

# ISLAMIC CODE OF CONDUCT FOR MEDIATION: A CASE STUDY OF THE CODE OF CONDUCT OF MALAYSIAN MEDIATION CENTRE (MMC)

Muhammad Amanullah

## ABSTRACT

The courts of every country are so overwhelmed by so many different types of cases submitted by their clients that these courts cannot settle them timely and also the related procedures are very costly. In order to help the public and to some extent the governments, alternative means of solving the conflicts and disputes are well established and practiced all over the world. One of these means is to solve the disputes through mediation. Many organizations, centers, etc. have been established for mediation all over the world. These organizations have tried to produce the code of conducts for mediation. One of these organizations is Malaysian Mediation Centre. This center has wide range of activities. In order to practice the mediation properly, this center, like many other organizations, produced its code of conducts. Because of some external factors, some Muslims have some doubt about the credibility of mediation. Islam has also prescribed many principles of mediation which combinedly may be called as “Islamic Code of Conduct for Mediation.” As per the knowledge of the researcher, no comprehensive Islamic code of conduct for mediation has been written in English. In the past and to some extent even now the mediation for family affairs and other simple issues has been conducted by the imams of the mosques or influential leaders of the society. But nowadays it has become a well-established profession, for which, like any other professions, there is a need to produce such a code. On the other hand, an evaluation of MMC’s code of conduct in light of Islamic code of conduct for mediation is required to find out whether MMC’s code is complete and suitable for this purpose, or it still needs modifications. Using analytical, critical and comparative methods and depending on the verses of the Qur’an and *ahadith* of the Prophet (p. b. u. h.) and statements of Muslim scholars, this research paper attempts to focus on producing a comprehensive Islamic code of conduct for mediation and evaluating the code of conduct of MMC. Therefore, this paper is divided into following sections: introduction, methodology and guidelines of writing this ode, Islamic code of conduct for mediation, evaluation of the code of conduct of Malaysian Mediation Centre (MMC) and suggestions to improve MMC’s code of conduct, and a conclusion.

**Keywords:** *Code of Conduct, Islamic, Mediation, Evaluation, Guidelines, MMC.*

## 1. INTRODUCTION

The literature written in English related to the topic of this research may be divided into two groups: first group is on the mediation in Islam; and the second group is on the mediation in Malaysia. Among the first group, an article entitled “Concept of Mediation in Islamic Jurisprudence,” has been written by A. Sirajuddin.<sup>1</sup> The author has tried to provide the concept

---

<sup>1</sup> A. Sirajuddin, “Concept of Mediation in Islamic Jurisprudence,” *Mediation in Islamic Jurisprudence*.

of mediation in Islam and its difference from Western mediation. Although he has written some guidelines and principles for mediation in Islam, he has not attempted to produce an Islamic code of conduct for mediation. Another article entitled “Islamic Mediation” written by Khalid Iqbal<sup>2</sup> has mentioned some principles of mediation in Islam briefly. He has also not attempted to produce a comprehensive Islamic code of conduct for mediation. A third article “Foundation of Mediation in Islamic Law and Its Contemporary Application” by Dr. Said Bouheraoua<sup>3</sup> has discussed the definition of mediation, its proofs of legality and some foundations in Islam. Like previous two authors, his treatment of the topic also is brief and no attempt has been made to produce a complete Islamic code of conduct for mediation. Additionally, Hakimah Yaacob (2012) has written a book entitled “Alternative Dispute Resolution (ADR): Expanding Options in Local and Cross Border Islamic Finance Cases.”<sup>4</sup> In her book, the author has mentioned some principles of mediation from the viewpoint of conventional mediation. Once she has discussed mediation from Islamic point of view, she has mainly focused on its definition and fields and has not tried to write an Islamic code of conduct for mediation. Among the second group, an article entitled “Arbitration and Mediation in Malaysia” written by Khutubul Zaman bin Bukhari.<sup>5</sup> The author has highlighted the sections of the Malaysian Arbitration Act, 1952 that discussed judicial intervention. He has also introduced The Regional Centre for Arbitration, Kuala Lumpur and Malaysian Mediation Centre (MMC) briefly. However, he has not tried to discuss the code of conduct of MMC. Another article “The Development of Family Mediation in Malaysian Muslim Society” belongs to Raihanah Azahari (2010).<sup>6</sup> The author has discussed the development of dispute resolution and family mediation in Malaysia during pre-colonial era and colonial era. She has not tried to discuss the code of conduct of MMC. A third article “Sulh in the Malaysian Syariah Courts” has been produced by Zainal Rizal Abu Bakar and Zainl Rizal Talha & Amir.<sup>7</sup> The authors have discussed different types of sulh which are implemented by the Syariah courts in Malaysia. They have not touched on the code of conduct of MMC. A fourth article entitled “Majlis Sulh (Islamic Mediation) in the Selangor Syariah Court and Malaysian Mediation Centre of the Bar Council: A Comparative Study.”<sup>8</sup> The author mainly has tried to do a comparative study between the code of conduct of Majlis Sulh of the Selangor Shari`ah Court and that of MMC. He has not tried to compare between Islamic code of conduct for mediation and the code of conduct of MMC. The present research will attempt to produce a comprehensive Islamic code of conduct for mediation, and also will focus on comparing between this Islamic code of conduct and that code of conduct of MMC.

## 2. METHODOLOGY AND GUIDELINES OF WRITING THIS CODE

### 2.1. Methodology

This paper is primarily based on library research. Besides that, it also applies the analytical method to analyze the meanings of the related verses of the Qur'an and *ahadith* of the Prophet

---

<sup>2</sup> Khalid Iqbal, Islamic Mediation.

<sup>3</sup> Said Bouheraoua, “Foundation of Mediation in Islamic Law and Its Contemporary Application,”

<sup>4</sup> Hakimah Yaacob, Alternative Dispute Resolution (ADR) (Kuala Lumpur: ISRA, 2012).

<sup>5</sup> Khutubul Zaman bin Bukhari, “Arbitration and mediation in Malaysia,”

<sup>6</sup> Raihanah Azahari, The Development of Family Mediation in Malaysian Muslim Society,”

<sup>7</sup> Zainal Rizal Abu Bakar and Zainl Rizal Talha & Amir, “Sulh in the Malaysian Syariah Courts,”

<sup>8</sup> Su`aida Bt Safel, “Majlis Sulh (Islamic Mediation) in the Selangor Syariah Court and Malaysian Mediation Centre of the Bar Council: A Comparative Study,”

(p. b. u. h.) and to some extent views of Muslim scholars. Likewise, it also uses critical method to review the code of conduct of MMC. And finally it uses the comparative method to compare between Islamic code of conduct for mediation and the code of conduct of MMC.

## 2.2. Guidelines of Writing This Code

The researcher discusses here some principles that are considered to be special guidelines for writing this code, so that he will try to follow them accordingly and will not be diverted from them. These guidelines are also applicable for all mediating organizations who want to prepare their codes of conduct according to the rulings of Islamic Shari`ah. These guidelines are as follows:

- 2.2.1. The intention of writing this code should be for the sake of public interest which causes achievement of the satisfaction of Allah (S. W. T.). The Prophet (p. b. u. h.) says: “Surely deeds are considered according to their intention.” If the intention of writing this code is to serve the cause of Allah, then it will be considered as a good deed, which will be rewarded by Him on the Day of Judgment.
- 2.2.2. All the rulings of Islamic Shari`ah are not obligatory. Rather, some of them are obligatory, some are forbidden, some are recommended, and some are disliked, while some are permitted. Therefore, the language of this code sometimes will be legalistic, i.e. for obligatory deeds it should use “should or must do;” and for forbidden actions it should use “should not do.” On the other hand, for recommended actions it should use “expected to do;” for disliked actions it should use “expected not to do;” while for permitted actions it should use “may do.” However, one thing should be noted that the award of the mediation is not binding for the conflicting parties, unless they sign it and agree to bind them with it.
- 2.2.3. No mediation is allowed in Islam for the pillars of faith, and obligatory worshiping, such as five time daily prayers, fasting, payment of *zakah*, pilgrimage, etc. Likewise, it is not allowed for *hudud* because they are rights of Allah, and nobody has the right to forgive someone committed *hudud* crimes.
- 2.2.4. Important fields of mediation are family disputes; disputes related to property, finance, Islamic finance, business, etc.; disputes between two or more persons or groups or countries. The same code could be applied to all these fields. However, each field may add some additional principles that are very specific to it.
- 2.2.5. All mediating organizations are expected to apply the same code. However, according to the objectives, mission and vision of each organization, some recommended and permitted principles may differ from each other.
- 2.2.6. This code should cover mediators, mediating process and also conflicting parties.
- 2.2.7. The language of the code should be easy. But since the original language of Islamic Shari`ah is Arabic, translation of some ideas, principles and terms into English and other languages may not be easy. If the translation is not clear enough, its explanation should be given in footnotes.
- 2.2.8. The code should be written, reviewed and edited by the experts including Shari`ah specialists.
- 2.2.9. The code should be updated and reviewed regularly.
- 2.2.10. The researcher prefers to arrange the points of the code under groups, i.e. all points related to a topic should be in a group under a sub-heading.

- 2.2.11. The code should be equally applied to everyone without any discrimination. However, application method may be different from one to another.
- 2.2.12. There should be a system of making this code binding. It could be done through written or verbal oath taking.
- 2.2.13. The code should be well known to all concerned parties, employees and officers. It is recommended to post it on the special permanent notice boards of every mediating organization's office.
- 2.2.14. A kind of mediation is applied to all different types of alternative dispute resolution, such as sulh, tahkim, wasatah, etc. Therefore, to some extent, this code is considered to be hybrid of all these types. It means that there are principles that are shared by all these types, while some principles are specific to each one of them. The shared principles will be taken for this code of mediation, in addition to what are specific to it.
- 2.2.15. This code will borrow some ideas from the conventional codes of mediation which do not go against the Qur'an and Sunnah.

### **3. ISLAMIC CODE OF CONDUCT FOR MEDIATION**

In light of the guidelines mentioned above and based on some verses of the Qur'an and ahadith of the Prophet (p. b. u. h.), the researcher attempts to produce a comprehensive Islamic code of conduct for mediation dividing it into following 14 articles.

#### **3.1. Article 1: Introduction (Definitions)**

Important means of alternative dispute resolution in Islam are: tahkim (arbitration), sulh (conciliation), and wasatah (mediation). In order to understand them clearly, it is necessary to know their definitions and similarities and differences. (Bouheraoua) They are as follows:

- 3.1.1. Conciliation is: "A contract between two parties or more to resolve a specific dispute by ending its causes."
- 3.1.2. Arbitration is: "The appointment of a judge or judges by the disputed parties to adjudicate a certain dispute or issue."
- 3.1.3. Mediation is: "A benevolent and non-binding procedure to end a dispute. It is characterized by one or more persons intervening in a dispute either of their own initiative or at the request of one of the parties. The independent mediator must then seek to achieve an amicable settlement by proposing solutions to the parties."
- 3.1.4. The similarities among these means are: they are forms of alternative dispute resolution; they depend on the choice of the disputants; they can lead to have possible settlement of the dispute.
- 3.1.5. The differences between arbitration and conciliation are: arbitration results in a binding judicial decision, whereas conciliation results in a non-binding proposal for settlement; and in conciliation one or both parties renounce some rights, whereas in arbitration no one renounces his rights.
- 3.1.6. A difference between arbitration and mediation is that the former results in a binding decision, while the latter facilitates negotiation.

#### **3.2. Article 2: Dependence on Allah**

As Muslims, we are obliged to depend on Allah (SWT) in every aspect of our life because without His help and support, we cannot be successful in our life. Allah (SWT) says: "Then

when you have taken a decision, depend on Allah; certainly Allah loves those who depend (on Him)” (Al `Imran, 3: 159). He also teaches us to seek His help by saying: “And we only seek your help,” (al-Fatihah, 1:4). Mediation is not an exception from this dependence on Allah and His help. Therefore:

- 3.2.1. In order to receive help of Allah (SWT), and become successful in his/her mediation, from the beginning, a mediator should depend on Allah (SWT).
- 3.2.2. It is recommended that he/she should start his/her work with the recitation of *tasmiyyah*, praise of Allah and *salah* on the Prophet (p. b. u. h.). Recitation of *Surat al-Fatihah* at the beginning also is recommended.
- 3.2.3. Likewise, it is recommended to adjourn the session with the recitation of *Surat al-`Asr*.

### 3.3. Intention

Intention (*niyyah*) is very important for many actions of a Muslim. For instance, obligatory five-time daily prayers require intention that he/she is performing them sincerely for the sake of Allah. On the other hand, there are some collective worldly duties, such as work of a physician or engineer, for which intention is not necessary. But it is recommended for a Muslim doctor or engineer to make an intention that he/she is performing his/her duty for the sake of Allah. This way his/her work will become worship of Allah, for which he/she will receive reward from Him. The profession of a mediator is one of the collective duties, for which intention can play an important role, i.e. it can make mediation as a worship. The Prophet (p. b. u. h.) says: “Verily, deeds are considered based on intentions.” Therefore,

- 3.3.1. A Muslim mediator is recommended that he/she does an intention that he/she performs the work of mediation for the sake of Allah.
- 3.3.2. He/she also should try to make his/her mediation as perfect as possible because struggle for perfection is the key condition to receive love and reward of Allah (SWT). The Prophet (p. b. u. h.) says: “Surely Allah loves a person who, when he does a work, tries to make it perfect.”

### 3.4. Article 4: Qualifications of a Mediator

- 3.4.1. All jurists unanimously agree that a mediator should attain the age of puberty or be an adult. A minor cannot be a mediator.
- 3.4.2. All jurists also agree that a mediator should be a sane because without sanity he/she cannot understand the different aspects of mediation, and also cannot conduct it.
- 3.4.3. He/she should have knowledge of how and what to do for mediation. Islam encourages to acquire knowledge of all different fields or aspects of human life including the mediation.
- 3.4.4. He/she should have experience and capability of doing mediation because without experience the work of mediation may not be done properly.

### 3.5. Article 5: Virtues That a Mediator is Expected to Possess

- 3.5.1. He/she should be trustworthy. Allah says: “Verily Allah commands that you should render back the trusts to those to whom they are due” (Al-Nisa’: 4: 58). According to this verse, maintaining trustworthiness in all different aspects of our life including mediation is obligatory. The Prophet (p. b. u. h.) says: “The one who does not possess trustworthiness (*amānah*) does not have perfect religion (*dīn*).” (Ibn Hanbal, v. 3, p. 135, *hadith* no. 12406). According to this *hadith*, trustworthiness is a part of our religion. Therefore, all Muslims including mediators should possess this quality.

- 3.5.2. He/she should control his/her anger during mediation. The Prophet (pbuh) says: “A person is not considered strong through wrestling; rather a strong person is the one who can control himself at the time of anger” (Bukhari, Muslim, see Riyad, p. 63).
- 3.5.3. He/she should possess the quality of being patient. Allah says: “O you who believe, seek help [of Allah] through patience and salah” (Al-Baqarah, 2: 153). In order to be successful in mediation, a mediator requires Allah’s help. A key condition for receiving His help is patience during the conflicting arguments of parties.
- 3.5.4. He should not insult any of the disputing parties. Allah says: “O you who believe, let not a group insult another group, it may be that the latter are better than the former” (Al-Hujurat, 49: 11). Although the verse states about a group, it is also applicable for individuals including mediators.
- 3.5.5. He is recommended not to disclose personal shortcomings or faults of any of the disputing parties unless they are disclosed by the parties. The Prophet (pbuh) says: “One who covers [the fault of a] Muslim, Allah (SWT) will cover [his fault] on the Day of Resurrection” (Bukhari, Muslim, Riyad, 145, 148-149).
- 3.5.6. He is also recommended not to hate any of the disputing parties. The Prophet (pbuh) says: “Do not hate each other” (Bukhari, Muslim, Riyad, 594).
- 3.5.7. He should not give bad names or titles to any of the parties. Allah says: “Do not insult each other by nicknames” (Al-Hujurat, 49: 11).
- 3.5.8. He should not provoke the conflicting parties against each other.
- 3.5.9. Normally he should be truthful in his dealing with the parties and conducting mediation for them. Allah says: “O you who believe, be afraid of Allah, and be with those who are true [in words and deeds].” (Al-Tawbah, 9: 119).
- 3.5.10. However, if the situation becomes so complicated and there is no way to solve the problem except through telling a lie, the mediator is allowed to tell a lie provided that it should not be related to alternating the facts, denying the rights of any conflicting party, and it should be considered an exception of the normal rule of telling the truth and should not be a regular practice. Imam al-Nawawi says that in order to reconcile among people, telling a lie is permissible. (Riyad, 586-587).
- 3.5.11. He should try his best to get the right of a conflicting party such as right of a piece of land back to this party from the other party, if he considers it as an appropriate and right action to do.

### **3.6. Article 6: Neutrality and Impartiality**

- 3.6.1. He/she should be neutral and just in his/her mediation. On the tongue of His Messenger, Allah says: “And I am commanded to do justice among you” (Al-Shura, 42: 15). This command is not confined to the His Messenger; rather it is applicable to all Muslims including a mediator.
- 3.6.2. He should not harm any of the disputing parties. The Prophet (pbuh) says: “No harm should be inflicted to anyone” (Tirmidhi).
- 3.6.3. He should not try to achieve personal gain through his mediation except his fees that has been decided by him or his organization beforehand. For instance, he is not allowed to receive bribe from any party to take a decision in their favor unjustly.
- 3.6.4. He should not take a decision after listening complain and arguments of one party only. Rather, his decision should be made after listening complain and arguments of all conflicting parties. In other words, he/she should give equal chance to all disputing

parties to talk and complain. The Prophet (pbuh) says: “When two persons come to you to carry on a lawsuit, do not judge for the first person unless you listen to the statement of the other; then you will know how to judge” (Ahmad, Abu Dawud, Tirmidhi).

### **3.7. Article 7: Confidentiality**

Confidentiality is related to trustworthiness. It has been discussed earlier that a mediator should be a trustworthy person. Additionally, keeping confidential matters, information and documents as confidential is the right of the party to whom they belong. Therefore,

- 3.7.1. Points discussed during mediation should not be disclosed publicly.
- 3.7.2. Any shortcoming of any party known to a mediator should be kept as secret.
- 3.7.3. Data belong to any party should be kept confidential and should not be used for any other purpose.
- 3.7.4. However, if it is required by the law of a country to disclose these confidential matters for a certain purpose, a mediator is allowed to do so with the permission of their owners.

### **3.8. Article 8: Conflict of Interest**

A mediator is recommended to avoid conflict of interest in his mediation because it can cause harm to any of the parties. The Prophet (p. b. u. h.) says: “Harm should neither be inflicted nor should be reciprocated.” (Ibn Mājah, vol. 2, p. 784, *hadith* no. 2340). Therefore,

- 3.8.1. A mediator should not have any financial or other personal interests in the mediation other than his mediation fees because this interest may cause him/her to be unjust to a party. This injustice can cause different types of harm to this party.
- 3.8.2. If a mediator has a personal interest, he/she should refrain from mediation, otherwise his/her mediation may cause injustice and harm to any of the disputing parties.
- 3.8.3. He is not supposed to be one of the conflicting parties.
- 3.8.4. If any of the conflicting parties is his relative, he should try to hand over the case to another mediator.
- 3.8.5. However, if there is no choice except to conduct the mediation between his relative and other party who is not his relative, he must be just to each party.

### **3.9. Article 9: Etiquettes That Conflicting Parties are Expected to Maintain**

Many of the etiquettes mentioned below have already been discussed earlier for a mediator. The same etiquettes are also applicable to the conflicting parties. Therefore, a mediator should advise his clients at the beginning of his mediation to follow the following etiquettes:

- 3.9.1. All the parties without any exception should have sincere intention to have a solution for their disputes.
- 3.9.2. If they are Muslims, they should depend on Allah (SWT).
- 3.9.3. They should not tell a lie in their discussion and complain against each other.
- 3.9.4. They should control their anger.
- 3.9.5. They should not cheat in providing their supporting documents and data.
- 3.9.6. They should not abandon their brotherly relationship following the possible settlement of their disputes, if they are Muslims.
- 3.9.7. They should not neglect their blood relationship following the settlement of their disputes, if they have this type of relationship.

- 3.9.8. They should forgive each other unless it is related to a worldly interest such as right of a piece of land. However, this type of right also can be forgiven, if the right owner wants to do so.
- 3.9.9. They should not harm each other.
- 3.9.10. They should not insult each other.
- 3.9.11. They should not disclose shortcomings or faults of each other during mediation which have nothing to do with issue under mediation.
- 3.9.12. They should not hate each other.
- 3.9.13. They should not give bad names or titles to each other.
- 3.9.14. If the conflict is related to the right of the conflicting parties such as the right of a piece of land, the mediator is advised to warn them about the consequences of wrong ownership in the Day of Judgment.
- 3.9.15. They should respect each other during the time of mediation.
- 3.9.16. Once the settlement is completed, they should forget the past and make a new start for maintaining good brotherly relationship among them.
- 3.9.17. None of the parties should consider himself/herself free from committing mistakes and shortcomings because this quality belongs to Allah (SWT) and His prophets only.

### **3.10. Article 10: Fees**

- 3.10.1. A mediator is expected to fix reasonable charges for his/her mediation.
- 3.10.2. A mediator should inform all disputing parties about his/her charges beforehand.
- 3.10.3. There should be flexibility in charging the clients. If a poor person needs mediation but he/she is unable to pay fees, he/she should not be deprived from mediation services. Rather, this service should be offered to him/her free or with reduced charges.

### **3.11. Article 11: Utilization of Modern Technology**

- 3.11.1. It is recommended that a mediator uses modern technology for keeping records.
- 3.11.2. He/she should use email, phones, etc. For updating any change about appointment or other deadlines.

### **3.12. Article 12: Procedures/ Agreement and Commencement/ Recording of Decisions**

Following all required procedures for mediation is part of its perfection, which is encouraged by the Prophet (p. b. u. h.) in a hadith mentioned above. Therefore,

- 3.12.1. After the contact of disputing parties with a mediator, and consent of all them, he/she should make a preliminary appointment for them to discuss all requirements for evaluating their case through his mediation.
- 3.12.2. All disputing parties without exception should be willing to participate in mediation among them. An agreement should be made between the mediator and disputing parties for mediation.
- 3.12.3. A particular day, date, time and place should be fixed for mediation.
- 3.12.4. All supporting documents of all parties should be submitted to the mediator enough time before the date of mediation, so that he/she will be able to read them and be ready for proper mediation.
- 3.12.5. He/she should be satisfied before the commencement of mediation that he/she will be able to do evaluation of the submitted case through his/her mediation.

- 3.12.5. At the beginning of mediation the mediator should explain again what he /she is going to do.
- 3.12.6. He/she also should explain to the parties what are expected from them during the mediation session.
- 3.12.7. Before completion of mediation, if the mediator feels that anyone of the parties does not want to reconcile or to have a solution, or feels that the evaluation will not be possible, or any party requests him/her not to do mediation, or any party requests him/her to do an unjust favor to them, or if any party breaches the agreement, or if there is no hope of reaching a settlement, he/she should immediately refrain from mediation.
- 3.12.8. The decision or award of mediation should be recorded.
- 3.12.9. The session should be adjourned by declaring that it has ended.

### **3.13. Article 13: Binding/non-Binding Nature of Possible Settlement**

- 3.13.1. Since the mediation is not considered an official task, its possible settlement is not binding to any of the parties.
- 3.13.2. However, if all the parties agree in the session to abide themselves with this settlement and give their consent by signing it, then it will be binding.
- 3.13.3. Or, if the settlement is submitted to a court and a judge adopts it, it will be binding for all the parties.

### **3.14. Article 14: Enforcement Mechanism of the Code**

- 3.14.1. Before starting the profession of mediation, a mediator should take a written oath that he/she will try to implement the code of conduct for mediation.
- 3.14.2. This code could be posted in the website of all mediating centers or organizations for public awareness.
- 3.14.3. Its hard copy could be posted on the main noticeboard of all mediating centers or organizations for a reminder for mediators and also for disputing parties.

## **4. Evaluation of the Code of Conduct of Malaysian Mediation Centre (MMC) and Suggestions to Improve It**

### **4.1. Code of Conduct (of MMC)**

“This Code of Conduct (“this Code”) applies to all persons appointed by the Malaysian Mediation Centre (“MMC”) to act as Mediators in sessions held by the MMC.

1. Acceptance of Assignment

The Mediator will before accepting an assignment, be satisfied that he will be able to conduct the mediation expeditiously and impartially.

2. Impartiality

2.1 The Mediator will be impartial and fair to the parties, and be seen to be so. Following from this, he will disclose information which may lead to the impression that he may not be impartial or fair, including, that:-

- (a) he has acted in any capacity for any of the parties;
- (b) he has a financial interest (direct or indirect) in any of the parties or the outcome of the mediation; or

(c) he has any confidential information about the parties or the dispute under mediation derived from sources outside the mediation.

2.2 When in doubt, the Mediator shall refer the matter to the MMC.

### 3. The Mediation Procedure

The Mediator will act in accordance with the Mediation Rules of the MMC.

### 4. Confidentiality

4.1 Any document and information supplied for, and disclosed in the course of the mediation will be kept confidential. The Mediator will only disclose the same if required to do so by general law, or with the consent of all the parties, or if such disclosure is necessary to implement or enforce any settlement agreement.

4.2 The Mediator (or any member of his firm or company) will not act for any of the parties subsequently in any manner related to or arising out of the subject matter of the mediation without the written informed consent of all the parties.

### 5. Settlement

The Mediator will ensure that any settlement agreement reached is recorded in writing and signed by the parties. The Mediator is to witness and authenticate the settlement agreement upon the parties signing the agreement.

### 6. Withdrawal

6.1 A withdrawal by the Mediator will occur:-

(a) when he realises that he has committed a breach of any of the terms of this Code;

(b) if there is a request to do so in writing by any of the parties; or

(c) when he is required by any of the parties to do anything in breach of this code or the MMC's Mediation Rules.

The Mediator, shall, on the occurrence of (a), (b) or (c) above, immediately inform the MMC of his withdrawal.

6.2 The Mediator also has the discretion to withdraw if:-

(a) any of the parties breaches the Agreement to Mediate or the MMC's Mediation Rules;

(b) any of the parties acts unconscionably;

(c) there is no reasonable prospect in his opinion of a settlement; or

(d) the parties allege that he is in breach of this Code.

### 7. Fees

In accepting appointment, the fees would be determined based on the agreement between the Mediator and the parties concerned.

### 8. Evaluation

The Mediator will not evaluate the parties' case unless requested by all the parties to do so, and unless he is satisfied that he is able to make such an evaluation."

## **4.2. Evaluation of MMC's Code of Conduct and Some Suggestions to Improve IT**

4.2.1. From Islamic Shari'ah point of view, all points mentioned under MMC's Code of Conduct are acceptable. For instance, it says that a mediator should be impartial and fair to the parties. The Qur'an and Sunnah command Muslims to be so in all of their activities which include mediation. This code also says that a mediator should not disclose the information and documents supplied during the course of mediation except it required by the law. This point is related to amanah (trustworthiness) and preserving the rights of the

parties, which are strongly commanded by the Qur'an and Sunnah. Likewise, this code suggests to record the settlement in writing, which is part of making a work as perfect as possible. This perfection is encouraged by a hadith of the Prophet (pbuh). All other points of this code are either suggested or commanded by the Qur'an and Sunnah.

- 4.2.2. Although the points mentioned in MMC's Code of Conduct are Islamically acceptable, this code, compared to the code developed by the researcher, is considered to be incomplete. This is because MMC's code has not mentioned the dependence of a mediator on Allah; his/her good intention to do mediation; a number of qualifications of mediator, such as puberty, sanity, knowledge, etc.; and a number of virtues such as truthfulness, controlling anger, being patient, not insulting the conflicting parties, covering their faults, etc.
- 4.2.3. MMC's Code has not mentioned the etiquettes that the conflicting parties should follow.
- 4.2.4. MMC's Code has not clearly mentioned the means of making its code mandatory for mediators who are affiliated with it.
- 4.2.5. In this code there is no mention of helping poor people who need mediation, but unable to pay the fees.
- 4.2.6. The researcher understands that the MMC does not claim to be an Islamic organization. But it can include some points mentioned in the Islamic code developed by the researcher, such as qualifications of puberty, sanity, knowledge, etc., virtues that are not confined to Islamic faith, rather they are universal and acceptable by all human kind, such as truthfulness, controlling anger, being patient, not insulting the conflicting parties, covering their faults, etc.
- 4.2.7. In its Code, MMC may also include a number of etiquettes that should be followed by the conflicting parties during the course of mediation, such as being truthful, avoiding cheating in providing information and documents, not neglecting blood relationship following the possible settlement, not harming each other, not hating each other, respecting each other, etc.
- 4.2.8. MMC is suggested to have a clear policy to make its code mandatory for mediators affiliated with it.

## **5. CONCLUSION**

- 5.1. The main difference between mediation and arbitration is that the possible settlement in the former is not binding, whereas it is binding in the latter.
- 5.2. Important guidelines to write this code are: no mediation is allowed in Islam for the pillars of faith, obligatory worshipping, hudud, etc.; important fields of mediation are family disputes, disputes related to property finance, business, etc. this code should cover mediators, mediating process and conflicting parties, etc.
- 5.3. The main headings of the articles of this code are 14. They are: introduction (definitions), dependence on Allah, intention, qualifications of a mediator, virtues that a mediator is expected to possess, neutrality and impartiality, confidentiality, conflict of interest, etiquettes that conflicting parties are expected to maintain, fees, utilization of technology, procedures, etc., binding/non-binding nature of possible settlement, and enforcement mechanism of the code.
- 5.4. From Islamic Shari'ah point of view, all points mentioned under MMC's Code of Conduct are acceptable.

- 5.5. Although the points mentioned in MMC's Code of Conduct are Islamically acceptable, this code, compared to the code developed by the researcher, is considered to be incomplete.
- 5.6. MMC's Code has not mentioned the etiquettes that the conflicting parties should follow.
- 5.7. MMC's Code has not clearly mentioned the means of making its code mandatory for mediators who are affiliated with it.
- 5.8. The researcher understands that the MMC does not claim to be an Islamic organization. But it can include some points mentioned in the Islamic code developed by the researcher, such as qualifications of puberty, sanity, knowledge, etc., virtues that are not confined to Islamic faith, rather they are universal and acceptable by all human kind, such as truthfulness, controlling anger, being patient, not insulting the conflicting parties, covering their faults, etc.
- 5.9. In its Code, MMC may also include a number of etiquettes that should be followed by the conflicting parties during the course of mediation, such as being truthful, avoiding cheating in providing information and documents, not neglecting blood relationship following the possible settlement, not harming each other, not hating each other, respecting each other, etc.
- 5.10. MMC is suggested to have a clear policy to make its code mandatory for mediators affiliated with it.

## **REFERENCES**

- Yaacob, Hakimah. (2012). *Alternative Dispute Resolution (ADR)*. Kuala Lumpur: ISRA.
- Bouheraoua, Said. "Foundation of Mediation in Islamic Law and Its Contemporary Application"
- Bar Council Malaysia, Malaysian Mediation Centre, Code of Conduct.
- Mafhum wa Ta`rif al-Wasatah fi Hall al-Niza`at. Retrieved on 30<sup>th</sup> October 2015 from <http://horiyatlibya.blogspot.my/2012/12/blog-post-6221.html>.
- Al-Tahkim wa al-Wasatah, al-Ma`rifah al-Qanuniyyah. Retrieved on 30<sup>th</sup> October 2015 from <http://anibrass.blogspot.my/2014/07/blog-post-2589.html>.
- Al-Mahkamah al-Duwaliyyah lil-Tahkim, al-Markaz al-Duwali lil-Taswiyyah al-Wuddiyyah lil-Munaza`at. Qawa'id al-Tahkim Qawa'id al-Wasatah. Retrieved on 30<sup>th</sup> October 2015 from ICC865-2ARA Arbitration\_Mediation\_Arabic-1.
- European Code of Conduct for Mediation.
- Sirajuddin, A. "Concept of Mediation in Islamic Jurisprudence," *Mediation in Islamic Jurisprudence*.
- Iqbal, Khalil. *Islamic Mediation*
- Bin Bukhari, Khutubul Zaman. *Arbitration and Mediation in Malaysia*.

Azahari, Raihanah. The Development of Family Mediation in Malaysian Muslim Society.

Bt Safel, Su`aida. Majlis Sulh (Islamic Mediation) in the Selangor Syariah Court and Malaysian Mediation Centre of the Bar Council: A Comparative Study.

Yousef, Darwish A. “The Islamic Work Ethic as a Mediator of the Relationship between Locus of Control, Role Conflict and Role Ambiguity: A Study in an Islamic Country Setting.”

Irani, George E. “Islamic Mediation Techniques for Middle East Conflicts.” Mediate.com.

Hoffman, David A. “Ten Principles of Mediation Ethics.”

Mediator Standards, Alabama Code of Ethics for Mediations.

Law Council of Australia. Ethical Guidelines for Mediators.