.

On the whole, studies have shown that families that mediate their differences have a substantially better after-divorce relationship than families that litigate their differences. Nevertheless, mediation has proved futile where there has been evidence of domestic

violence or abuse. The yardstick, for the mediation to work, is the existence of some degree of trust between the disputants.[11]

Mediation processes

According to Charlton, whilst there is no universally agreed model of mediation, the most popular one is a seven-stage model[12], which with or without modification can be applied in a wide range of dispute resolutions. They, *inter alia*, include :[13]

1. Mediator`s opening statements - aimed at explaining the role of mediator and setting the scene for constructive use of the process.
2. Parties' statements and mediator`s summaries - designed to make it clear that mediator has understood the parties and encourage the parties to listen to each other`s issues.
3. Issues identification and agenda setting - for the purpose of setting the scene for clarification of issues.
4. Clarification and exploration of issues - with the end of eliciting the underlying needs and interests and ultimately to identify options.
5. Private sessions (caucus) - for the purpose of exploring mutually satisfying outcomes and rehearsing negotiations.
6. Facilitating negotiations - to help the parties to move from their entrenched positions for mutual benefit and to finally own the outcome.
7. Mediation outcome - work out terms of agreement to ensure lasting and realistic agreement and to assist them to decide on the future action if a partial or no agreement is reached.

Jessica A. Stepp gives a more hands-on summary of how the process works. She states that first, the mediator will wait until both parties are present and then make introductions. The physical setting will be controlled so that no party feels threatened. Most mediators will ask that if children are present, they wait outside. The mediator will then give an opening statement. This outlines the role of the participants and demonstrates the mediator's neutrality. Some mediators will make comments about what they see as the issue and confirm the case data if briefs have been pre-submitted. Next, the mediator will define protocol and set the time frame for the process. There will be a review of the mediation guidelines and the mediator will briefly recap what it is that he has heard as the issues. Second, after the opening statement, the mediator will give each side the opportunity to tell their story uninterrupted. Most often, the

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[11] http://www.houston-familylaw.com/Mediation.htm(retreived,15.04.2008)

[12] According to Peter Lovenheim the model consists of six stages: Mediator's Opening Statement; Disputants' Opening Statements; Joint Discussion; Private Caucuses; Joint Negotiation; and Closure. See , http://www.houston-familylaw.com/Mediation.htm(retreived,15.04.2008)

[13] For details ,see Charlton & Dewdney ,*The Mediator`s Handbook*,pp.3-127.

person who requested the mediation session will go first. The statement is not necessarily a recital of the facts, but it is to give the parties an opportunity to frame issues in their own mind, and to give the mediator more information on the emotional state of each party. If there are lawyers present who make the initial statement, the mediator will then ask the client to also make a statement. The rationale behind the statement of the problem is not a search for the truth; it is just a way to help solve the problem. Thirdly, the mediator will ask the parties open-ended questions to get to the emotional undercurrents. The mediator may repeat key ideas to the parties, and will summarise often. This helps the mediator to build a rapport between the parties, especially when a facilitative style is used. Fourthly, the mediator tries to find common goals between the parties. The mediator will figure out which issues are going to be able to settle or those that will settle first. Finally, the mediator identifies ways to get the parties to agree .He engages in bargaining to develop options. To achieve that the most commonly used method is the caucus. Caucus involves holding private sessions with both parties in order to move the negotiations along. This caucus session will be confidential. The caucus provides a safe environment in which to brainstorm and surface underlying fears. The goal of the session is to find some common grounds by exploring lots of options, and to bring about possible solutions for the parties to think about. Parties can also entertain alternative solutions to their problems without committing themselves to offer the solutions as concessions. Once the participants are committed to achieving a negotiated settlement, the mediator will propose a brainstorming session to explore potential solutions. This can lead to a final agreement, which diffuses the conflict and provides a new basis for future relations.[14]

Mediation techniques

Mediation basically involves how to get the disputing parties to negotiate and talk. Divorce, being deeply embedded in miscommunications[15], requires rigorous knowledge of communication to reestablish communications between the estranged spouses. Accordingly, the most important requisite skills[16] that a mediator must possess are two: effective listening and questioning skills.

Listening skill as a communication tool is applied not only to understand the parties but to ensure that appropriate interventions and responses occur which will facilitate progressing the session. Listening can be active or passive. Active listening refers to the mediator listening to what the parties are saying and feeds back in active way reflecting

[14] *Adopted with slight modification from , ` How Does The Mediation Process Work? `by Jessica A. Stepp ,at* http://www.mediate.com/articles/steppJ.cfm(retrieved ,20.04.2008).

[15] http://www.mediate.com/articles/green2.cfm(retieved 20.04.2008)

[16] There are also other skills for a mediator ,such as being a good re-framer , summarizer, retaining the perception of neutrality which ,by and large , lawyers would generally fulfill. However, communication skill is a dimension which law training would not provide. For instance, Salleh Buang frankly admitted this by saying that he never learnt mediation during his study of law. See Wan Siti Asmak,``The Importance of mediation in settling Divorce Cases``,in *Islamic Family Law: New Challenges in the 21st Century*(Kuala Lumpur: IIUM,2004) ,edit.Zaleha Kamarudddin, vol.II,p.175.

an appreciation of the significance of what the parties have said. Its main objectives include[17]:

- to convey to the parties that the mediator not merely listened to them but also understood the significance of what they have said.

- reflect to the parties the intensity of their feelings.

- to clarify and minimise misunderstanding between the parties.

- to make constructive use of what the parties have said in order to facilitate mutually satisfying negotiated settlement of their dispute.

- to facilitate problem-solving by creating opportunities for empathy and mutual understanding.

Passive listening, on the other hand, involves the mediator listening in silence to what the parties are saying and responding in a passive way. For example, by using non-verbal cues like eye contact, nodding, leaning forward, generally being relaxed, focused and alert, not appearing uninterested and while verbally responding to make use of non-committal acknowledgement, such as : `` I see.``[18] In this process, he must also make statements which incite the parties to talk out their grievances. For instance, telling one party after listening to him or her, "Please elaborate on the point you have made." Then by looking at the other party, saying: "I am sure, he (the other) would be interested in what you have to say about this." He must avoid making any statement that may identify (bias in favour of) him with another party. For instance, statements like, ``That is very interesting`` or ``How awful for you`` should be avoided.[19] Thus, the main objectives of passive listening include[20] :

- to encourage parties to continue talking.

- to encourage the parties to finish their statements especially when they are hesitating while talking.

- to convey to them that by keeping quiet, you do not look uninterested in their submission.

- to observe the effects the parties have on each other.

The mediator`s effective listening would be obviated if he is[21]:

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[17] Charlton & Dewdney ,*The Mediator`s Handbook,pp.193-197.*
[18] Ibid.,p.193.
[19] Ibid.194.
[20] Ibid.
[21] Ibid,pp.194-195.

- Finishing the sentence for the speaker.
- Talking at the same time as the parties.
- Suggesting that what is being said is untimely.
- Playing with an object while attempting to demonstrate that he is listening to them.
- Faking attention or looking bored.
- Taking excessive notes (head down all the time) and not creating an appropriate listening environment.

In a nutshell, the mediator needs to master the communication skill of effective listening which, among others, requires the following[22]:

- Listening for ideas, not facts – asking them what they mean.
- Judging content, not delivery, i.e. *what* they say, not how they say it.
- Listening optimistically – not losing interest straight away.
- Not jumping to conclusions.
- Being flexible, adjusting one`s note-taking to the speaker.
- Concentrating – not start dreaming – and keeping eye contact.
- Not thinking ahead of the speaker – one will lose track.
- Working at listening – being alert and alive.
- Keeping emotions under control when listening.
- Opening one's mind – practising accepting new information.
- Breathing slowly and deeply.
- Relaxing physically and getting comfortable.

Questioning technique is another essential tool in mediation. Effective questioning is the one which is geared to furnish the following objectives:[23]

- To clarify what parties are saying.
- To encourage parties to provide each other with additional relevant information.
- To probe for further ideas to encourage parties to shift the focus to the future.
- To facilitate parties` identification of feelings and emotions.

To this end, three types of questions are most common to be asked: first, closed questions in order to clarify and check the information, such as you felt angry when your husband used to come late home after office hours. Second, open-ended questions aimed

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[22] http://honolulu.hawaii.edu/intranet/committees/FacDevCom/guidebk/teachtip/effquest.htm retrieved at 20.04.2008).
[23] Charlton & Dewdney ,*The Mediator`s Handbook.p.205.*

at getting more creative response from the parties. They usually involve the ``how``, ``why ``, ``what``, ``where`` and `` when`` type of framework. Lastly, hypothetical questions known as the ``what if`` type of questions. They have the multiple potential of opening up the dialogue, performing a reality testing role, refocusing a party on the future and posing a hypothetical solution.[24]

For the questioning to yield the desired goal of clarifications and probing, it must not reach the level of getting at the full facts. Otherwise, the process would relegate a mediator`s role to that of an investigator`s and communication between the parties comes to a deadlock. It is also recommended that the mediator must avoid asking excessive questions and let the parties to talk.[25]

Legislative foundation in Islamic law

Mediation as a process of go-between spouses when their relationship has been ruptured by friction is first and foremost mandated by the Qur`an. Allah (s.w.t) states to the effect: "If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything."[26] This Qur`anic verse makes it a communal obligation on Muslims to reconcile the spouses once there is *shiqaq* (break up) between them. This rule is derived from the view of the majority who regard mediation as the mandatory duty upon the rulers.[27]According to another verse, reconciliation rather than divorce is the declared better option[28] to resolve marital conflict: ``If a wife fears cruelty or desertion on her husband`s part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men`s souls are swayed by greed….``[29]

To practically operationalise this, the Qur`an institutionalised *hakam* ( arbitrator).[30] This is also supported by both practical and legislative sunnah of the Prophet (p.b.u.h). His practical sunnah pertains to his appointment of Abu Bakar to iron out (arbitrate) a minor disagreement that had occurred between him and `Aisah[31]. According to a *hadith* also he

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[24] Ibid , pp.206-208. For more details see Sourdin,*Alternative Dispute Resolution,pp.41-74.*
[25] Charlton & Dewdney ,*The Mediator`s Handbook,p.208.*
[26] Al-Qur`an , 4: 34.
[27] However, al-Jassas held that the spouses must themselves seek reconciliation while al-Khattab held that legal guardian must reconcile them. See Ibn Qudamah,al- Mugni,vol.7,p.320.al-Jassas, *Ahkam al-Qur`an*, vol.2,p.190, al-Qurtubi, *al-Jami` li Ahkam al-Qur`an*, vol.5,p.150.
[28] Khashi` Haqqi , *al-Talaq : Tarikhan wa Tashri`an wa Waqi`an* (Beirut : Dar ibn Hazm, 1997),p.77.
[29] Al-Qur`an,4: 128.
[30] Kahtan Abd al-Rahman al-Dawri, *`Aqd al-Tahkim fi al-Fiqh al-Islami wa al-Qanun al-Wad`i(*Baghdad : al-Matba`ah al-Khulud,1985),pp.91- 111;Saalih ibn Ghaanim al-Sadlaan *Marital Discord(Nushooz),* (N.pp:al-Bahseer Company,n.d.),Jamaal al-Din M.Zarabozo(Trans.),p.56; K.N. Ahmed , *The Muslim Law of Divorce* (New Delhi : Kitab Bhavan,2006),pp.277-280.
[31] Al-Ghazali, *Ihya `Ulum al-Din*,vol.2,p.44.

decreed: `` Any one who arbitrates between two people and does not judge in truth between them, would be cursed by Allah.[32]``

Accordingly, mediation in marital conflict as a principle is sanctioned by highest sources of legislation in Islamic Law. This was also designed to be implemented and realised through the most common mechanism for dispute resolution in the time of revelation, namely, the institution of *hakam (*arbitration). Therefore, now we turn to a brief juristic delineation of *hakam.*

Juristic exposition of *hakam*

The jurists while detailing the law, wrote a great deal about various dimensions of arbitration. Nevertheless, for our purpose, the following are most pertinent:

i. Affiliation with the disputants

Majority of the jurists maintain that it is not *wajib* (mandatory) that the arbitrator should be related by kinship to the disputants but only recommended (*mandub*) [33]. Accordingly, it would be completely in order for any stranger (a friend, a mediation practitioner or even a judge) to mediate between the disputants. Their main arguments are : first, the meaning of *min ahliha* in the proof-text on the subject means those who are best suited to the job; second, `Umar appointed `Utham and Ibn `Abbas, who were unrelated to the parties, to mediate between a married couple; one from Bani Hashim and another from Bani `Abd Shams; third, blood kinship is not a condition for agency nor for adjudication; and lastly, the *ratio legis* behind arbitration is reconciliation which can be fulfilled by qualified mediators.[34] The Malikiyyah and some Hanabilah, on the other hand, maintain that arbitrators must be from among blood relations of the wife and the husband – even if he happens to be a judge. They argued that this is the true statement of the law : first, the verse in question explicitly makes it so; second, relatives` right to arbitrate for the purpose of either maintaining the marriage or dissolving it takes priority over unrelated people to them; and lastly, relatives being well-acquainted with the nature of their marital discord, would be in a better position to decide what is best for them. Furthermore, it is argued that relatives are best suited for mediation as they are most interested in reconciling rather than separating the disputing spouses; have best knowledge of what is best for them and are most capable of enforcing the agreement that would be reached between them.[35]

In our opinion, the view adopted by the majority is to be credited as it stands on strong footing, practice of the *sahabah* and is consistent with institutionalisation of religious

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[32] Musannaf `Abd al- Razaq,vol.6,p.407.
[33] Muhammad Ali al-Sabuni, *Rawa`i` al-Bayan*,vol.1,p.443.
[34] See al-Dawri, *`Aqd al-Tahkim fi al-Fiqh al-Islami wa al-Qanun al-Wad`,pp.419-421.*
[35]Muhammad al-Ghazali rationalizes it in this way. See http://www.balagh.com/woman/trbiah/jv0nyrnh.htm (retrieved, 23.04.2008).

percepts[36], for efficacious and effective implementation, especially in our age of specialization and technical expertise. It is logical that this should be the true statement of the law as even the Malikiyyah compromise on essentiality of kinship as a requirement when they allow a stranger`s mediation, when there are no qualified next-of-kins around or they are of non-existence *ab initio*.[37]

ii. Qualifications

The classical jurists predominantly, while delineating characteristics of arbitrators as mediators, have determined a set of criteria. They are divided into two categories: undisputed and disputed criteria.

Undisputed qualifications include: Islam, legal competence, uprightness of character and knowledge about dispute resolution. Accordingly, mediators must be Muslims as non-Muslims cannot have jurisdiction over Muslims.[38]They must be legally competent to be able to appreciate the facts disputed and resolve them and be competent to account for their decision. For instance, Imam Shafi`i holds that the arbitrator must be from people of ingenuity and intellect so that they can be entrusted with this responsibility.[39] He must also be a person of integrity so that people can place confidence in him. Al-Kharashi also agreed by saying: ``Arbitration by a minor, non-Muslim, profligate…is null and void.[40]`` Likewise, he must be well-versed in matters of resolving marital discord. For instance, al-Shirazi reasoned: ``Fiqh of dispute resolution is indispensable for arbitrators as the nature of their job requires to make competent decisions on either reconciling or separating the spouses. However, if we regard them as agents and not arbitrators, they do not necessarily be learned on this matter.[41]`` Al-Alusi beautifully delineated the kind of fiqh (expertise) that an arbitrator should possess when he said: ``He must be a just man of knowledge, refined policy and foresight in protecting the disputing spouses' interests.[42]``

While underlining this, Ibn `Arabi, however, draws a distinction between arbitrator appointed by the disputing spouses and those designated by the court. He maintained: "*al-hakam* by definition means the person who is qualified to make just decisions among people and resolve their disputes by reconciling them. Consequently, according to a body of opinion among the *`ulama,* he (they) must be well-acquainted with the nature of the conflict between the spouses, possess integrity, be insightful to determine the best

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[36] For details ,see Abd al-Rahman al-Kaylani, ``Dawr Mu`ssat al-Mujtama` li al-Tasaddi li Zahirat al-Talaq``, a paper presented at International Conference on ,*Zahirat al-Talaq,al-Asbab al- `Athar al- `Ilaj,al-Shariqah* , 21-22,April,2004 in pp.2-6.
[37] al-Dawri, *`Aqd al-Tahkim fi al-Fiqh al-Islami wa al-Qanun al-Wad`,pp.416-418.*
[38] Al-Nisa : 141. This is the law where the parties are Muslims.
[39] Quoted in al-Dawri, *`Aqd al-Tahkim fi al-Fiqh al-Islami wa al-Qanun al-Wad`i,p.427.*
[40] Ibid,p.432.
[41] Ibid.,p.427.
[42] Ibid.,p.435.

interests of the disputing couples and be learned in Shari`ah. But some other scholars advanced the view that this condition is required in the case of state-appointed arbitrators. As such, it does not apply in the case of arbitrators who are picked up by the parties themselves. Hence,in their case, they have to be adult, sane, Muslims, trustworthy and credit worthy to advise the parties.``[43]

I believe, the above distinction is in keeping with the social structure of a traditional society where the culture of respect to elders and esteemed members of the community plays a pivotal role in resolving familial and tribal conflicts. To dismiss expert knowledge of the mediators who opt to resolve marital discord among urbanised cosmopolitan city spouses would be utopianistic at best. That is why some other Malikiyyah, like Sahnun, maintain that if mediation is done by people who have no expertise in dispute resolution, it may result in the miscarriage of justice (would not be in order). The reason being that Allah's intention in designating the task to arbitrators was to hand over this duty to people of knowledge in matters of rectifying what was deteriorating in a marriage and not to commoners (*`awam*). Accordingly, mediation by non-experts would not be admissible unless they carry out their duty in consultation with experts[44].

Disputed conditions, on the other hand, include masculinity, absence of past conviction for *qazaf* and freedom from infirmity of sight. Non-admissibility of females as arbitrators is the stand adopted by the majority[45]. The reason is that arbitration involves adjudication and as such, maleness is a condition[46]. Hanafiyah, Zahiriyah, Ibn Jarir and Shi`ah do not require this. The main argument by the majority is that adjudication as part of public administration cannot be held by women. Others, among others, do not hold this to be the case. The view adopted by the latter, I believe, is the preferred view as today, there are many qualified women counselors having mastery of soft skills such as psychology, communications, etc., necessary for modern day mediation. This is also consistent with the original position in Islam as `Umar appointed al-Shifa` bint `Abd Allah as the Chief Inspector of Markets in Madinah.[47] Methodologically speaking also, the issue of mediation partakes of social laws of Islam and not pertain to its rituals, thus, is open to fresh interpretation on account of change in social conditions and social objectives as envisioned by the Shari`ah.

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[43] Ibid.,pp.433-434.

[44] Ibid.

[45] Ibid.,437-439.

[46] The main base of this opinion is a hadith,``a community will not prosper if its affairs is administered by a women. The Prophet said this when he was informed about the designation of the daughter of the king Kisra as his successor. See Sunan al-Nasa`i,p.852 .This hadith , however ,has been variously interpreted by both the classical and contemporary jurists.Some regarded as legislative others as historical.However, details of this issues, is purposely omitted from this study. For details , see Ja`far `Abd al-Salam,*al-Islam wa Huquq al-Mar`ah* (Qairo : Rabitat al-Jami`at al-Islamiyyah, 2004),pp.95-103; Muhammad Saleem *al-`Awwah,al-Fiqh al-Islami fi Tariq al-Tajdid* (Qatar : Jam`iyyat Qatar,1998),pp.61-72; and Aftab Hussain,*Status of Women in Islam* (Lahore : Law Publishing Company,1987),pp.201- 271.

[47] Ibid.

Other conditions of healthy sight and clean record are the Hanafiyyah conditions which are not required by other schools.[48]

iii. Number

Majority of the jurists, by virtue of the explicitness of the number requirement as embodied in the proof-text on *hakam,* do not allow less than two arbitrators. Malikiyyah predominantly do not require this, arguing, among others[49], on the basis of the end-goal of the law by maintaining that if both parties agree on one person to mediate between them, it suffices as it serves the objective. Nevertheless, this is allowed only in the case of mediators appointed by the parties.[50]

iv. Authority

Arbitrators` primary job is to remove ill-feelings and reestablish communications between the spouses. Accordingly, the jurists agreed that arbitrators will have full power to reconcile them but they differed as to their power to pronounce *talaq* between them when they can not be reconciled. According to Hanafi and Shafi'i schools, the arbitrators have no authority to separate between the parties unless they are nominated / appointed by the spouses themselves and they consent to such a decision.[51] The reason is that if they are appointed by the parties, their position is one of agent (wakil) who has no power to rule against their principal. But if they are appointed by the court, their status, according to Hasan al-Basri, is like that of the witnesses, to carry out fact finding mission, and refer the matter to the court[52]. Malikiyyah and Imam Ahmad, on the other hand, held that arbitrators have powers not only to reconcile but also to order separation, irrespective of who has designated them[53]. The reason for the differences is that the first group regards arbitration as primarily a kind of agency (*wakalah*) while the second regards it as a form of adjudication (*hakimiyyah).*[54]Practically, however, arbitrators leave the final decision to the court which is the preferred view as it is consistent with the notion of mediation whose locus lies in mending rather than ending the marriage relation.

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[48] Al-Dawri, *`Aqd al-Tahkim fi al-Fiqh al-Islami wa al-Qanun al-Wad`i,p.434.*
[49] They also refer to the precedent by `Umar who a case appointed only one arbitrator. see ibid.,p.446.
[50] For details ,see ibid.,pp.445-450.
[51] They build up their case ,mainly on the interpretation of the verse on *hakam* as we referred in the text. Ibn Qudamah, ibid,p.320.
[52] al-Dawri, *`Aqd al-Tahkim fi al-Fiqh al-Islami wa al-Qanun al-Wad`i,pp.498-503.*
[53] Ibid.
[54] Supporters of adjudication power for arbitration cite a precedent by Ali where he authorized the arbitrator to separate the litigants if they cannot be reconciled. See al-Shirazi, al-Muhadhdhab,vol.2,p.70. See also ,Muhmud Mahjub Abd al-Nur, *al-Sulh wa Atharuha fi Inha al-Khusumah fi al-Fiqh al-Islam* (Beirut : Dar al-Jalil,n.d),pp.141- 145; Atiyyah Abd al-Mawjud,*Mushkilat al-Zawjiyyah wa Hululuha al-Fiqhiyyah*(al-Azhar : al-Maktabah al-Azhariyyah li al-Turath,2000),pp.63-71.For elaborate detail see, al-Dawri, *`Aqd al-Tahkim fi al-Fiqh al-Islami wa al-Qanun al-Wad`i,pp.451-504.*

Application today

Today Muslim minorities in the West, opt for mediation outside the framework of arbitration. To this end, they may turn to relatives or trusted friends or seek the assistance of social organisations, lawyers and marriage counsellors. It is held that arbitration as an institution is the recourse to the parities whose marriage is at the verge of divorce. Then arbitration would be a better alternative for them as compared to litigation which is slow, combative and costly.[55] Arbitration cannot be the first step as Shahina Siddiqui explains: ``Conflict [means] basically we have stopped listening, we have both become entrenched in our particular positions. We believe we are not being heard or understood. And we believe we are right. The job of the mediator is to turn it around and say, 'make each other listen, make each other facilitate the communication' and then help them arrive at a resolution of the conflict. Nevertheless, mediation is not always successful. However, most of the time it is if the mediator is trained, neutral, knowledgeable, and has compassion.[56]`` She went on to say: `` arbitration is also more likely to be a last resort measure for couples on the verge of divorce. When it (marital conflict) reaches the arbitration stage, or you have asked an arbitrator, usually it means that the couple is not planning to stay together. Arbitration would come into how the property is divided, who will take the children, that kind of stuff because you cannot really arbitrate a relationship. Usually for marriage conflicts, I would recommend mediation, not arbitration.[57]"

Zafar Hasan , a Chicago-based corporate lawyer, also agrees by saying : ``mediation is a better option legally as Muslim couples can resolve a conflict through mediation, then sign a contract agreeing to uphold conditions they have agreed to through the mediation. If this contract is notarized, it is then a binding, legal document that can be enforced by local courts. This is in contrast to arbitration, for example, where such a contract is more likely to be ignored, appealed or not enforced because of incompatibility with local laws. Moreover, the courts are more likely to enforce a notarised contract that results from mediation than one that results from arbitration because both the husband and the wife have agreed to the conditions mutually. It was not a decision enforced on one party by another.[58]``

In the local scene, reconciliation in theory is the job of arbitrators[59] but practically, there are various grades of mediators, such as marriage counsellors at the Religious Offices or Kadis at the court. For instance, the law in Selangor provides that if the court is satisfied that there are constant quarrels between the parties to a marriage, ***the court may appoint*** two arbitrators to act for the husband and wife respectively.In such appointment, the court where possible gives priority to the close relatives of the parties having

[55] http://www.soundvision.com(retrieved,20.04.2008).

[56] See Shahina Siddiqui, executive director of the Islamic Social Services Association of the United States and Canada,ibid.

[57] Ibid.

[58] Ibid.

[59] Zaleha Kamaruddin, *The Problem of Divorce Among Muslims and non-Muslims in Malaysia,*pp.229-233.

knowledge of the circumstances of the case. The arbitrators may also be authorised to divorce the parties.[60]

In practice, however, according to Sharifah Zaleha, the counsellor and kadi are the nuclei of mediating forums.[61] For instance, in the case of Yusuf v. Roslina where Yusuf, a former drug addict, lodged a complaint to the religious office about the behaviour of his wife, Roslina - works as a barmaid. The complaint was that he was fired from work and could not support his family so his wife left him and hardly cared for their children. During the counselling, a ***lady counselor*** successfully got both parties to express their grievances. At one juncture, the counsellor upon the wife`s request, held a caucus with the wife where she asked her as to whether she still loved Yusuf, which she answered in the affirmative. Then she urged her to forgive him. She cajoled her to reconcile and state her terms and conditions thereto. Then she called Yusuf back and told him that his wife still loved him but to resume cohabitation, he has to fulfil her conditions. Yusuf henceforth agreed. Commenting on the full hearing version, Sharifah Zaleha holds that the counsellor failed to comply with certain protocols as a go-between agent. First, she started to be judgmental about Roslina`s job as a barmaid, stating: `` … if you do not make anything blameworthy, people will not blame you. People will stop talking.[62]``Second, throughout the session, she does not document grievances. I may add that she also did not obtain any written pledge from Yusuf to start working and stop taking drugs.

In the case of Shamsul v. Asmah, on the other hand, ***the Kadi*** of Kota Jati, engages in mediation between the estranged spouses. On the fact of the case, Shamsul`s wife, after twenty-five years of marriage, found that her husband has another woman as (*simpan*) with intention of marrying her. When Shamsul came, she threatened to cut off his genitals. Shamsul confided with a lawyer friend about this and was advised to see the Kadi. The Kadi met him unofficially and asked him to bring along his wife and see him. After much persuasion, Asmah agreed but insisted it to be unofficial. During mediation session, after hearing the grievances by Asmah, the Kadi started to cajole her to accept her husband`s decision, to have another wife, and not to hurt him. He also advised her against asking for divorce which she was pressing for. The meeting continued for half an hour without any agreement as the Kadi left for another meeting.. This is criticized as one-sided [63]and more of a counselling than mediation, i.e., the kadi arbitrates rather than mediates

The most obvious departure from theory takes place once the parties lodge formal complaint to the court.[64]Here the Hakim Syarie resorts to mediation where the facts disputed would cause embarrassment to one of the parties if heard in the open court. Instead, the judge advises the parties to settle their problems in the privacy of his own office. For instance, in a case of petition for *fasakh* on account of husband`s impotence. An example was the case of Faridah v. Munir. On the facts of the case, the defendant

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[60] See Selangor Enactment No.4 of 1984, S.48.

[61] Sharifah Zaleha & Sven Cederroth, Managing Marital Disputes in Malaysia,p.130.

[62] Ibid.,p.132.
[63] See ibid.,pp.137-144.
[64] Ibid.,pp.144 -145.

was unable to consummate the marriage. The plaintiff after confiding with her mother applied for *fasakh*. On the hearing day, Faridah said that Munir could not provide her with *nafkah batin*. Hearing this, the judge casually informed those present that the court would take a recess and resume sitting in about two hours' time. Then the judge took them in the privacy of his office and diplomatically got the defendant to confess and agree to judicial separation. When the court resumed sitting, the judge announced that the court approved Faridah`s application for *fasakh.*[65]

In other cases, the judge partially dispenses with formal court procedures to give advice, make proposals for a solution, and invites views from the disputants themselves about the possibility of reconciliation rather than granting the relief petitioned for. A case to illustrate this was the case of Humisah v. Mehat. In this case Mehat married a second wife. Hamisah accepted this but later on their relationship deteriorated as she thought that Mehat was favouring the new wife. Hence, she left the house and later on petitioned for *taklik.* The judge, after hearing the parties and the defendant`s witnesses, the local imam and another influential man in the village, learnt that the husband has not neglected his duty. Accordingly, he started to coax Hamisah to reconcile and give the marriage a second try, which she accepted.[66]

From the above, it appears that a trend in favour of moving beyond the parameters of the classical notion of restricting mediation work to arbitrators is in the offing.

Comparison

From the above analysis, among others, one may conclude: First, Western society favours more participative resolution of marital conflicts via engaging a qualified neutral third party as facilitator whose locus is to work out mutually agreed settlement of marital conflicts. To this end, it has developed the institution of mediaton which is technically different from conciliatory and arbitration bodies. On the contrary, the classical Islamic jurisprudence recommends arbitrators to do the job. They may be academically qualified or else men of respect and social stature so long as they can reconcile the parties or separate them as held by some schools. Second, mediators in the Western system are professional bodies without any relation to the parties whereas in classical Islamic Law, according to one body of opinion, they must be from among the next-of-kin of the parties.Third, the Western system over-emphasises more on the soft skills of the mediator. Islamic Law, on the other hand, focuses on the integrity of the mediators. Lastly, the line of demarcation between arbitration, mediation and reconciliation in Islamic Law is not clearly defined. In the Western system; they, whilst similar in nature, are distinct remedy institutions of conflict resolution.

Conclusion and recommendation

[65] Ibid.,pp.157-159.
[66] Ibid.,pp.154 -157.

The foregoing discussion points to some discrepancies between the law in the book and the one in practice, both at official and unofficial levels, in many ways, including : First, mediation according to classical jurists is the task of arbitration, be they next-of-kins, friends, well-wishers or professional state appointed arbitrators. However, in the local scene today, there may be marriage counsellors, religious officers or Kadis. This is so because the law in Selangor does not make the appointment of arbitrators mandatory(the court may appoint…).Secondly, judicial practice also indicates that courts nowadays are more keen to favour mediation rather than litigation. This again is a departure from the traditional role of the Kadis who are supposed to adjudicate based on facts and evidences and assign the settlement job as the case may be to the parties themselves or to arbitrators.

In view of the above, the question is: Are these new ways efficacious in achieving the objective? The answer, according to the critiques, cannot be a sure affirmative one. This can be obviously seen from some cases that we cited. A close scrutiny of the above cases points to some weaknesses in the way that the remedy agents handle disputes. For example, when advising, they tend to be bias, hasty, less sensitive to issues like gender, etc. Accordingly, if mediation in the Muslim world is going the Western way, we need to develop it in line with modern state-of-the-art modes blended with the eternal principles of the Shari`ah.To achieve this, we recommend the following:

1. reorganise arbitration along the institution of mediation or conciliation which is consonant with the *raison det`re* of arbitration in Islamic Law. It is similar to reorganization of *`aqilah*, being primarily a tribal system of support, in the form of diwan by `Umar, the Second Caliph.

2. upgrade existing counsellors` soft skills at par with their Western counterparts. To equip these remedy agents with knowledge of communications, psychology, anthropology, etc., would make them better negotiators to help reestablish relationships between quarrelling couples. This would be perfectly Islamic, as the wisdom is the lost property of every Muslim, according to a hadith.

3. revitalise the existing marriage counselling in the Shari`ah courts and set up more of them to do the mediation. Judges and lawyers as popular options are held not to be suited for the job unless they have been specially trained in the field.

4. introduce soft skill courses for students of Shari`ah and Islamic judiciary.

5. include next-of-kin in the process of reconciliation, if helpful.