

PRACTICE AND APPROACH OF MEDIATORS UNDER THE  
SHARIAH JURISDICTION IN RESOLVING FAMILY  
CONFLICTS IN MALAYSIA

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ACADEMY OF ISLAMIC STUDIES  
UNIVERSITI MALAYA  
KUALA LUMPUR

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UNDER THE SHARIAH JURISDICTION IN  
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**THIS DISSERTATION IS PRESENTED TO MEET THE  
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# PRACTICE AND APPROACH OF MEDIATORS UNDER THE SHARIAH JURISDICTION IN RESOLVING FAMILY CONFLICTS IN MALAYSIA

## ABSTRACT

The mandatory court-annexed mediation in Shariah courts is commonly referred to as *sulh* and led by third-neutral parties known as *sulh* officers. While *sulh* has countless proven to be a highly effective mechanism in reducing a backlog of cases, Shariah courts continue to be burdened with high rate of cases, including divorce and family cases. Muslim family conflicts subject to Shariah jurisdiction also continue to plague Malaysian society, a situation that has worsened since the emergence of COVID-19 pandemic. Family dynamics in Malaysian Muslim society have been severely affected. The issue of backlog of cases also remains a challenge for the Shariah courts. With only a limited number of *sulh* officers appointed across Malaysia and very little information available on private mediators providing mediation services for family cases under Shariah jurisdiction, the progressive practice of *sulh* (mediation) to resolve family conflicts has consequently become static. Therefore, a qualitative approach of semi-structured interviews with ten respondents and library research was applied to explore the prospects of private mediators, particularly Syarie lawyers with mediation accreditation (SLMAs), in terms of their practice and approach in expanding the mediation practice for family conflicts under Shariah jurisdiction. The objectives of this study are threefold: to determine the types of alternative dispute resolutions in Islam that are used to resolve family conflicts, to analyse the practice of private and state Shariah mediators in resolving family conflicts in Malaysia; and to identify the benefits and challenges faced by state and private Shariah mediators in Malaysia. The results indicated that *sulh* (mediation) is indeed an ideal alternative for resolving family conflicts due to its voluntary, binding, less time-consuming, and less costly. The practice and approach of mediators under Shariah jurisdiction are similar to those of civil mediators. However, compared to civil mediators, state mediators under Shariah jurisdiction rely heavily on *sulh* officers, whilst SLMAs barely practice mediation for Shariah family cases. The results also concluded that compared to other challenges of the mediator's profession, the lack of awareness in the society has a high negative impact on both the society and the mediators' perspective. The disputing parties would lose time and money while SLMAs would find it difficult to obtain clients as it is against their policy to promote themselves. SLMAs could undeniably be a great asset for the expansion of *sulh* or mediation practice under Shariah jurisdiction. Their services help to speed up the work of state mediators and elevate the position of Shariah courts, as mediation agreements for family conflicts subject to Shariah jurisdiction would need to be endorsed by Shariah courts via settlement agreements. To conclude, state and private mediators providing services for family cases under Shariah jurisdiction are encouraged to join forces to promote the growth of *sulh* (mediation) for Muslim family conflicts both within and outside Shariah jurisdiction.

Keywords: Mediation, Syarie lawyers, *sulh* officers, Shariah jurisdiction, family conflicts.

# **PRAKTIS DAN PENDEKATAN MEDIATOR DI BAWAH BIDANGKUASA SYARIAH DALAM MENYELESAIKAN KONFLIK KELUARGA DI MALAYSIA**

## **ABSTRAK**

Pengantara bagi tujuan perdamaian di mahkamah Syariah dikenali sebagai *sulh* yang mana ia dikendalikan oleh pegawai sulh iaitu pihak ketiga yang bersifat neutral. Meskipun keberkesanan sulh telah terbukti dalam mengurangkan kadar kes-kes yang tertunggak namun mahkamah Syariah masih lagi dibebani dengan kadar kes yang tinggi melibatkan penceraian dan masalah kekeluargaan. Konflik keluarga Muslim yang juga berada di bawah bidang kuasa mahkamah Syariah di Malaysia terus menunjukkan trend peningkatan lebih-lebih lagi sejak kedatangan pandemik Covid-19. Lambakan kes-kes tertunggak pula kekal menjadi suatu cabaran yang perlu ditangani oleh mahkamah Syariah. Bilangan pegawai sulh berdaftar yang sangat terhad di seluruh Malaysia serta kurangnya pengetahuan mengenai pengantara swasta yang menyediakan perkhidmatan pengantaraan bagi kes keluarga di bawah bidang kuasa mahkamah Syariah telah merencatkan perkembangan sulh dalam memulihkan konflik keluarga. Oleh itu, penyelidikan kualitatif berasaskan kajian kepustakaan dan juga temu bual separa berstruktur terhadap sepuluh responden dijalankan bagi meneroka prospek pengantara swasta khususnya bagi peguam Syarie yang mempunyai akreditasi pengantaraan (SLMA), dalam konteks pengamalan dan pendekatan yang digunakan oleh mereka dalam mengantara konflik keluarga yang berada di bawah bidang kuasa mahkamah Syariah. Penyelidikan ini mempunyai tiga objektif; menentukan jenis penyelesaian alternatif dalam Islam bagi menyelesaikan konflik keluarga, menganalisis amalan pengantara Syariah swasta dan kerajaan dalam menyelesaikan konflik keluarga di Malaysia dan mengenalpasti faedah dan cabaran yang dialami oleh pihak kerajaan dan pengantara Syariah swasta di Malaysia. Hasil penyelidikan mendapati bahawa sulh (pengantaraan) sememangnya merupakan alternatif yang ideal dalam menyelesaikan konflik keluarga berikutan ianya bersifat sukarela, mengikat, kurang memakan masa dan juga murah. Amalan dan pendekatan yang digunakan oleh pengantara di bawah bidang kuasa Syariah adalah sama dengan pengantara sivil. Namun jika dibandingkan dengan pengantara sivil, pengantara kerajaan di bawah bidang kuasa Syariah sangat bergantung kepada pegawai sulh manakala SLMA didapati hampir tidak mengamalkan pengantaraan bagi kes keluarga Syariah. Hasil kajian juga menunjukkan, berbanding cabaran lain yang dialami oleh pengantara, kurangnya kesedaran dalam kalangan masyarakat adalah penyumbang kepada kesan negatif yang tinggi terhadap masyarakat dan juga pengantara. Pihak yang terlibat akan mengalami kerugian dari segi masa dan wang manakala SLMA akan menghadapi kesukaran bagi mendapatkan klien kerana mempromosikan diri dikira sebagai melanggar polisi. Tidak dinafikan, SLMA sememangnya mampu menjadi aset yang utuh dalam mengembangkan lagi sulh dan amalan pengantaraan di bawah bidang kuasa Syariah. Perkhidmatan mereka hakikatnya dapat membantu mempercepatkan lagi kerja pengantara kerajaan serta memartabatkan lagi kedudukan Mahkamah Syariah yang mempunyai kuasa untuk mengendorskan perjanjian mediasi yang telah dirangka berdasarkan persetujuan bersama. Kesimpulannya, pengantara kerajaan dan swasta yang

menyediakan perkhidmatan untuk mengendalikan kes keluarga di bawah bidang kuasa Syariah disarankan untuk bekerjasama dan bergabung tenaga bagi mengembangkan lagi sulh (pengantaraan) untuk konflik keluarga Muslim yang berlaku di dalam mahupun di luar bidang kuasa Syariah.

Kata kunci: Mediasi, Peguam Syarie, Pegawai Sulh, Bidangkuasa Syariah, Konflik Keluarga.

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Sincerely,

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Legal Aid (Mediation) Regulations 2006

Legal Aid Act 1971

Section 147, Shariah Court Civil Procedure (Selangor) Enactment 2003

Section 48, Part V Dissolution of Marriage, Islamic Family Law Enactment (Selangor) (2003)

Section 8, Federal Constitution

Section 80(1), Islamic Administration Enactment of Selangor (Enactment No.1 of 2003).

Section 83, Shariah Court Civil Procedure (Selangor) Enactment 2003

Section 99 *Sulh*, Shariah Court Civil Procedure (Selangor) Enactment 2003

The Shariah Court Civil Procedure (Sulh) Selangor Rules 2001

The *Sulh* Manual

*Sulh's* Code of Ethics

## SYMBOLS AND SHORTFORMS

ADR	:	Alternative Dispute Resolutions
BPKR	:	<i>Bahagian Pendaftaran, Keurussetiaan dan Rekod</i> (Registration, Secretariat and Records Division (BPKR))
BSK	:	<i>Biro Sokongan Keluarga</i>
CAM	:	Court-Annexed Mediation
FSD	:	Family Support Division
IDR	:	Islamic Dispute Resolution
IMC	:	Islamic Mediation Centre
JKSM	:	<i>Jabatan Kemajuan Syariah Malaysia</i>
JPA	:	<i>Jabatan Perkhidmatan Awam</i>
LAD	:	Legal Aid Department
MMC	:	Malaysian Mediation Centre
PPMM	:	<i>Persatuan Peguam Muslim Malaysia</i>
SLMA	:	Shariah lawyer with mediation accreditation
SOP	:	Standard Operating Procedure

## TRANSLITERATION TABLE

### CONSONANT

Arabic Alphabet	Roman Alphabet	Arabic Alphabet	Roman Alphabet
ا، ء	a, 'a	ط	ṭ
ب	b	ظ	ẓ
ت	t	ع	'
ث	th	غ	gh
ج	j	ف	f
ح	ḥ	ق	q
خ	kh	ك	k
د	d	ل	l
ذ	dh	م	m
ر	r	ن	n
ز	z	و	w
س	s	ه	h
ش	sh	ي	y
ص	ṣ	ة	h, t
ض	ḍ		

### VOCALS

Short Vocal		Long Vocal	
ا	a	ا، ى	ā
ي	i	ي	ī
و	u	و	ū

### DIPHTHONG

- و	a w	- و	uw w
ي	a y	ي	iy, ī

# CHAPTER 1: INTRODUCTION

## 1.1 Introduction

In this chapter, the researcher explains the introduction and background study on mediation in Malaysia, followed by the research problem, research questions, and research objectives. This chapter also includes the significance of the research, the scope, and the limitations of the study covered by the research, as well as the literature review. At the end of this chapter, the research methodology used is discussed, followed by the researcher's work schedule in conducting this research.

## 1.2 Background of the Study

In society, disputes are deemed natural, if not inevitable.<sup>1</sup> For many decades, the civil and Shariah courts in Malaysia have been burdened with a backlog of cases and are often associated with being delayed,<sup>2</sup> to the point that even courts have raised concern over delays in dispute settlements.<sup>3</sup> Aside from disputing parties' unwillingness to cooperate during court proceedings,<sup>4</sup> the nature of the litigation processes,<sup>5</sup> transfer of judges or judicial officers, requests for adjournments, the lack of court interpreters, as well as the loss of exhibits or evidence in court<sup>6</sup> also contribute to delays. Over the years, the society in Malaysia has also had to deal with court procedures that were found vexatious as the

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<sup>1</sup> Syed Khalil, *Alternative Dispute Resolution: The Emerging New Trend of Informal Justice* (Research Centre, International Islamic University, 2002), 1.

<sup>2</sup> "Mediasi Sebagai Alternatif Litigasi", *Sinar Harian*, 30<sup>th</sup> July 2019. Accessed on 30.07.2019 through <https://www.sinarharian.com.my/article/20600/KOLUMNIS/Mediasi-sebagai-alternatif-litigasi>.

<sup>3</sup> "Mediation A Compliment to Litigation", *The Star Online*, 24<sup>th</sup> April 2018. Accessed on 24.09.2019 through <https://www.thestar.com.my/opinion/letters/2018/04/24/mediation-a-compliment-to-litigation>

<sup>4</sup> Mumtazah Narowi et al., "Hakam and Its Application in Divorce Cases in Selangor Syariah Courts", *Selangor Humaniora Review*, 4(1) (June 2021), 23.

<sup>5</sup> "Mandatory Mediation Can Help Cut Backlog", *The Star Online*, 30<sup>th</sup> December 2003. Accessed on 24.09.2019 through <https://www.thestar.com.my/opinion/letters/2003/12/30/mandatory-meditation-can-help-cut-backlog/>

<sup>6</sup> "Mediation A Compliment to Litigation", *The Star Online*, 24<sup>th</sup> April 2018.

cases involve the interests of the applicants and related individuals.<sup>7</sup> In these times, the society is looking for a faster, cheaper, and more cost-effective alternative.<sup>8</sup>

To address these issues, Malaysian courts have mandated mediation as part of court procedures.<sup>9</sup> In Shariah courts, the mediation process is known as *sulh*. Various studies have been conducted on the implementation of *sulh* in Shariah courts and it has proven to be a successful step in helping the backlog of cases aside from its appealing characteristics, such as confidentiality, low-cost, and time-saving (see Nik Roslina, 1999<sup>10</sup>, Raihanah Azahari, 2005; Tan Yeak Hui and Ashgar Ali Ali Mohamed, 2006; Muhammad Amanullah, 2005).

Unfortunately, divorce is an increasingly common phenomenon as Malaysia evolves into an urban society.<sup>11</sup> Over the last two decades, Malaysia continues to be labelled as a country with a consistently increasing rate for dissolution of marriages. These dissolution cases among Muslims continue to rise and has yet to indicate the possibility of decreasing (Roziana Mat Amin, Mohd Norhusairi Mat Hussin and Raihanah Abdullah, 2022).<sup>12</sup> For instance, the graph below provides a comparison in the number of

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<sup>7</sup> Hammad Mohamad Dahalan and Mohamad Azhan bin Yahya (2016), “*Kedudukan Pegawai Sulh di Mahkamah Syariah*”, International Conference on Aqidah, Dakwah and Shariah 2016 (IRSYAD 2016), 1083.

<sup>8</sup> “Mediasi Sebagai Alternatif Litigasi”, *Sinar Harian*, 30<sup>th</sup> July 2019. Accessed on 30.07.2019 through <https://www.sinarharian.com.my/article/20600/KOLUMNIS/Mediasi-sebagai-alternatif-litigasi>.

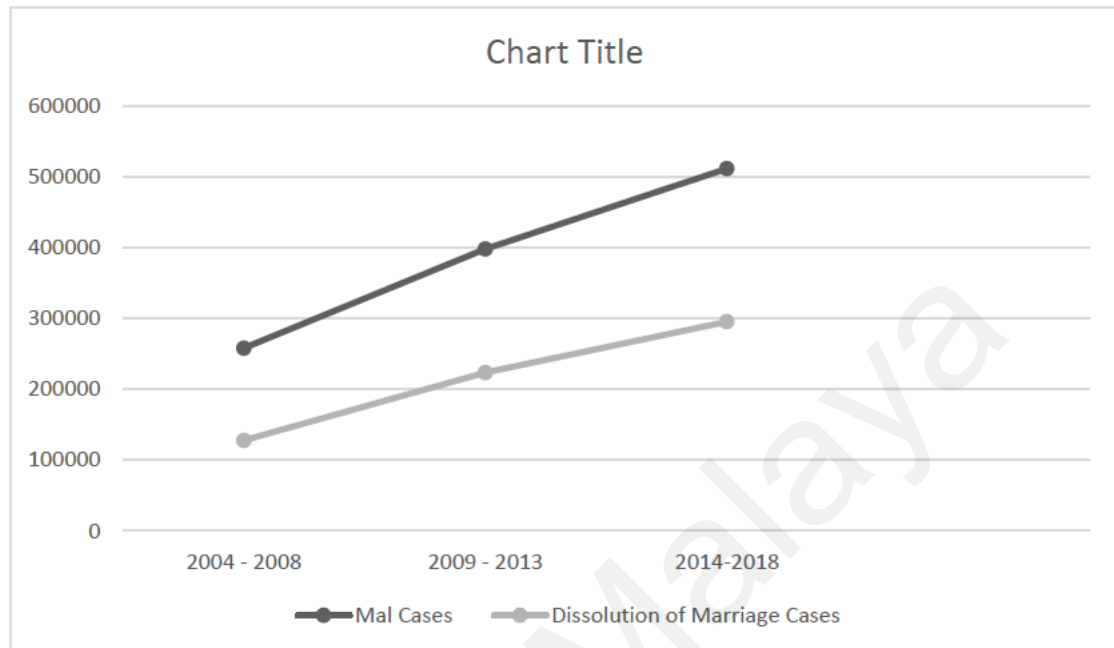
<sup>9</sup> Nurah Sabahiah Mohamed, “Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of its Application in Malaysia” (PhD Thesis Dissertation, International Islamic University Malaysia, 2013), 180.

<sup>10</sup> Hajah Nik Noriani Nik Badlishah (Eds). *Islamic Family Law and Justice for Muslim Women* (Malaysia: Micom Sdn Bhd, Sisters in Islam, 2003), 1-136

<sup>11</sup> Nor Fadzlina Nawawi, “Family Mediation in Malaysian Muslim Society: Some Lessons for the Civil Family Law in Malaysia”, *Conference Booklet-East Asian Law and Society Conference* (October 2011), 2.

<sup>12</sup> Roziana Mat Amin, Mohd Norhusairi Mat Hussin and Raihanah Abdullah, “*Pembubaran Perkahwinan, Nusyuz, dan Iddah di Mahkamah Syariah*” (Kuala Lumpur: University of Malaya Publication, 2022), 6.

cases for mal cases and dissolutions of marriage from 2004 until 2018 in Shariah courts throughout Malaysia:<sup>13</sup>



**Graph 1. 1. Statistics for dissolution of marriages and mal cases from 2004 until 2018 in Malaysia**

From the graph above, the number of mal cases and cases for dissolution of marriage in Shariah courts throughout Malaysia has shown an increasing pattern. The graph shows that from 2004 until 2008, 127, 938 cases were registered for dissolution of marriage. These cases later increased to 223, 618 cases from 2009 to 2013, and later skyrocketed to 295, 663 from 2014 until 2018. The registration of mal cases at courts also increased throughout the years in line with cases registered for dissolution of marriage. Undeniably, the *sulh* system has assisted the Shariah courts to decrease the backlog of cases while the cases are increasing.

However, the courts continue to receive many cases as modern challenges continue to plague family institutions. Divorces are becoming more common as Malaysia becomes

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<sup>13</sup> *Ibid*, 7.

a more urban society,<sup>14</sup> and such pattern indicates the role of *sulh* officers and mediators in ensuring that the Shariah courts do not suffer from a large backlog of cases.

As more cases are registered from various familial backgrounds and disputes, this also implies that mediators in Shariah courts will deal with more *sulh* cases. In the past, there was the issue of insufficient manpower to handle cases in Shariah courts, leading to an increasing number of backlog of cases and dissatisfaction among many people with the administration of Shariah courts.<sup>15</sup> As it is, it brings up the question of whether the same situation could happen with the administration of cases registered for *sulh*.

Fortunately, the Shariah mediator profession has now expanded. It is not simply limited to *sulh* officers in Shariah courts, but also to mediators in other government and private institutions. How well *sulh* officers and mediators deal with this phenomenon also relies on their abilities and capabilities. This study therefore examined how these mediators work and resolve Shariah family cases to ensure that disputes are settled amicably.

### **1.3 Problem Statement**

For third-party intermediaries, the basic intention of Islamic legal intermediaries in marital disputes is to contribute to a solution that reunites couples and enables them to live together.<sup>16</sup> Sharifah Zaleha Syed Hassan (1997) emphasised that the restoration of relationships between spouses and family members essentially relies on the amount of time that can be allocated to the dispute and how well the intermediary can understand

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<sup>14</sup> Nor Fadzlina Nawwi, "Family Mediation in Malaysian Muslim Society: Some Lessons for the Civil Family Law in Malaysia", *Conference Booklet-East Asian Law and Society Conference* (October 2011), 2.  
<sup>15</sup> Nora Abdul Hak and Umar A. Oseni, "Sulh (Mediation) in the Shariah Courts: Some Problems and Prospects", *National Conference on Dispute Resolution 2011* (Selangor, Faculty of Law, Universiti Kebangsaan Malaysia), 154.

<sup>16</sup> Sharifah Zaleha Syed Hassan, *Managing Marital Disputes in Malaysia Islamic Mediators and Conflict Resolution in the Shariah Courts* (Cornwall: Curzon Press Ltd, 1997), 234-235.

the multiplex levels of meaning of his or her interest in the dispute<sup>17</sup>, including the mediator's skills and competence, and the cooperation of all parties involved.

Under Shariah jurisdiction, *sulh* officers are appointed by Shariah courts to lead mediation sessions known as *sulh proceedings* conducted in courts. Shariah judges may also conduct judge-led mediation to resolve disputes. Unlike traditional mediation, where mediators in the past often consisted of *kadhis* and heads of villages, in this modern era of mediation, *sulh* officers receive trainings on how to mediate and settle disputes outside the courts without going through lengthy trials through the mediation method of the Department of Shariah Judiciary, Malaysia (JKSM)<sup>18</sup> and the Accord Group from Australia. These trainings have proved to be successful as there has been a significant and remarkable increase in the number of cases resolved outside of court litigation.<sup>19</sup>

While it is undeniable that *sulh* officers and judges in Shariah courts play a significant role in expanding the practice of Islamic mediation (*sulh*), there are reports on the insufficiency of *sulh* officers throughout Malaysia. In his article, Wan Muhammad Asyraf Bin Wan Mohd Fadzli (2018) reported that in 2008, there were only a limited number of 29 *sulh* officers available in the entirety of Shariah courts across Malaysia, of which five were female officers.<sup>20</sup> As *Sulh* mediation is mainly focused on marital disputes, the need for more trained female *Sulh* officers in Malaysia is paramount.<sup>21</sup>

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<sup>17</sup> *Ibid.*

<sup>18</sup> Hammad Mohamad Dahalan, "Pengurusan *Sulh*: Peranan, Pelaksanaan dan Keberkesannya oleh Pegawai *Sulh*," (International Research Management and Innovation Conference 2014 (IRMIC2014), *KUIS*, Bangi, Selangor, 17-18 November 2014).

<sup>19</sup> Hammad Mohamad Dahalan, "Pengurusan *Sulh*: Peranan, Pelaksanaan dan Keberkesannya oleh Pegawai *Sulh*," (International Research Management and Innovation Conference 2014 (IRMIC2014)

<sup>20</sup> Wan Muhammad Asyraf Bin Wan Mohd Fadzli, (14.03.2018) "Mediation in the Shariah Courts: An Empowerment Alternative for Amicable Resolution in Shariah Disputes", University of Malaya Law Review. Accessed online through <https://www.umlawreview.com/lex-in-breve/mediation-in-the-Shariah-courtsan-empowering-alternative-for-amicable-resolution-in-Shariah-disputes>

<sup>21</sup> "Mediation in the Shariah Courts: An Empowerment Alternative for Amicable Resolution in Shariah Disputes", <https://www.umlawreview.com/lex-in-breve/mediation-in-the-Shariah-courtsan-empowering-alternative-for-amicable-resolution-in-Shariah-disputes>



Already, according to Ruzita Ramli et al. (2021), there is a significant difference in the number of male and female *sulh* officers, as shown below:

**Table 0.1. Statistics of *sulh* officers based on gender in 2021**

<b>Service scheme</b>	<b>Male</b>	<b>Female</b>
Common Service (Federal)	28 (61%)	18 (39%)
Non-common Service (States)	20 (67%)	10 (33%)
<b>Total</b>	<b>48 (63%)</b>	<b>28 (36%)</b>

Source: *Sulh section, JKSM (2021)*.<sup>22</sup>

In their book of “Alternative Dispute Resolution (ADR) in Islam”, Nora Abdul Hak et al. (2011) reported that amongst the challenges of the *sulh* programme is the inadequacy of staff. With 81 *sulh* officers currently in Malaysia, Nora Abdul Hak et al. (2011) stressed the appointment and training of more staff to cater the increasing number of cases in court, especially divorce cases. After almost a decade, the Malaysian Public Service Department (also known as *Jabatan Perkhidmatan Awam, JPA*) has been urged to increase the number of *sulh* officers in an effort to further empower the *sulh* council to reduce backlog of cases.<sup>23</sup> This situation implies that more *sulh* officers are needed to maximise the effectiveness of the *sulh* programme.

Although judge-led mediation exists in Shariah courts, relying on it to promote the *sulh* approach is even more challenging. Shariah judges are already burdened with their heavy workload and are restrained by their respective officers and social distance from the disputants. This is evidenced by the fact that trial processes in Shariah courts are often associated with being delayed.<sup>24</sup> Furthermore, a judge’s role is committed towards

<sup>22</sup> Ruzita Ramli et al., “The Roles and Competencies of Women *Sulh* Officers in Malaysian Shariah Courts”, *International Journal of Academic Business and Social Sciences*, 12(7), 995 – 1007.

<sup>23</sup> “*JPA Disaran Tambah Jumlah Pegawai Sulh*”, *Berita Harian*, 21<sup>st</sup> April 2017.

<sup>24</sup> “Mediasi Sebagai Alternatif Litigasi”, *Sinar Harian*, 30<sup>th</sup> July 2019. Accessed on 30.07.2019 through [https://www.sinarharian.com my/article/20600/KOLUMNIS/Mediasi-sebagai-alternatif-litigasi](https://www.sinarharian.com.my/article/20600/KOLUMNIS/Mediasi-sebagai-alternatif-litigasi).

the adjudication process. Because of this, judges who mediate are unable to devote much interest and time to every case hence seldom consider all the important aspects for the parties involved and everything that contributes to a conflict.<sup>25</sup>

The insufficient manpower of *sulh* officers and low reliance on judge-led mediation jeopardise the efficiency of the *sulh* programme as cases in the Shariah courts continue to rise throughout the years. An increase in cases would also increase the number of *sulh* cases registered in the courts. A simple example of this is the increasing rate of *sulh* cases over the years between 2013 to 2017 as divorce cases under the Shariah courts throughout the Malaysian states within the same period also increasing, as presented in the two tables below. Table 1.2 shows the number of divorce cases.<sup>26</sup>

**Table 1.2. Shariah Court Divorce Registration Statistics 2013-2017 presented by the Public Sector Open Data**

No.	State	2013	2014	2015	2016	2017	Total
1	Johor	5,159	5,597	5,920	5,984	6,128	28,788
2	Kedah	3,683	4,462	5,189	5,506	5,655	24,495
3	Kelantan	4,408	4,581	4,382	4,719	4,637	22,727
4	Melaka	1,631	1,749	1,925	1,850	1,822	8,977
5	N. Sembilan	2,395	2,499	2,615	2,982	2,781	13,272
6	Pahang	3,593	3,809	3,894	4,256	3,908	19,460
7	Perak	3,371	3,696	4,038	4,401	4,477	19,983
8	Perlis	683	721	891	894	926	4,115
9	Pulau Pinang	2,080	2,263	2,392	2,490	2,276	11,501

<sup>25</sup> Sharifah Zaleha Syed Hassan, *Managing Marital Disputes in Malaysia Islamic Mediators and Conflict Resolution in the Shariah Courts*, 235.

<sup>26</sup> Shariah Court Divorce Registration Statistics for 2013-2017. The Public Sector Open Data. Accessed on 12.12.2012 through [https://www.data.gov.my/data/ms\\_MY/dataset/statistik-pendaftaran-perceraian-mahkamah-Shariah-seluruh-malaysia/resource/5f6eb89f-62d4-41bb-8719-8a92de888468](https://www.data.gov.my/data/ms_MY/dataset/statistik-pendaftaran-perceraian-mahkamah-Shariah-seluruh-malaysia/resource/5f6eb89f-62d4-41bb-8719-8a92de888468).

10	Sabah	3,274	3,730	4,155	4,346	4,180	19,685
11	Sarawak	2,302	2,471	2,639	2,669	2,676	12,757
12	Selangor	10,154	11,072	11,896	12,513	12,203	57,838
13	Terengganu	3,374	3,631	4,320	4,325	4,441	20,091
14	Kuala Lumpur	3,611	3,832	3,908	4,159	3,978	19,488

Table 1. 3 shows the number of *sulh* cases registered in Shariah courts from 2013 to 2017:<sup>27</sup>

**Table 1.3. Statistics of *sulh* cases registered in 2013-2017.**

	State	2013	2014	2015	2016	2017	Total
1	Johor	259	188	342	296	539	1,624
2	Kedah	191	249	506	447	615	2,008
3	Kelantan	199	237	346	427	340	1,549
4	Melaka	513	371	443	503	639	2,469
5	N. Sembilan	1,077	1,202	1,325	1,423	1,457	6,484
6	Pahang	166	358	511	550	501	2,086
7	Perak	257	588	478	698	801	2,822
8	Perlis	111	187	219	228	236	981
9	Pulau Pinang	303	389	323	421	319	1,755
10	Sabah	668	787	736	819	623	3,633
11	Sarawak	0	39	101	207	316	663
12	Selangor	2,118	2,467	2,644	2,984	3,440	13,653
13	Terengganu	1,141	1,221	1,289	1,134	954	5,739
14	Kuala Lumpur	1084	1206	1216	1584	1599	6,689

One possible factor for the increase could be that the disputing parties are opting for *sulh* rather than attending court trials.<sup>28</sup>

<sup>27</sup> “Statistics of case registered for *Sulh* in Shariah courts throughout Malaysia.” Accessed on 20.09.2019 through [http://www.data.gov.my/data/ms\\_MY/dataset/statistik-pendaftaran-sulh-mahkamah-Shariah-seluruh-malaysia/resource/d695f006-6800-467e-a866-2e8105522fba](http://www.data.gov.my/data/ms_MY/dataset/statistik-pendaftaran-sulh-mahkamah-Shariah-seluruh-malaysia/resource/d695f006-6800-467e-a866-2e8105522fba). The researcher was unable to obtain the latest statistics during and after the pandemic outbreak until this research is published, hence the statistics in 2013 to 2017 are used to indicate the correlation in increase in pattern between cases registered in court and *sulh* cases.

<sup>28</sup> Nurzakiah Ramlee and Nurul Hikmah Hidzam, “The Practice of Sulh in the New Norm in Brunei and Malaysia”, *Journal of Islam and Contemporary Society*, 23(2), 54 -67.

In 2020, the number of divorce cases in Malaysia decreased from 47, 242 cases to 43, 934 cases in 2021. Although the number of divorce cases has improved, it is possible that this decrease is due to the closing of civil and Shariah courts, as well as the National Registration Department during the Movement Control Order (MCO) period, where only a limited number of cases could be handled following the court's new standard operating procedures (SOP) during the Recovery Movement Control Order.<sup>29</sup> Considering the above statistics and situation, this research highlighted private mediators as a potential support for these issues.

Alwi (2013) noted that in Malaysia, the present situation of court-annexed mediation also includes court-annexed mediation undertaken by private mediators.<sup>30</sup> This proves that there are also private mediators who work outside the courts.<sup>31</sup> Under the Shariah jurisdiction, such position may be filled in by Syarie lawyers, who are abundant among both men and women. However, unlike Shariah officers who receive training and whose capabilities are well-established to conduct mediations, there are instances where not all mediators are accredited,<sup>32</sup> even among lawyers.

It is observed that there are Syarie lawyers in Malaysia who participated in the mediation training held under the Accord Group, Australia, and are therefore qualified to conduct mediations. Yet, there is little to no record on the knowledge of their mediation practice in Shariah cases, which could be a barrier to greater practice of mediation in

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<sup>29</sup> (n.a), "*Bilangan menurun, 43, 934 Pasangan Bercerai Tahun Lalu – Perangkaan*", *AstroAwani Online*, (25.11.2022). Accessed on 23.01.2023 through <https://www.astroawani.com/berita-malaysia/bilangan-menurun-43934-pasangan-bercerai-tahun-lalu-perangkaan-393655>.

<sup>30</sup> Alwi Abdul Wahab (2013), "*Court-Annexed and Judge-Led Mediation in Civil Cases: The Malaysian Experience*", *PhD Thesis Dissertation, College of Law and Justice*, Victoria University of Melbourne, Melbourne.

<sup>31</sup> Alexia Georgakopoulos, ed., *The Mediation Handbook (Research, Theory and Practice): Mediation and Collaboration with Multiple Disciplines*, (Routledge, 2017), 122.

<sup>32</sup> Aroma Elmina Martha, "*Penal Mediation for Medical Dispute Settlement in Indonesia Perspective*". In *The European Conference on Politics, Economics and Law Conference Proceedings* (2016), 7.

family disputes under Shariah jurisdiction and could affect the success of the mediation process between disputants in Shariah family cases. There is also the argument that although Syariah lawyers too mediate, there are cases where they would induce clients to retract from *Sulh* agreements before they could be endorsed by the Shariah courts.<sup>33</sup>

Considering the fact that the number of *sulh* cases is constantly increasing due to the ever-increasing number of family and marriage dissolution cases at the Shariah courts, the number of *sulh* officers in the Shariah courts is limited, various family conflicts exist in urban society and very little light is shed on the practice of Syariah lawyers as qualified mediators, the researcher contends that it is of paramount importance to understand and dive into the practice and approach of mediators under Shariah jurisdiction in resolving family conflicts in Malaysia. This research also aims to shed light on the practice of Syariah lawyers with mediation accreditation (SLMAs) as private mediators and determine whether they are able to complement and support the current *sulh* programme at Shariah courts in dealing with the aforementioned challenges.

#### **1.4 Research Question**

The research questions for the study are as follow:

- a. What are the alternative dispute resolutions available in Islam to resolve family conflicts?
- b. How and what are the differences in practice among current Shariah mediators in Malaysia when resolving family conflicts in Malaysia?
- c. What are the benefits achieved and challenges faced by Shariah mediators in Malaysia?

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<sup>33</sup> Alexia Georgakopoulos, ed., *The Mediation Handbook (Research, Theory and Practice): Mediation and Collaboration with Multiple Disciplines*, 122.

## 1.5 Research Objectives

The research objectives for this study are as follow:

- a. To determine the types of alternative dispute resolutions in Islam used to resolve family conflicts;
- b. To analyse the practice of current mediators under the Shariah jurisdiction in resolving family conflicts in Malaysia;
- c. To identify the benefits achieved and challenges faced by government and private Shariah mediators in Malaysia.

## 1.6 Significance of the Study

To date, few studies have been conducted that focus on the Shariah mediators themselves in resolving family conflicts within the context of Shariah jurisdiction. Most studies focus on the processes and procedures of *sulh* in court-annexed mediation in Shariah courts, such as the studies conducted by Raihanah Azahari and Soraya Khairuddin (2009)<sup>34</sup> which focused on the administration and provide case studies of Shariah courts, Norjihana Ab Aziz and Nasimah Hussin (2016)<sup>35</sup> whose study focused on the application of mediation (*sulh*) in Islamic Criminal Law, Nor Khalidah Dahl et al. (2017)<sup>36</sup>, whose study touched generally the ADR methods from the Shariah Perspective in Malaysia, and many others. Through this study, we could examine whether private and state Shariah mediators have adequate skills and experience to act as mediators.

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<sup>34</sup> Raihanah Azahari and Soraya Khairuddin, "The Malaysian Shariah Courts: Polygamy, Divorce and the Administration of Justice", *Asian Women* 25(1) (2009), 21-54.

<sup>35</sup> Norjihana Ab Aziz and Nasimah Hussin, "The Application of Mediation (*Sulh*) in Islamic Criminal Law", *Shariah Journal* 24(1) (2016), 115-136.

<sup>36</sup> Nur Khalidah Dahlan et.al, "Alternative Dispute Resolution Methods from the Shariah Perspective in Malaysia" *Journal of Nusantara Studies* 2017, 2(1) (2017), 86-98.

While litigation and adjudication have irreplaceable merit and significance in dealing with rights in conflicts, mediation has the ability to end disputes amicably and ensure a higher likelihood that parties will abide by the agreement achieved through mediation, hence avoiding incompliance of court orders.<sup>37</sup> By exposing and expanding the term ‘Shariah Mediators’, the society will be encouraged to settle their disputes through mediation, whether by state mediators or private mediators who undergone mediation training.

This could help promote private Shariah mediators and encourage trained Shariah mediators to practice mediation, especially since voluntary mediation for family law disputes is available in Malaysia, but attracts relatively few cases.<sup>38</sup> At the same time, it provides a greater understanding of the practice and approach of mediators under Shariah jurisdiction as a guide to harnessing the skills of a mediator. In any case, the significance of this research correlates with one of Raihanah Azahari’s (2006) suggestions for monitoring the development of *sulh* in Malaysia:

*“Memastikan agar setiap konsep ataupun mekanisme pelaksanaan sulh yang ingin dijalankan samada di mahkamah Shariah ataupun di peringkat individu tertentu perlu mematuhi syarat asas konsep sulh seperti mana ditetapkan oleh fuqaha silam. Hal ini amat penting bagi memastikan konsep sulh ini tidak disalahgunakan ataupun dijadikan alat justifikasi untuk sesuatu produk ataupun tindakan yang tidak halal”.*<sup>39</sup>

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<sup>37</sup> “Legal Clinic: Husbands Who Don’t Provide for Muslim Wives, Children A Top Concern”, *MalayMail Oline*, 8<sup>th</sup> March 2019. Accessed on 25.04.2019 through <https://www.malaymail.com/news/malaysia/2019/03/08/legal-clinic-husbands-who-dont-provide-for-muslim-wives-children-a-top-conc/1730506>

<sup>38</sup> Nor Fadzlina Nawi, “Family Mediation in Malaysian Muslim Society: Some Lessons for the Civil Family Law in Malaysia”, 2.

<sup>39</sup> Raihanah Hj Azahari, “Modifikasi Teori Sulh dalam Fiqh Klasik Berasaskan Data-data Kajian Lepas”, *Journal of Malay Studies*, 17(2006), 244.

Hence, this study would not only inspire the growth of the mediation profession, promote Islamic mediation in resolving family conflicts amicably, and reduce family conflicts which may lead to divorce and breaking off family ties. It would also serve as a way to update the latest developments in the profession of Shariah mediators in Malaysia.

### **1.7 Scope and Limitations of the Study**

Although the study ideally should cover these practitioners all over Malaysia, it is very hard to locate Syariah lawyers who possess mediation accreditation as there is no list provided by any organisation. Furthermore, the constraint of resources and time led the researcher to narrow down the scope of the study to mediators over the west side of the West Peninsula, as these are the states with the highest divorce rates, as shown in the statistic above. Through snowball sampling, ten representatives of state and private Shariah mediators from Selangor, Federal Territories (Kuala Lumpur), and Negeri Sembilan were interviewed.

These respondents were various mediation practitioners, including Shariah officers (a *sulh* officer at the Shariah courts, a Shariah judge, and a Shariah research officer/registrar), a Legal Aid Department mediator who deals with civil and Shariah family conflicts, and most importantly, Syariah lawyers possessing mediation accreditation (SLMAs) by the Accord Group, Australia, and who played the most crucial role in this research in identifying the practice and approach of private mediators under the Shariah jurisdiction. Two other high authorities were also interviewed, where one represents private mediation, and the other represented state mediation under the Shariah jurisdiction.

To justify, SLMAs with accreditation from the Accord Group were mainly selected to represent private mediators in this research as they have had received similar mediation training attended by many Shariah and *sulh* officers since 2007. Accord Group is an



international consultant based in Australia that has been training and exposing *sulh* officers in Malaysia with alternative dispute resolution methods, including mediation<sup>40</sup> for many years since 2007. In 2007, 24 *sulh* officers were trained and presented the Certificate for Conducting Mediation by the Accord Group.<sup>41</sup> Participants who attended the mediation course also received the Associate Membership of the United Kingdom Chartered Institute of Arbitrators without the need to take the usual examination.<sup>42</sup> From time to time, Accord Group continues to provide mediation training not only to Shariah judges and officers, but also civil and Syariah lawyers.

The research focused on family disputes because it is in these disputes that mediation is developing at its fastest growth.<sup>43</sup> Mediation in family conflicts is known as Family Mediation. According to Nora Abdul Hak et al. (2016), family mediation has the same meaning as general mediation, except that it is applied to family disputes.<sup>44</sup> In family mediations, various needs of a family, differing attitudes, and positions of the disputants would be taken under consideration, unlike the current legal processes.<sup>45</sup>

For *sulh* in Malaysian Shariah courts, its implementation of rules and regulations is generally standardised among the Malaysian states, with some states having different arrangement of contents only.<sup>46</sup> Therefore, this research chose to refer to the Shariah rules

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<sup>40</sup> Adnan Trakic and Hanifah Haydar Ali Tajuddin. *Islamic Law in Malaysia: The Challenges of Implementation* (New York: Springer, 2021), 121.

<sup>41</sup> Hanis Wahed (2015), "SULH: Its Application in Malaysia", *IOSR Journal of Humanities and Social Science*, 20(6), 75.

<sup>42</sup> Sa'odah Ahmad, "User Satisfaction with *Sulh* (Mediation) in the Selangor Syariah Judicial Department", *Malaysian Journal of Consumer* 19 (2012), 128.

<sup>43</sup> Sa'odah Ahmad & Nora Abdul Hak (2010), "*Family Mediation and Sulh: An Alternative Dispute Resolution in Malaysia*", 69.

<sup>44</sup> Nora Abdul Hak, Umar A. Oseni and Nurah Sabahiah Mohamed, *Comparative Perspectives on Alternative Dispute Resolution with Reference to Malaysia* (Kuala Lumpur: IIUM Press, 2016), 224.

<sup>45</sup> Nora Abdul Hak, Umar A. Oseni and Nurah Sabahiah Mohamed, *Comparative Perspectives on Alternative Dispute Resolution with Reference to Malaysia*, 225.

<sup>46</sup> Nur Farahiyah Mohd Nasir, Zinatul Ashiqin Zainol and Shamsuddin Suhor, "Mediating Family Disputes Involving Violence in Malaysia", *International Journal of Asian Social Science*, 8(12)(2018), 1122.

and regulations of the Selangor state as Selangor was the first Malaysian state to formally establish the *sulh* council in 2002.<sup>47</sup> Other studies such as Norman Zakiyy<sup>48</sup> and Nur Farahiyah Mohd. Nasir et al. (2018)<sup>49</sup> also referred to Selangor's rules and regulations when conducting studies within the scope of Malaysia.

The main limitation in this study would be the transparency of obtaining relevant and reliable data; mediation sessions are often private, confidential, and behind closed doors. Therefore, the researcher could only rely on interviews with mediators and library research in this study as it is challenging to conduct observations, particularly during the COVID-19 pandemic. While this approach helped to reduce costs and time, there were difficulties in approaching and contacting some of the respondents as the Malaysian government ordered Movement Control Order (MCO), Conditional Movement Control Order (CMCO), and the Recovery Movement Control Order (RMCO) to curb the pandemic.<sup>50</sup> Institutions were closed and respondents had to deal with the onslaught of COVID-19. Observation sessions through online mediation were also challenging to conduct.

## 1.8 Literature Review

The literature review in this study is divided into three themes: mediation from the Islamic perspective, mediation as a compliment to litigation, and lastly, the practice of family mediation in Malaysia.

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<sup>47</sup> Sa'odah Ahmad, Rojanah Kahar and Muslihah Hasbullah, "Mediation as an Alternative Dispute Resolution in Family Disputes", *Proceedings of International Conference on Public Policy and Social Science*, UiTM Melaka (November 2012), 155.

<sup>48</sup> Norman Zakiyy Chow Jen-T'chiang, "Court-Annexed Mediation in Resolving Disputes Relating to Family in Malaysia: What We Need To Know Before We Go Forward", *Malaysian Journal of Shariah and Law* 2(2010), 135 -151.

<sup>49</sup> Nur Farahiyah Mohd Nasir, Zinatul Ashiqin Zainol and Shamsuddin Suhor, "Mediating Family Disputes Involving Violence in Malaysia", 1120 – 1129.

<sup>50</sup> "MCO, CMCO, RMCO: Dos and don'ts", *New Straits Times*, 11<sup>th</sup> January 2021. Accessed on 09.08.2021 through <https://www.nst.com.my/news/nation/2021/01/656469/mco-cmco-rmco-dos-and-donts>

## i. Mediation from the Islamic Modern Perspective

*Sulh*, also known as peace-making or conciliation, is a practice that pre-existed before the coming of Islam.<sup>51</sup> It was an approach preferred by Prophet Muhammad PBUH<sup>52</sup> and encouraged by Umar ibn al-Khattab who said: ‘Dispel the disputants until they settle amicably with one another; for truly adjudication leads to rancour’.<sup>53</sup> In terms of terminology, most scholars in Malaysia, such as Ramizah Wan Muhammad (2008), Raihanah Azahari (2010), Sa’odah Ahmad (2012), as well as Norjihah Abd Aziz and Nasimah Husin (2016) viewed *sulh* as synonym to mediation. For instance, Sa’odah Ahmad (2012) said that mediation is known as *sulh* in Islamic law, which is a restorative justice and peace-making process and that the actual outcome of the said process is that the disputants enter into a contract with an agreed private settlement outside of court.<sup>54</sup>

However, scholars such as Aseel al-Ramahi (2008) and Said Bouheraoua (2008)<sup>55</sup> believed that the terms *sulh* and mediation are different. Bouheraoua (2008) explained that conciliation (*sulh*) in Islamic Law is a means of amicable dispute settlement, whereas mediation (*wasatah*) is just one of the means of amicable settlement, like arbitration. His explanation coincides with that of Aseel al-Ramahi (2008), who stated that ‘*wasta*’ refers to the person or action that mediates or intercedes, with its role is centred towards ‘prevention of retaliation in interpersonal or intergroup conflict’.

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<sup>51</sup> Aseel Al-Ramahi (2008), “*Sulh*: A crucial part of Islamic Arbitration”, *Islamic Law and Law of the Muslim World Research Paper series*, no. 8-25, 4.

<sup>52</sup> *Ibid*, 11.

<sup>53</sup> Ibn Abī Shayba, *al-Mu annaf*, 7 (2938): 213-14.

<sup>54</sup> Sa’odah Ahmad (2012), “User Satisfaction with *Sulh* (Mediation) in the Selangor Shariah Judicial Department, *Malaysian Journal of Consumer*, 19, 125-141.

<sup>55</sup> Said Bourheraoua, “Foundation of Mediation in Islamic Law and its Contemporary Application” in *Asia Pacific Mediation Forum*, Department of Islamic Law, International Islamic University Malaysia (Jun 2008), 1 -8.

Meanwhile, *sulh* is the ‘duty to reconcile’ that exists not only upon mediators, but also to judges and arbitrators.

Their studies are further supported by Azwina Wati Abdul Manaf et.al (2018) in “*Mediation in Islam*” who mentioned that ‘*wasatah*’ is known as Islamic mediation. In this study, the **concept of mediation and** its application in the Malaysian context are analysed from the Islamic perspective. The authors mentioned that the process whereby parties to a suit meet with a neutral third-party known as the mediator to find a mutually acceptable resolution to settle the case.<sup>56</sup>

Other studies include Nasif Sidqee Pauzi (2009) in ‘*Perdamaian Menurut Islam: Kajian Terhadap Kitab al-Sulh Dalam Sahih al-Bukhari*’ where he categorised hadiths touching on different variations of *sulh* mentioned in the book of *Sahih al-Bukhari* where the author repeatedly mentioned about *Sulh Hidaybiyyah* as a crucial point in the development of Islam. During this event, Prophet Muhammad PBUH was involved in a negotiation process and succeeded to form an agreement. Among the categories of hadiths related to *sulh* include hadiths encouraging *sulh* to settle disputes, non-permissible *sulh*, *sulh* between husband and wife, how to write a peace treaty, and the role of leaders in encouraging *sulh*.<sup>57</sup>

In “*Conciliation Ethics in the Quran*”, Shafi Fazaluddin (2016) provided a detailed explanation of the definitions and concepts of *Sulh* from the Islamic perspective of many scholars. He concluded that conciliation studies limited to verses referring to *sulh* would be incomplete as the term goes beyond verses the root of ‘*sa-la-ha*’ that

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<sup>56</sup> Azwina Wati Abdul Manaf, Asfarina Kartina binti Shakri dan Siti Marshita binti Mahyut, “Mediation in Islam”, *Advanced Science Letters, Published by Amer Scientific Publishers*, Vol 24(7) (2018), 5171-5173(3)

<sup>57</sup> Nasif Sidqee bin Pauzi, *Perdamaian Menurut Islam: Kajian Terhadap Kitab al-Suoh Dalam Sahih al-Bukhari*, PhD thesis Dissertation, Department of Al-Quran and Hadis, Academy of Islamic Studies, Universiti Malaya. (2009)

indicate the meaning of *sulh*. Through the teachings of the Quran, attitudes related to reconciliation such as positive thinking, differentiation, and externalisation are essential to restrict the detrimental effects of negative behaviours.<sup>58</sup>

From the Shariah perspective, Dahlan et al. (2017) added that the only rule that governs *sulh* in Islamic law that has no compromise is the rules related to the rights of Allah SWT. The said rules include the rules of *hudud*, *zakat*, and *kafarah*. Any attempt to circumvent and violate these rules is considered void and sinful.<sup>59</sup> In addition, any agreement regulated in an amicable settlement must be within the scope of halal and haram set by Islam. Amongst the latest research that listed popular Islamic alternative dispute resolutions is Nor'Adha Abdul Hamid et al. (2019)<sup>60</sup> who elaborated on the following processes; tahkim, med-arb (a combination of *sulh* and tahkim), muhtasib, fatwa, and *sulh*.

With modern mediation is now being conducted online, careful scrutiny needs to be made to ensure that mediation is conducted in accordance with Islamic teachings. For *sulh*, Sodiq O. Omoola (2019)<sup>61</sup> examined the concept of Online Dispute Resolution (ODR) and its justification in Islamic jurisprudence using a doctrinal method of *sulh*. He noted that existing Islamic legal ethos, including *sulh*, are in harmony with the present reality of online conflict resolution, where the practice of Islamic ODR must be in line with the fundamental principles of Islamic law.

## ii. Mediation as a compliment to litigation

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<sup>58</sup> Shafi Fazaluddin (2016), "Conciliation Ethics in the Quran", *International Journal for the Semiotics of Law-Revue* 29(2), 333-358.

<sup>59</sup> Nur Khalidah Dahlan et al. (2017), "Alternative Dispute Resolution Methods from the Shariah Perspective in Malaysia", *Journal of Nusantara Studies*, 2(1), 86-98.

<sup>60</sup> Nor'Adha Abdul Hamid et al. (2019), "Alternative Dispute Resolution (ADR) via *Sulh* Processes", *International Journal of Law, Government and Communication*, 4(17), 25-33.

<sup>61</sup> Sodiq O. Omoola (2019), "ODR: An Islamic Jurisprudence Perspective", *Conflict Studies Quarterly*, Issue 26, 53 – 67.

According to John Eekelaar et.al (2000), mediation is an excellent alternative not only because it is a flexible process, but it can also be used to solve matrimonial conflicts before or after a couple divorces. This shows that mediation is seen as having a role in saving marriages. It enables couples to “take responsibility for the breakdown in their marriage”<sup>62</sup> rather than resorting to divorce. In his study, Syed Khalil Rashid (2002) explained that negative aspects of litigation such as excessive cost, multiple forms of delays, contingency fees, and limits of legal adjudications are among the factors which led to the emergence of Alternative Dispute Resolutions.<sup>63</sup> At the same time, there are also benefits of mediation that people sought after compared to litigation. For example, disputes settled through reconciliation ideally disperse tension thus allowing the relationship between disputants to harmonise in due time.<sup>64</sup>

Understanding these advantages of mediation, both civil and Shariah courts in Malaysia have established their own mediation systems and jurisdictions. Various statistical reports and research conducted have proven its outstanding effectiveness and helped greatly in reducing the backlog of cases suffered by both civil and Shariah courts, such as Raihanah Azahari (2005)<sup>65</sup> and Su’aida Safei (2005).<sup>66</sup>

Focusing on recent literature, several dissertations have studied their implementation and applications, such as Alwi Abdul Wahad (2013),<sup>67</sup> Nurah

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<sup>62</sup> John Eekelaar, Mavis Maclean and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (North America: Hart Publishing, 2000), 2.

<sup>63</sup> Syed Khalil Rashid (2002), *Alternative Dispute Resolution: The Emerging New Trend of Informal Justice*

<sup>64</sup> Sharifah Zaleha Syed Hassan and Sven Cederroth (1998), “Managing Marital Disputes in Malaysia Islamic Mediators and Conflict Resolution in the Shariah Courts”, 55.

<sup>65</sup> Raihanah Azahari, *"Sulh dalam Perundangan Islam: Kajian Di Jabatan Kehakiman Shariah Selangor Darul Ehsan"*, *PhD Thesis Dissertation*, University of Malaya (2005).

<sup>66</sup> Su’aida Safei (2005), “Mediation as an Alternative Mode of Resolving Family Disputes in Malaysia”, *Dissertation, Faculty of Law*, University of Malaya.

<sup>67</sup> Alwi Abdul Wahab (2013), “Court-Annexed and Judge-Led Mediation in Civil Cases: The Malaysian Experience”, *PhD Thesis Dissertation, College of Law and Justice*, Victoria University of Melbourne, Melbourne.

Sabahiah Mohamed (2013),<sup>68</sup> and Christina Ooi Su Siang (2017).<sup>69</sup> Through a mix mode of surveys, interviews, and documentation, Alwi found that there are three stakeholders who resisted mediation; the judges, lawyers, and the public. Such resistance was due to their separate interests in not losing judicial authority and income, whilst the public's lack of knowledge caused them to prefer judges as the 'appropriate decision-makers' in their conflicts.

Nurah Sabahiah (2013) compared the mediation practice in Malaysia with that in Australia and Singapore. Narrowing down to Malaysia, the extent of mediation practice is wide under the civil jurisdiction such as the Legal Aid Department, administrative tribunals, corporate bodies, private institutions, as well as international organisations. In Australia and Singapore, the process is more popular and standardized than in Malaysia, where society is less aware of mediation. Based on observations, the Singaporean community is very accepting of mediation, considering the essence of the foundation of the mediation practice revolves around their customary and religious practices, such as Islam, Confucianism, and Hinduism. Community acceptance also takes place in Australia. Nonetheless, one striking factor that expands society's awareness is the increased establishment of various government and private mediation centres in Australia, such as the Australian Dispute Resolution Association (ADRA), Leading Edge Dispute Resolvers, the Institute of Arbitrators and Mediators of Australia, and many more.<sup>70</sup>

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<sup>68</sup> Nurah Sabahiah Mohamed (2013), "Mediation in the New Dispute Resolution Landscape; A Case for the Enhancement of Its Application in Malaysia", *PhD Thesis Dissertation, Faculty of Law, University of Malaya, Kuala Lumpur*.

<sup>69</sup> Christina Ooi Su Siang (2017), "Mediation and the Courts on Settlement of Disputes: An Analysis on Legislating Court-Directed Mediation in Malaysia", *PhD Thesis Dissertation, Faculty of Law, University of Malaya, Kuala Lumpur*.

<sup>70</sup> Nurah Sabahiah, "Mediation in the New Dispute Resolution Landscape; A Case for the Enhancement of Its Application in Malaysia", 422.

Finally, Christina Ooi Su Siang (2017) in her doctorate thesis dissertation titled “*Mediation and the Courts on Settlement of Disputes: An Analysis on Legislating Court-Directed Mediation in Malaysia*” focused her study on civil court mediation and analysed the sufficiency of current mediation guidelines in civil court-directed mediation practice in Malaysia, as well as the role of courts and the judiciary in promoting court-directed mediation as an ADR. These studies, however, mainly circle around civil mediation, with part of the *sulh* process in Shariah courts also covered. As for the Shariah courts’ jurisdiction, *sulh* was established in 2002 as a mandatory step made for specific family-related disputes, where its implementation received full support from the Malaysian legislature.<sup>71</sup> Through documentations and library research, NurSyasya Rossiman (2020) presented similar practices and applications of *sulh* complementing the Shariah legislation in Brunei Darussalam. The *sulh* approach in Brunei Darussalam was similar to that in Malaysia in matters where the session will be led by a neutral and court-appointed *sulh* officer, who will attend caucuses when necessary, and the *sulh* process itself is free of charge.<sup>72</sup>

In Australia, Lesley Allport (2015), in her thesis “Exploring the Common Ground in Mediation”, examined the similarities and differences in mediation practices across sectors in the United Kingdom and considered whether variations in delivery were so wide that they could not be regarded as the same process. She reported that for the mediation practice in the UK, there is no united voice to speak for the mediation profession in the civil sectors, and that the profession is disjointed as a whole. Because of the resistance to scrutiny due to the principle of confidentiality, it is difficult to

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<sup>71</sup> Nur Khalidah Dahlan, “Alternative Dispute Resolution Methods from the Shariah Perspective in Malaysia”, *Journal of Nusantara Studies* 2017, 2(1), 95.

<sup>72</sup> Nur Syasya Rossiman (2020), “The Significance of *Sulh* in the Shariah Courts”, *Journal of Islamic Legal Thoughts and Law*, 11(1), 141-154.



examine the actual practice and explore the common ground in mediation, including how far and with what rate of recurrence the mediator's advice and solutions are offered during mediation processes.<sup>73</sup>

With the current modern world depending on technology, a few scholars have also discussed the prospect of conducting online *sulh* in Malaysia to further support the litigation process. Focusing on community mediation, Raini Hassan et al. (2013)<sup>74</sup> emphasised the need to integrate *sulh* and the first online site in Malaysia, the Online Dispute Resolution (ODR) technologies, together to run an online e-government effort that not only promotes mediation, but also allows more interaction between the government and the citizens. As a response, a preliminary study was conducted by Siti Noor Ahmad et al. (2018)<sup>75</sup> through documentation and interviews with *sulh* officers. They defined ODR as “the combination of mediation, arbitration, and court proceedings using the internet, websites, online communication, databases, and other technologies.” The authors also identified that not all disputes are suitable for ODR due to each's case unique circumstances. The prototype presented in this study provided a similar conceptual prototype of an online *sulh*-based mediation model to the actual offline process, except that every step is done online, including registrations by both parties. Cases for child support claims were chosen as prototypes in this research.

### **iii. The practice of family mediation in Malaysia**

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<sup>73</sup> Lesley Allport, “Exploring Common Ground in Mediation”, Thesis Dissertation, *University of Birmingham*, United Kingdom (2015), 297.

<sup>74</sup> Raini Hassan et al. (2013), “Setting-Up a *Sulh*-based, Community Mediation-Type of Online Dispute Resolution (ODR) in Malaysia”, *International Conference on Information and Communication Technology for the Muslim World 2013*, 26.03.2012-27.03.2013, 1-6.

<sup>75</sup> Siti Noor Ahmad et al. (2018), “Preliminary Study on Online *Sulh*-Based Mediation Community”, *4<sup>th</sup> International Conference on Information Technology and Society*, (30<sup>th</sup>-31<sup>st</sup> October 2018), 27-33.

When it comes to family matters such as matrimonial disputes, going for mediation is advantageous in the sense that it can be done whenever it is needed, be it before or after a couple's divorce. Undeniably, litigation processes could destroy family relationships.<sup>76</sup> As such, a mediator would always be readily available before or after a divorce event, even though it has been a pre-condition before a court trial can commence<sup>77</sup> for decades. Family mediation does not simply stop at divorce mediation. Others also include issues such as consolatory gifts, jointly acquired property, and custody of children.

Nora Abdul Hak (2007)<sup>78</sup> discussed the practice of family mediation in selected Asian countries such as China, Singapore, Hong Kong, and Japan. Her study focused mainly on the law and practice of conciliation in Malaysia, governed by the Law Reform (Marriage and Divorce) Act 1976. In oriental countries such as Japan and China, mediation is a primary means used to solve disputes as it emphasises moral persuasion and maintaining harmony in human relationships.

Mediation has been practiced in Malaysia and Singapore since the early 19<sup>th</sup> century by *penghulus*, clan heads, and family elders. Singapore offers free mediation services to encourage amicable settlements, and litigation is used as a last resort should all attempts to settle the case harmoniously fail. Meanwhile, the term 'mediation', introduced in 2007, has yet to appear in Malaysian family law. In the context of family mediation, the researcher commented that the development of family mediation should

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<sup>76</sup> Sao'dah Ahmad, "User Satisfaction with *Sulh* (Mediation) in the Selangor Shariah Judicial Department", *Malaysian Journal of Consumer*, Vol 19 (2012), 126.

<sup>77</sup> Raihanah Azahari (2010). *The Development of Family Mediation in Malaysian Muslim Society*, 227.

<sup>78</sup> Nora Abdul Hak, "Family Mediation in Asia: A Special Reference to the Law and Practice in Malaysia", *IJUM Law Journal*, 15(1) (2007), 121-148

include promotion of mediation, training, a code of practice, standards, and interdisciplinary programs, as well as information dissemination.

Mediation is seldom used in cases in which couples have already agreed to divorce and wish to resolve the necessary claims arising therefrom (Raihanah Azahari, 2010). Nor Fadzlina Nawi (2011), in her study, complimented the *sulh* programme in Malaysia. According to the researcher, the programme in its initial developmental phase consisted of the three necessary elements to achieve a successful and effective change in any public sector programme, which are ‘authority’ from the Shariah Chief Justice, the ‘public value’ where *sulh* is brought forward to improve justice among the public, and lastly, ‘capability of being implemented’, where support and availability of resources were available to conduct *sulh*. At the same time, the researcher did comment on the fact that there was a lack of skilled personnel to deliver the programme. At the end of the research, she reminded that although mandatory mediation, including family mediation, is a good possible solution to improve justice delivery, there is still a need to understand some of its risks, concerns, and limitations related to its implementation.<sup>79</sup>

One classic work of literature that contributes greatly to family mediation is Sharifah Zaleha Syed Hassan (1997)’s “*Managing Marital Disputes in Malaysia*”, which concentrated on how the Malays resolve their marital disputes with neutral third parties such as mediation counsellors, qadhis, and judges, as well as the techniques and methods practiced by Islamic religious officers in Malaysia, which comprise mediation, consultation, and arbitration.<sup>80</sup> Later, in another study “User Satisfaction

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<sup>79</sup> Nor Fadzlina Nawi, “Family Mediation in Malaysian Muslim Society: Some Lessons for the Civil family Law in Malaysia”, *Conference Booklet-East Asian Law and Society Conference* (2011), 1-17

<sup>80</sup> Sharifah Zaleha Syed Hassan & Sven Cederroth, *Managing Marital Disputes in Malaysia* (Surrey: Curzon Press for Nordic Institute of Asian Studies, 1997).

with *Sulh* (Mediation) in the Selangor Shariah Judicial Department”, Sa’odah Ahmad (2012)<sup>81</sup> reported that 87% of the respondents were highly satisfied with *sulh*, with more male respondents showing a higher level of satisfaction with the process. In her study, she mentioned that for any unsuccessful *sulh* session, many faulted the disputing parties more than the mediator.<sup>82</sup> Still, this reason does not exempt the fact that mediators also contribute to the success rate of a mediation session.

Unlike in civil courts, mediation at the Shariah courts generally centres around family disputes, mainly related to child custody and matrimonial property. For example, A. Ahmad et al. (2015)<sup>83</sup> discussed child participation in *sulh* proceedings in Pulau Pinang, Malaysia. They commented on how in *sulh* proceedings, the parents hold the highest opinion and the child’s opinion is barely heard, despite the child’s best interest being the highest priority. It was also reported that child custody cases are the most common cases registered at court for *sulh* in three Malaysian states, namely the Federal Territories, Labuan, and Putrajaya.

Through library-based research, Nor Farahiyah Mohd Nasir et al. (2018)<sup>84</sup> in the study of “*Mediating Family Disputes Involving Violence in Malaysia*” emphasised family mediation involving violence. Because domestic violence usually happens under wraps and is difficult to prove, family mediation in Malaysia will not accept divorce cases with a history of violence. Instead, it has to be brought to the Civil Court with reasonable evidence. Yet, due to fear of the batterer, the victim would not report

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<sup>81</sup> Sa’odah Ahmad (2012), “User Satisfaction with *Sulh* (Mediation) in the Selangor Shariah Judicial Department, *Malaysian Journal of Consumer*, 19, 125-141.

<sup>82</sup> Sa’odah Ahmad (2012), “User Satisfaction with *Sulh* (Mediation) in the Selangor Shariah Judicial Department, *Malaysian Journal of Consumer*, 19, 125-141.

<sup>83</sup> A. Ahmad, A. Yaakob, K. W. Mohd, N. A. Mohd Awal and M. A. A. A. Samuri (2015), “The Voice of the Child in *Sulh* (Mediation) Proceeding”, *Journal of Advanced Research Design*, 15(1), 1-14.

<sup>84</sup> Nur Farahiyah Mohd Nasir, Zinatul Ashiqin Zainol and Shamsuddin Suhor, “Mediating Family Disputes Involving Violence in Malaysia”, *International Journal of Asian Social Science*, 8(12), 1120-1129.

the violence to the police and instead agree to a mediation process, which later caused the issue of the power imbalance in the mediation process. Unlike Australia, Malaysia's family mediation does not mandate the mediator to screen separately for family violence to ensure the safety of the weaker party. Hence, researchers of this study proposed that mediators should be trained how to tackle mediation cases involving violence by referring to Australian guidelines and practices.

To add, Megan Morris (2016)<sup>85</sup> conducted her study on mediation in Australia and found out that motivational interviewing (MI) enhances agreement rates between separated parents in a mediation compared to mediation as usual (MAU) by taking into account the psychological aspects, such as psychological distress, co-parental acrimony, children's behavioural difficulties, and co-parental conflicts.

In his article "Discovering the Importance of Mediator Style – An Interdisciplinary Challenge", E. Patrick McDermott (2012) voiced his concern on the practical aspect of what went on during a caucus or in a mediation room in the USA. As mediation is a confidential process, he said that it is often hard to identify whether the success or failure of a mediation process may be due to the approaches or style of the mediator himself. Examples mentioned by McDermott include the hostility of a mediator towards the involvement of counsel at mediation, the inability of a mediator to gain the clients' confidence, and the lack of professionalism of a mediator in settling a mediation case.<sup>86</sup>

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<sup>85</sup> Megan Morris, "Motivational Interviewing and Family Mediation; Outcomes for Separated Families" (PhD Thesis Dissertation, The University of Queensland, Australia, 2016).

<sup>86</sup> E. Patrick McDermott, "Discovering the Importance of Mediator-Style – An Interdisciplinary Challenge", *Negotiation and Conflict Management Research* 5(4) (2012), 340 – 342.

Robert A. Baruch Bush (1996), in his study, highlighted the role of mediators in a negotiation process. According to him, mediators can assist parties in making better decisions by putting more information on the table, ensuring its reliability, and raising less suspicion than when the parties negotiate alone. Mediators can also assist parties in perceiving each other closely and fully, which avoids parties making false assumptions about one another. Bush also explained that the reason people are drawn towards mediation is because of *how* the process works, where two features of mediation are credited. The first feature is the greater degree of participation by parties in decision-making. The second feature is the greater opportunity for parties to express themselves and communicate their views to each other and to the neutral third party.<sup>87</sup>

To conclude the overall literature review, there have been numerous studies related to Islamic mediation, or *sulh*, in Malaysia and internationally as well. These studies generally focus on the implementation, procedures, and challenges of civil mediation and mediators. While there has been a significant amount of research done on *sulh* in the Shariah courts, only its general application, effectiveness, and concerns have been researched, with some studies focusing on *sulh* in child custody and matrimonial property.

Other studies include the roles and procedures of *sulh* officers appointed to resolve family conflicts. However, none has acknowledged the existence and prospect of other mediators under Shariah jurisdiction, their functions, as well as their benefits and challenges. Hence, this study was conducted to fill in the 'gap' of understanding how Shariah lawyers in Malaysia apply their mediation knowledge and skills, whilst

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<sup>87</sup> Robert A. Baruch Bush, "What Do We Need A Mediator For?": Mediation's "Value-Added" for Negotiators, 12 Ohio St. J. on Disp. Resol.1 (1996), 1 -36.

determining their advantages and challenges, and to, at the end, determine how their existence would assist in further promoting mediation or *sulh* in Malaysia.

## 1.9 Research Methodology

A research methodology is a systematic way to resolve a problem. It is a science to study how research is to be carried out. Essentially, the procedures by which researchers go about their work of describing, explaining, and predicting phenomena are called research methodology.<sup>88</sup> For this study, a qualitative approach was used to obtain relevant data and information. The approach was deemed appropriate as this research involved dealing with human interaction and perspectives. It took on an exploratory approach and therefore relied on the respondents' words and meanings for data analysis.<sup>89</sup> Also, qualitative methods are most suitable for studies conducted to understand a phenomenon where information about the phenomenon is obscure to others (Mohd Fuad Mohd Salleh, 2014). With that said, this research took on an exploratory approach to discover a phenomenon of interest,<sup>90</sup> particularly the practice and approach of mediators under Shariah jurisdiction.

### 1.9.1 Data Collection

Information and data collection for this research was conducted as follow:

#### 1.9.1.1 Library Research

Library research is a method that has long been used by researchers in social science studies where priority is given to primary and secondary resources.<sup>91</sup> It is highly

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<sup>888</sup> S. Rajasekar, P. Philominathan, V. Chinnathambi. (2006). *Research Methodology*. Barathidasan University, Tamilnadu. India through <https://arxiv.org/pdf/physics/0601009.pdf> on 03.07.2018

<sup>89</sup> *Ibid*, 41.

<sup>90</sup> Pamela Maykut and Richard Morehouse, *Beginning Qualitative Research A Philosophic and Practical Guide: Designing Qualitative Research: An Overview* (London, The Falmer Press: 1994), 40

<sup>91</sup> Mohd Istajib Mokhtar (2015), "*Konservatsi Biodiversiti Menurut Etika – Perundangan Islam: Kajian Terhadap Kawasan Perlindungan di Malaysia*" (Thesis Dissertation, University of Malaya, Kuala Lumpur, 2017), 18.

convenient as it is used to obtain relevant and thoughtful information that has been discovered and reported by past studies. Furthermore, it also saves time and expenses for transcription as it is presented as written evidence.<sup>92</sup>

For library research, data were obtained from academic dissertations, books, proceeding seminars, and article journals at the Main Library, University of Malaya (UM), the library of the Academy of Islamic Studies of the University of Malaya, the International Islamic University of Malaysia, and the library of the University of Brunei Darussalam. Online databases were also accessed, such as the UM online database, Google Scholar, Web of Science, SCOPUS, Hein Online, Emerald Insights, and JSTOR.

Data were also collected from online newspapers and bulletins required to support the research theme. Relevant statutes, policies, and legal documents,<sup>93</sup> such as current and updated statutes, practice directions, and *sulh* cases at the Shariah courts, were also referred to. Library research is mainly used in chapters two and three to answer the first objective, whereby information from official government websites such as the Legal Aid Department Official Website, the e-Shariah portal, and government statistical websites is cited. It was also used to support the data obtained through field research to answer the second and third objectives.

### **1.9.1.2 Field Research Through Interviews**

Data from the primary resources for this research were also gained through semi-structured interviews. The interviews included questions related to the profession of a family mediator, such as the cost of a mediation process, the professional attitude and

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<sup>92</sup> John W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches: Data Collection Procedures*, 2<sup>nd</sup> Edition (London: SAGE Publication, 2003), 188.

<sup>93</sup> Husna Mohd Sa'adan, "Pembangunan Wakaf di Institutsi Pendidikan Tinggi Malaysia: Kajian Perundangan", 24.



qualification of a mediator, and the techniques and approaches used by a mediator to achieve a successful mediation process. The interview approach was employed because it is useful when the session cannot be observed directly yet may disclose historical information<sup>94</sup> based on the respondents' knowledge and experiences.

For interview preparation, a pilot test was conducted to assist the researcher in identifying any flaws, limitations, or weaknesses within the interview questions designed.<sup>95</sup> By doing so, the researcher was able to make necessary revisions or refinements to the interview questions. The pilot test was carried out with two legal practitioners; a Syariah lawyer with mediator accreditation and a *sulh* officer working at the Main Headquarters, Legal Aid Department.<sup>96</sup> Both participants share the same interests as the respondents who took part in the final study implemented.<sup>97</sup>

The situation caused by the COVID-19 pandemic had also greatly affected the research methodology. Due to COVID-19 limitations, all interviews were conducted online and recorded through Google Meet with permission from all the respondents interviewed. The interview approach was also chosen as it was useful when the researcher was unable to directly observe the respondents.<sup>98</sup> To strengthen the reliability of data collection, the interviews were also audiotaped, while the researcher took notes and jotted down

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<sup>94</sup> John W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches: Data Collection Procedures*, 2<sup>nd</sup> Edition, 186.

<sup>95</sup> Daniel Q. Turner III (2010), "Qualitative Interview Design: A Practical Guide for Novice Investigators", *The Qualitative Report*, 15(3), 757.

<sup>96</sup> The first participant is an experienced Syariah lawyer of more than 10 years of experience. Aside from possessing a mediation accreditation from the Accord Group, Australia, she is also a mediation trainer and coach under Persatuan Peguam Muslim Malaysia (PPMM). The second participant is a male mediator working at the Legal Aid Department Headquarters.

<sup>97</sup> Daniel Q. Turner III (2010), "Qualitative Interview Design: A Practical Guide for Novice Investigators", 757.

<sup>98</sup> John W. Creswell, "Research Design: Qualitative, Quantitative, and Mixed Methods Approaches: Qualitative Methods," (Thousand Oaks, Sage Publications, 2014), *Qualitative Methods*, 191.

information throughout the whole interview sessions and consequently covered parts of the sessions where the recorded audio was slightly unclear or inaudible.<sup>99</sup>

Data from primary resources related to the mediator profession, such as the cost of a mediation process, professional attitude, qualifications of a mediator, and techniques and approaches used by a mediator to achieve a successful mediation process, were gained through the interview method. All interviews were executed on a one-on-one basis, and each interview generally took around two hours. In this research, the findings were confined to the respondents' responses and might not reflect all mediation practitioners under Shariah jurisdiction.

### **1.9.1.3 Respondent Sampling**

Prior to engaging with the respondents, the researcher determined a few critical criteria for sampling selection. This research applied two non-probability sampling techniques, particularly purposive sampling that included snowballing sampling. Also known as judgement sampling, purposive sampling is defined as a deliberate choice of a participant due to the qualities the participant possesses, where the researcher decides what needs to be known and sets out to find people who are cooperative to provide the information by virtue of knowledge or experience.<sup>100</sup>

For this research, several criteria were determined. First, respondents must possess a Shariah background and serve under the Shariah's jurisdiction. Another criterion was that the respondent must be recognised as a person who is qualified to practise mediation, whether by default due to his or her position as a Shariah officer, or if he or she possesses a mediation certification after attending the mediation course provided by the Accord

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<sup>99</sup> John W. Creswell (2014), "Research Design: Qualitative, Quantitative, and Mixed Methods Approaches: Qualitative Methods," 194.

<sup>100</sup> Rukayya S. Alkassim and Xuankiem Tran (2015), "Comparison of Convenience Sampling and Purposive Sampling", *American Journal of Theoretical and Applied Statistics*, 5(1), 2.

Group, Australia. Because there is no official or public list of private mediators who dealt with family cases at the Shariah courts,<sup>101</sup> the researcher had difficulty obtaining relevant respondents. As such, the snowball sampling approach was used to identify and contact said respondents.

Sharma (2017) defined snowball sampling as a non-probability sampling technique whereby existing study subjects recruit future subjects from among their acquaintances,<sup>102</sup> or through recommendation.<sup>103</sup> For private mediators, the researcher obtained respondents using this approach. Rationally, the interview approach is applied to obtain up-to-date information, explanations for fact-based questions, and more transparent opinions directly from the primary resources.<sup>104</sup> As for the number of respondents, there is no rule to determine the number of samples in a qualitative study.<sup>105</sup> Often, a small number of samples ranging from one to seven are adequate as long as the sample fits the sample criteria.<sup>106</sup> Information on the respondents who were interviewed is briefly shown in Table 1.1:

**Table 1.4. List of interviewees**

<b>Institution</b>	<b>Position</b>	<b>Personal Information</b>
Legal Aid Department	1 Mediator	
Mediators at the Shariah Courts	1 Shariah High Court Judge	
	1 <i>Sulh</i> Officer	

<sup>101</sup> The *Persatuan Peguam Syarie Malaysia* (PGSM) is an association for Syarie lawyers in Malaysia. However, they do not keep a list of Syarie Lawyers who possess mediation accreditation while the Malaysian Mediation Centre (MMC) only provides a list of civil mediators in Malaysia.

<sup>102</sup> Gaganpreet Sharma (2017), "Pros and Cons of Different Sampling Techniques", *International Journal of Applied Research*, 3(7), 751.

<sup>103</sup> Nina Nurdiani (2014), "Teknik Sampling Snowball Dalam Penelitian Lapangan", *ComTech: Computers, Mathematics and Engineering Applications*, 5(2), 1114.

<sup>104</sup> Husna Mohd Sa'adan, "Pembangunan Wakaf di Institutsi Pendidikan Tinggi Malaysia: Kajian Perundangan" (Thesis Dissertation, University of Malaya, Kuala Lumpur, 2018), 24.

<sup>105</sup> Ghazali Darusalam and Sufean Hussin, "Metodologi Penyelidikan dalam Pendidikan Amalan dan Analisis Kajian" (Kuala Lumpur: University of Malaya Publication, 2016), 433.

<sup>106</sup> *Ibid.*

Shariah Lawyers who possess Mediation Certification	5 Shariah Lawyers who possess Mediation Certification	Refer to Chapter 4 for more detailed information
Authoritative figures	1 Head of <i>Sulh</i> , Department of Shariah Judiciary (JKSM)  1 President of the Malaysian Muslim Lawyers Association (PPMM) @ Practicing lawyer and mediator	

To clarify, the main focus of this study was to identify the prospect of private mediators under Shariah jurisdiction. Hence, the research focused more on Syarie lawyers with mediation accreditation. To increase validity and not simply rely on documentation and library research, one mediator for each type of government mediator was interviewed and used for comparison, and data analysis for added value. Different sets of interview questions were given to the respondents, depending on their suitability as a type of mediator (government or private), their background (which institution), and their status (practitioner or authoritative figure).

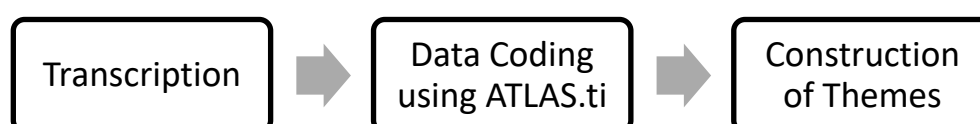
## 1.9.2 Data Analysis

Once the data collection process was completed, the data were then analysed and presented using the following methods.

### 1.9.2.1 Thematic Approach

Data analysis in this study was conducted using a thematic approach, as shown in Figure 1.2:

**Figure 1.1. The Analysis Process for Interviews**



After all the respondents were interviewed, the data obtained were transcribed by the researcher in the form of transcriptions. According to Creswell (2012), transcription is the process of converting audiotape recordings or fieldnotes into text data.<sup>107</sup> After all the interviews were transcribed, a thematic analysis approach was used to conduct data analysis and information to achieve the research objectives. The researcher used the ATLAS.ti software to divide the data into themes and code the information taken from the data collection. When allocating the codes, deductive coding was used when certain codes were created prior to analysis and the coding framework was imposed on the data, whereas inductive coding was used when the codes were generated during the coding process.<sup>108</sup>

Among the themes set using deductive coding were “the advantages of mediation”, “challenges in mediation”, “mediation fees”, “preparing a conducive environment”, “mediation skills and competency”, “practice and procedures of mediation”, as well as “defining the term Shariah Mediator”. For inductive coding, the themes set included “scope of handling Shariah cases”, “most common family cases handled”, “factors considered when accepting and mediating cases”, and “the rotation of *sulh* officers”.

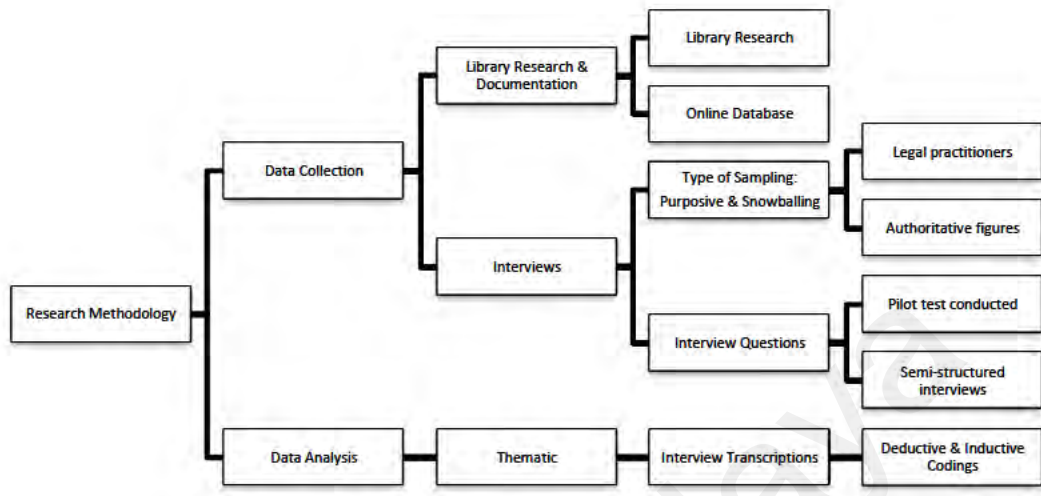
Overall, the research methodology applied for this study is summarised below:

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<sup>107</sup> John W. Creswell, “Educational Research Planning, Conducting and Evaluating Quantitative and Qualitative Research (4<sup>th</sup> Edition): Analysis and Interpreting Qualitative Data” (Lincoln: Pearson, 2012), 239.

<sup>108</sup> Elizabeth Archer, Hermen H Jase van Vuuren and Hugué D Van der Walt, “Introduction to ATLAS.ti: Allocating the codes” (6<sup>th</sup> Edition) (South Africa: Research Rescue, 2017), 26.

**Figure 0.2. The research methodology of the study**



Universiti Malaya

## CHAPTER 2: THE THEORETICAL AND CONCEPTUAL PROCESSES OF ALTERNATIVE DISPUTE RESOLUTIONS (ADR) FROM THE ISLAMIC PERSPECTIVE

### 2.1 Introduction

Justice and equity are the fundamental purposes of the Shariah principles.<sup>109</sup> The legal views of peace and violence in the classical period of Islam were articulated and applied in the light of the overall teachings and aims of Islamic law (*maqāsid al-sharī'ah*). The *maqāsid* provides a context within which the strict legality of the law was blended into the necessities and realities of communal life.<sup>110</sup>

As a religion that promotes peace and amicable settlements, Islam has laid out the necessary 'tools' to ensure that humanity lives peacefully, known as Alternative Dispute Resolutions (ADR). The importance of Chapter Two of the research is based on the fact that mediation as a process under alternative dispute resolution, would not be welcomed by society, particularly the Muslim society, unless they had a good understanding of the background of mediation.<sup>111</sup> Hence, an overview of Islam as a peaceful religion is provided, along with various Islamic dispute resolution processes.

Chapter Two begins with an explanation of the difference between Alternative Dispute Resolutions (ADR) and Islamic Dispute Resolutions (IDR), followed by explanations of each IDR process used to resolve family disputes in Islam and why *sulh*, or mediation, is considered one of the best approaches to resolving family conflicts.

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<sup>109</sup> Mohamed M. Keshavjee, *Islam, Sharia and Alternative Dispute Resolution* (London: LB Tauris & Co Ltd, 2013), 165.

<sup>110</sup> Ibrahim Kalin, "Islam and Peace: A Survey of the Sources of Peace in the Islamic Tradition", *Journal of Islamic Studies*, 44(3) (Autumn 2005), 330.

<sup>111</sup> Mohamed M. Keshavjee, "Islam, Sharia and Alternative Dispute Resolution", 165.

## 2.2 Alternative Dispute Resolutions and Islamic Dispute Resolutions

Throughout human history, three modes of dispute resolution have been known to settle disputes. They are resolution of dispute by regular formal adjudication, resolution of dispute by informal amicable means, and resolution of dispute by violence.<sup>112</sup> Resolution of disputes by informal and amicable means is later known as Alternative Dispute Resolution, a phrase not familiar in the work of classical and contemporary *fuqaha* (Muslim jurists).<sup>113</sup>

There are various terms used to describe ADR worldwide, such as Appropriate Dispute Resolution (ADR), Consensual Dispute Resolution (CDR), Conflict Resolution (CR), and Collaborative Problem Solving. In Australia, ADR is preferably called External Dispute Resolution (EDR) while the term Dispute Resolution Tools (DRT) is used in Switzerland.<sup>114</sup> Classical and contemporary scholars have given ADR countless definitions. More often than not, it is associated with western traditions.<sup>115</sup>

Hakimah Yaakob (2012) defined ADR as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes. These alternatives generally involve the intercession and assistance of a neutral and impartial third party.<sup>116</sup> Qazi Attaulah and Lutfullah Saqib (2016) then defined ADR from an objective-based and comprehensive angle, whereby ADR is a series of different modes of amicable, conclusive, and out-of-court resolution of disputes, almost resulting in a win-

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<sup>112</sup> Qazi Attaulah and Lutfullah Saqib, "Tracing the Concept of ADR in Shariah and Law", *Hamdard Islamicus* 39(3) (July-September 2016), 8

<sup>113</sup> *Ibid.*

<sup>114</sup> Hakimah Yaakob, "Alternative Dispute Resolutions" in *Alternative Dispute Resolutions (ADR) Expanding Options in Local and Cross Border Islamic Finance Cases* (Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance (ISRA), 2012), 35.

<sup>115</sup> Nora Abdul Hak, Umar A. Oseni and Nurah Sabahiah Mohamed, *Comparative Perspectives on Alternative Dispute Resolution with Reference to Malaysia*, 7.

<sup>116</sup> Hakimah Yaakob, "Alternative Dispute Resolutions" in *Alternative Dispute Resolutions (ADR) Expanding Options in Local and Cross Border Islamic Finance Cases* (Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance (ISRA), 2012), 35.



win situation.<sup>117</sup> The application of ADR processes is not limited to only one type of dispute. Among the areas that are suitable to settle using ADR are banking,<sup>118</sup> construction, consumer,<sup>119</sup> employment, and family matters. Each of these ADR processes has its own uniqueness, but they all have the same goal, which is to settle disputes amicably without having to go to litigation.

However, some scholars argued that the term ADR may not be precise enough to portray the Islamic law concepts of dispute resolution.<sup>120</sup> This is because, looking back at Islamic history during the Ottoman era, *sulh* was widely applied in court-annexed ADR processes and was considered by the Ottoman courts of the 18<sup>th</sup> century as part of the whole process of dispute resolution.<sup>121</sup> Therefore, under this research, the author would like to bring forward the term ‘Islamic Dispute Resolutions’.

Islamic Dispute Resolutions, or IDR, have a minuscule difference compared to ADR. It is almost the same as ADR. The only additional element emphasised in IDR is that the processes, procedures, and outcomes must comply with the Shariah principles<sup>122</sup> and teachings of Islam. There are eight processes of IDR recognised in Islamic law from the Quran, Sunnah and later further developed by Muslim jurists. Most of these processes

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<sup>117</sup> Qazi Attaulah and Lutfullah Saqib, “Tracing the Concept of ADR in Shariah and Law”, 16.

<sup>118</sup> Nur Khalidah Dahlan, Mohd Rizal Palil, Noor Inayah Yaa’kob and Mohamad Abdul Hamid, “Arbitration and Mediation Method Applied to Islamic Finance Conflicts in Malaysia”, *Journal of Social Science Research* 6(3) (2015), 1151-1158. See also Unaizah Abdul Manaf et al, “The Development of Islamic Finance Alternative Dispute Resolution Framework in Malaysia”, *International Business Management* 8 (1) (2014), 1-6.

<sup>119</sup> Syed Khalid Rashid, “Alternative Dispute Resolution in the Context of Islamic Law”, *The Vindobonia Journal of International Commercial Law and Arbitration* 8(1) (2004), 95.

<sup>120</sup> Nora Abdul Hak, Sa’odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 26-27.

<sup>121</sup> Isik Tamdoğan, “*Sulh* and the 18<sup>th</sup> Century Ottoman Courts of Üsküdar and Adana”, *Islamic Law and Society* 15(2008), 55-83.

<sup>122</sup> Nora Abdul Hak, Umar A. Oseni and Nurah Sabahiah Mohamed, “Comparative Perspectives on Alternative Dispute Resolutions with Reference to Malaysia: Historical Background of ADR: A Comparative Analysis” (Kuala Lumpur: IIUM Press, 2016), 8.

can be applied to settle disputes or conflicts pertaining to matters of family and *al-Ahwal al-Syakhsiyah*. They are:

- i. *Al-Qada* (The process of judicial administration)
- ii. *Sulh* (Mediation, conciliation, good faith negotiation, and compromise of action)
- iii. *Nasīhah* (Counselling)
- iv. *Tahkīm* (Arbitration)
- v. *Muhtasib* (Ombudsman)
- vi. *Fatwā al-Mufti* (Expert Determination)
- vii. *Wali al-Mazālim* (Chancellor or Special Tribunals)
- viii. Mediation-Arbitration (Med-Arb)

Although each IDR processes has its own benefits, there are certain circumstances where IDRs' agreements are rendered invalid, as mentioned in surah al-Luqman, verse 18:

وَأْمُرْ بِالْمَعْرُوفِ وَأَنْهَ عَنِ الْمُنْكَرِ (18)

*Meaning: "Enjoin what is just and forbid what is wrong."*

According to the verse, any settlement that goes against the teachings of Islam will be automatically void. When he appointed Abu Musa al-Ash'ari as a judge, Umar ibn Khattab provided guidance for him when making decisions for cases, one of which said:

“All types of compromise and conciliation among Muslims are permissible, except those which make *haram* (unlawful) anything which is *halal* (lawful), and anything that is *halal* as *haram*. ”<sup>123</sup>

Focusing on the scope of family conflicts, some IDR processes were deemed unsuitable to resolve family dispute matters, particularly *muhtasib* (Ombudsman) and *Wali al-Mazālim*.

*Muhtasib*, or hisbah,<sup>124</sup> generally aims to resolve matters pertaining to *al-amru bi al-ma'ruf wa al-nahi 'ani al-munkar*,<sup>125</sup> that is, to command what is good and forbid what is forbidden. Whilst some claimed that *muhtasib* is used for marriage consultations,<sup>126</sup> the concept of hisbah actually refers to the person who monitors the economic market and community behaviours. Hisbah is defined as the tasks performed by the state to ensure people carry out what is ordered in Islam and stay away from Islamic prohibitions in terms of measuring the appropriate dosage and scales, as well as monitoring trades to eliminate deception, fraud, and such.<sup>127</sup>

The person who handles hisbah is called the *muhtasib*. Al-Mawardi determined three forms of complaints dealt with by a *muhtasib*: I) weight and measurement complaints, II) complaints about various types of adulteration and an undue hike in the prices of items sold; and III) debtors' concerns about their inability to pay debts despite

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<sup>123</sup> Syed Khalid Rashid (2008), “Peculiarities & Religious Underlining of ADR in Islamic Law”, *Mediation in the Asia Pacific: Constraints and Challenges (16<sup>th</sup>-18<sup>th</sup> June 2008)*, *Asia Pacific Mediation Forum, Australia* at International Islamic University Malaysia, 4.

<sup>124</sup> Hisham Hanapi and Mohd Izzat Amsyar Mohd Arif, “Alternative Dispute Resolution in Islamic Law: Analysis on the Practice of *Sulh*”, *International Journal of Social Science and Humanities Research* 6(2) (April – June 2018), 327.

<sup>125</sup> Fadhli al-Ilahi, *al-Hisbah fi al-'Ashri al-Nabawi wa 'Ashari al-Khulafa al-Rasyidin* (Riyadh: Idarah Tajjamani al-Islami, 1990), 3.

<sup>126</sup> Nurul Hanis Sufia Othman et al. (2018), “Hisbah and Its Importance in Marriage Consultations”, *Journal of Islamic Social Sciences and Humanities*, 15(Oct), 127-136.

<sup>127</sup> Fahrur Rozi (2019), “Hisbah in Islam”, *Journal of Islamic Studies and Education*, 10(1), 2.

having the financial means to do so.<sup>128</sup> As such, *muhtasib* does not deal with cases involving family conflicts.<sup>129</sup>

For *wali al-Mazālim*, it is a process that combines the roles of a judge at court and *muhtasib* (ombudsman).<sup>130</sup> It is also known as a special tribunal that handles serious cases involving the society that cannot be handled by the *sulh*.<sup>131</sup> Similar to *hisbah*, the scope of *wali al-Mazālim* does not involve family disputes. The third neutral party, known as the *Mazālim*,<sup>132</sup> is appointed by the ruler and given coercive powers to address complaints against the following matters: misappropriation of property; misconduct in the management of land given as private or public funds; carelessness of public records kept by registrars, accountants, and clerks; government corruption; and matters under a *muhtasib*'s jurisdiction. The jurisdiction of a *wali al-Mazālim* also involves complaints lodged by scholarship holders and complaints against individuals.<sup>133</sup>

With that said, the *muhtasib* and *wali al-Mazālim* processes were covered nor discussed in detail in this research. The researcher directed the discussion on the IDR processes that deal with family conflicts.

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<sup>128</sup> Syed Khalid Rashid (2008), "Peculiarities & Religious Underlining of ADR in Islamic Law", 9.

<sup>129</sup> Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam* (Selangor: IIUM Press), 49.

<sup>130</sup> Md. Zahidul Islam (2012), "Provision of Alternative Dispute Resolution Process in Malaysia", *IOSR Journal of Business and Management*, 6(3), 35. See also Shamrahayu A. Aziz (2012), Mechanisms for protection and enforcement of human rights in Islam. *Human Rights Law: International, Malaysia and Islamic Perspective. Malaysia: Sweet & Maxwell*.

<sup>131</sup> Muhammad Ariffuddin Arifin (2017), "Function of Shariah in Mitigating Disputes in the Construction Industry through Muhtasib, *Journal of Quantity Surveying and Construction Business*, 7(2), 72.

<sup>132</sup> See also Shamrahayu A. Aziz (2012), Mechanisms for protection and enforcement of human rights in Islam. *Human Rights Law: International, Malaysia and Islamic Perspective. Malaysia: Sweet & Maxwell*, 6.

<sup>133</sup> Md. Zahidul Islam (2012), "Provision of Alternative Dispute Resolution Process in Malaysia", 35. See also Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 50.

### 2.3 Al-Qadā (Court Adjudication)

The first process of the Islamic Alternative Dispute Resolution is al-Qadā, which refers to adjudication in Western terms. This process is essential for human societies<sup>134</sup> considering disputes are inevitable among humans. The role of al-Qadā is to eliminate chaos, extinguish atrocities, settle disputes, enjoin good, and forbid evil.<sup>135</sup> Prophet Muhammad PBUH himself attended to settle disputes among society. As Islam continued to expand throughout the world, the Prophet delegated some of his Companions throughout the Arab Lands to act as judges.

By right, adjudication should not be included as part of the Islamic ADR since ADR's definition refers to processes outside court litigation. Regardless, al-Qadā plays a significant role as part of a solution to solve disputes. Undeniably, it is regarded as the preeminent method for settling family disputes in Malaysia.

#### 2.3.1 Definition and Authorities of Al-Qadā

Al-Qadā comes from the Arabic term *qadā* (قضى) which means to judge, pass, or pronounce judgment.<sup>136</sup> The lexical meaning of *al-qada'* (القضاء) *inter alia*, settlement, termination, or a judicial decision.<sup>137</sup> The term *al-qadā* may also mean to carry out, to order, or to decide.<sup>138</sup> From an Islamic legal perspective, *al-qada* refers to settlements of disputes based on divine revelations<sup>139</sup> by an authoritative person known as an *al-qadī*

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<sup>134</sup> Abdul Karim Zaydan, "Nizām al-Qadā fī al-Syari'ah al-Islamiyyah: Ta'rīf al-Qada (Beirut, Maktabah al-Bashā-ir, 1989), 11.

<sup>135</sup> Abdul Karim Zaydan, "Nizām al-Qadā fī al-Syari'ah al-Islamiyyah: Ta'rīf al-Qada (Beirut, Maktabah al-Bashā-ir, 1989), 21.

<sup>136</sup> Abdul Karim Zaydan, "Nizām al-Qadā fī al-Syari'ah al-Islamiyyah: Ta'rīf al-Qada, 11. See also Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan, 3<sup>rd</sup> Edition (New York: Spoken Language Services, 1976), 771, term for "Qadā".

<sup>137</sup> Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan, 772, term for "Qadā".

<sup>138</sup> Ramizah Wan Muhammad, "Shari'ah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study", *Journal of Muslim Minority Affairs* 29(1) (March 2009), 128.

<sup>139</sup> *Ibid.*

(judge). Abdul Karim Zaydan (1976) defined *al-qada* as an injunction of matters relating to *hukm syarak* that binds the parties involved.<sup>140</sup>

Therefore, the process of *al-qada* can be defined as a process where a judge administers justice between two disputing parties through inquisitorial proceedings that culminate in an enforceable judgement by referring to the divine revelations of Islam and his judicial creativity. Allah SWT decreed in surah al-Ghafir, verse 20:

”وَاللَّهُ يَفْضِي بِالْحَقِّ وَالَّذِينَ يَدْعُونَ مِنْ دُونِهِ لَا يَفْضُونَ بِشَيْءٍ ۗ إِنَّ اللَّهَ هُوَ السَّمِيعُ الْبَصِيرُ .“

*Meaning: “And Allah judges with truth, while those invoke besides Him judge with not with anything. Indeed, Allah – He is the Hearer, the Seer (20)”*

Another example of a Quranic verse that suggests the application of an al-Qadā in Islam can be seen in surah al-Ma’idah, verse 49:

”وَأَنِ احْكُم بَيْنَهُم بِمَا أَنْزَلَ اللَّهُ“

*Meaning: “And so judge between them by what Allah has revealed.”*

Al-Qada is a form of communal obligation (*fardhu kifayah*).<sup>141</sup> It is an obligation that must be discharged by the Muslim community as a whole. In other words, the ruler of a country must appoint qualified individuals to take on the responsibilities of judges, hence freeing this obligation from others. If it is not sufficiently executed, then every Muslim must act to address the deficiency.<sup>142</sup>

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<sup>140</sup> Abdul Karim Zaydan, “*Nizām al-Qadā fī al-Syari’ah al-Islamiyyah: Ta’rif al-Qada*, 12.

<sup>141</sup> Abdul Karim Zaydan, “*Nizām al-Qadā fī al-Syari’ah al-Islamiyyah: Ta’rif al-Qada*, 13.

<sup>142</sup> Fard al-Kifayah is defined as a communal obligation in Muslim legal doctrine: (n.a), term for “*Fard al-Kifayah*”, *The Oxford Islamic Studies Online*, accessed 7<sup>th</sup> February 2020, <http://www.oxfordislamicstudies.com/article/opr/t125/e625>

### 2.3.2 Nature and Conditions of Al-Qadā

From the definition above, it is apparent that any judgment made in an adjudication process has a binding quality upon the parties involved.<sup>143</sup> The settlement of disputes through al-Qada is carried out formally at Shari'ah Courts. Basically, the Shari'ah courts are meant for Muslim and non-Muslim individuals. This is prescribed in the constitution of Madinah, wherein Prophet Muhammad PBUH became the supreme judge for all types of cases.<sup>144</sup> Aside from settling disputes, al-Qadā is devised as an instrument to promote virtue and forbid wrongdoings.<sup>145</sup> The execution of a just adjudication is not just a secular assignment but, more importantly, a solemn duty and a form of divine trust (*amānah*) bestowed upon a Shari'ah judge.<sup>146</sup>

### 2.3.3 Third-Neutral Intervener in Al-Qadā

The third-neutral authoritative intervener in al-Qadā is known as a judge or *al-qadī*. The *qadī* is a state appointee who is bound to follow Islamic law and courtroom procedures, and judgements made by the *qadi* bind the litigants before him.<sup>147</sup> Looking back at the definition of al-Qadā, a *qadī*'s role is basically to resolve disputes and allocate rights to litigants.<sup>148</sup>

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<sup>143</sup> Ahmad Ibrahim, "Position of the Shariah Courts in the Administration of Justice", 142. Accessed on 7<sup>th</sup> February 2020, <http://eprints.um.edu.my/13689/1/0001.pdf>

<sup>144</sup> Ramizah Wan Muhammad, "Shari'ah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study", 128.

<sup>145</sup> Abdul Karim Zaydan, "*Nizām al-Qadā fī al-Syari'ah al-Islamiyyah: Ta'rif al-Qada*, 15.

<sup>146</sup> Sayed Sikandar Shah Haneef, Mohd Abbad Abdul Razak and Hayatullah Laluddin, "Shariah

<sup>147</sup> Aida Othman, "And Amicable Settlement Is Best": *Sulh* and Dispute Resolution in Islamic Law", *Arab Law Quarterly* 21(2007), 68.

<sup>148</sup> Joe Bradford, "Two in Hell, One in Heaven: Dispute Resolution in Islamic Law" on 30<sup>th</sup> September 2017, Joebradford.net, accessed 9<sup>th</sup> February 2020, <https://www.joebradford.net/two-in-hell-one-in-heaven-dispute-resolution-in-islamic-law/>. Joe Bradford is an American scholar of Islam with a Masters of Islamic Law, University of Medina and has studied traditionally in the Muslim world for at least 20 years.

When making a judicial judgment, it is also a qadi's responsibility to ensure that the adjudication process is executed relatively without any prejudice,<sup>149</sup> as decreed in Surah al-Nahl, verse 90:

إِنَّ اللَّهَ يُأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ  
وَالْبَغْيِ ۗ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ

Meaning: “Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded (90)”

Because the qadi holds such responsibility, Muslim jurists carefully stipulate requirements or conditions for the post. It is, therefore, a prerequisite in Islam that a qadi must be a Muslim, free (not a slave), and have a sound mind. Muslim jurists also stressed that a qadi must be fair (*al-Adil*).<sup>150</sup> Prophet Muhammad PBUH instructed Ali ibn Abi Thalib before he was sent to Yemen:

”إن الله سيهدى قلبك ، ويثبت لسانك ، فإذا جلس بين يديك الخصمان فلا تقضين حتى تسمع من الآخر كما سمعت من الأول ، فإنه أحرى أن يتبين لك القضاء“ .

Meaning: “Allah will guide your heart and keep your tongue true. When two litigants sit in front of you, do not decide till you hear what the other has to say as you heard what the first had to say, for it is best that you should have a clear idea of the best decision.”<sup>151</sup>

Solahuddin al-Nāha (1984) added that it is essential for a judge to be a learned person in Islamic law.<sup>152</sup> The phrase ‘learned in Islamic law’ is when an individual can issue a decree that does not go against Islamic revelations and precedence.<sup>153</sup> More specifically,

<sup>149</sup> Surah al-Nahl, verse 90. See also Surah al-Nisaa’, verse 105.

<sup>150</sup> Solahuddin al-Nāha, *Raudhah al-Qada wa Tariq al-Najat* (Beirut: Dar al-Fikrah ‘Aaman: 1984) Volume 1, 43.

<sup>151</sup> Sunan Abi Daud: 25, Hadith No.3582, accessed online on 13<sup>th</sup> February 2020, <http://qaalarasulallah.com/hadithView.php?ID=23583>

<sup>152</sup> Solahuddin al-Nāha, *Raudhah al-Qada wa Tariq al-Najat*, 54.

<sup>153</sup> Ramizah Wan Muhammad, “Shari’ah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study”, 131.



a judge must be a *mujtahid*.<sup>154</sup> This view is held by the Syafi'e, Maliki, and Hanbali scholars.<sup>155</sup> A *mujtahid* is a person who exercises *ijtihad*, which is the exertion of one's judgment.<sup>156</sup> Prophet Muhammad PBUH is reported to have asked Mu'adz ibn Jabal before sending him to Yemen:

أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بَعَثَ مُعَاذًا إِلَى الْيَمَنِ، فَقَالَ: «كَيْفَ تَقْضِي؟»،  
 فَقَالَ: أَقْضِي بِمَا فِي كِتَابِ اللَّهِ، قَالَ: «فَإِنْ لَمْ يَكُنْ فِي كِتَابِ اللَّهِ؟»، قَالَ: فَبِسُنَّةِ  
 رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: «فَإِنْ لَمْ يَكُنْ فِي سُنَّةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ  
 عَلَيْهِ وَسَلَّمَ؟»، قَالَ: أَجْتَهُدُ رَأْيِي.

*Meaning: Rasulullah PBUH asked Mu'az ibn Jabal before sending him to Yemen: "How will you give a judgment or settle a dispute?" Mu'az answered: "I will refer to the Quran." The Prophet then asked: "What will you do if the decree you are looking for is not in the Quran?" Mu'az answered: "I will refer to the Prophet's Sunnah." Rasulullah continued to ask: "And if you do not find a decree even in the Sunnah?" Mu'az answered: "I will resort to juristic reasoning (ijtihad) to the best of my power."<sup>157</sup>*

From here, it is clear that one major ability that a qādi possesses in Shariah jurisdiction is the ability to interpret and express what the law is. A qādi also holds the authority to order the code to be applied by the executive power, which appointed him to settle disputes. One condition that causes disagreement between Muslim jurists is the appointment of a female judge. The Syafie', Maliki, and Hanbali scholars believe that a judge must be a man. They based their argument on surah al-Nisaa', verse 34:

"الرِّجَالُ قَوُّمُونَ عَلَى النِّسَاءِ "

<sup>154</sup> Abdul Karim Zaydan, "Nizām al-Qadā fī al-Syari'ah al-Islamiyyah: Ta'rif al-Qada, 29.

<sup>155</sup> *Ibid.*

<sup>156</sup> Ralph H. Salmi, Cesar Abid Majul and George K. Tanham, *Islam and Conflict Resolution Theories and Practices: The General Nature and Development of Islamic Law* (New York: University Press of America, Inc., 1998), 53.

<sup>157</sup> Abdul Rahman ibn Muhammad ibn Qāsim al-Asīmi al-Qahtāni al-Hanbali al-Najdi, "Hāsiyah Kitāb al-Tauhīd: Bab Man Atā'a al-Ulama wa al-Amrā' fī Tahrīm ma Uhil".

*Meaning: "Men are the caretakers of women."*

To these jurists, the verse implies that men are leaders to women, and these interpretations are also agreed upon by countless Muslim interpreters, including Ibn Kathir and al-Fakhrulrazi.<sup>158</sup> Still, the prospect of leadership in this verse has differing interpretations as to whether it revolves around family matters or expands beyond societal matters.<sup>159</sup> This verse was also interpreted as a sign of physical and intellectual superiority for men compared to women.<sup>160</sup> Another source that is used to support this condition is a hadith narrated;

" ما أفلح قوم ولوا أمرهم امرأة "

*Meaning: "That a nation can never prosper which has assigned its reign to a woman."*<sup>161</sup>

Conversely, scholars such as the Hanafis state that a woman can be a judge in matters excluding hudud and *qisās* based on women's eligibility to be witnesses in commercial transactions, while Imam Ibn Jabir al-Thabārī supports women to hold the position of judge, in which he compares *al-qada* to the process of giving out al-fatwas by female muftis.<sup>162</sup> Khadijah M. Salleh (1994) too commented on the idea of the intellectual superiority of men by commenting that should one have 'good understanding of the Quran', there is the realisation that 'Allah does not in any way discriminate the intellectual capacity of a man from that of a woman.'<sup>163</sup>

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<sup>158</sup> See Ibn Kathīr, *Tafsir al-Quran al-Azim* (n.p: Maktabah Zahran, n.d), 1, 492 and al-Fakhrurazi, *Tafsir al-Fakhrurazi* (Beirut: Dar al-Fikr, 1994), 92.

<sup>159</sup> Raihanah Abdullah "Pegawai Syariah Wanita di Mahkamah-Mahkamah Syariah di Malaysia" (Article, Current National Islam Law Seminar, Department of Fiqh and Usul, University of Malaya, 17-18<sup>th</sup> June 1997), 376 – 390.

<sup>160</sup> Al-Tabatabai, *Mizān fī Tafsir al-Quran* (n.p, Muassasah al-'Alāmī, 1984), 4, 343.

<sup>161</sup> Al-Bukhari, Hadith 1456, Muhammad Nāsir al-Dīn al-Albānī, "Irwa' al-Ghalīl fī Takhrīj Ahādith Manār al-Sabīl" Vol. 8 (Beirut: al-Maktabal-Islami, 1985), 109.

<sup>162</sup> Abdul Karim Zaydan, "Nizām al-Qadā fī al-Syari'ah al-Islamiyyah: Ta'rif al-Qadā, 30.

<sup>163</sup> Khadijah M. Salleh, *Women in Development* (Kuala Lumpur, Institute of Policy Studies, 1994), 7.

#### 2.3.4 Al-Qadā in Malaysia

In Islam, the jurisdiction of the Shari'ah courts is called "*Wilayah al-Qada*". The term "*Wilayah*" indicates the territorial limits within which a judge is allowed to hear cases, have proceedings, and give judgments accordingly.<sup>164</sup> In Malaysia, *al-Qada* (adjudication) practises a dualism system consisting of civil courts and Shariah courts. There are three types of courts in Malaysia: The Civil Courts, the Native Courts (Penghulu Courts), and the Shariah Courts.

Theoretically, Islam dictates that a qadi's decision is binding and final. However, premodern Muslim polities developed a mechanism that allows a qadi's verdict to be reviewed. Focusing on Shari'ah courts, the system is divided into three courts: specifically the Shari'ah Subordinate Court, Shari'ah High Court, and finally, the Shari'ah Appeal Court.<sup>165</sup> Shari'ah courts are under the state jurisdiction of each respective state in Malaysia, and any matters within their jurisdiction cannot be interfered with by the civil courts.<sup>166</sup>

Unlike the past, where Prophet Muhammad PBUH adjudicated all forms of Muslim and non-Muslim disputes, the present administration of Shariah courts in Malaysia is only applicable to Muslims and relates to laws of personal status that consist mainly of family law, the law of inheritance, and criminal law. For criminal law, the Shariah courts may only exercise their jurisdiction for criminal cases under the Shariah Courts (Criminal Jurisdiction) (Amendment and Extension) Act 1989 with limited jurisdiction over punishments.

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<sup>164</sup> Ramizah Wan Muhammad, "Shari'ah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study", 129.

<sup>165</sup> Ramizah Wan Muhammad, "Shari'ah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study", 128.

<sup>166</sup> Article 121 (1A), "Judicial Power of the Federation", Part IX The Judiciary, Federal Constitution of Malaysia, 112.

The Malaysian constitution dictates that the appointment and dismissal of a Shariah judge are made by the Sultans<sup>167</sup> in their own states except for the Federal Territories of Kuala Lumpur, Putrajaya, and Labuan. As these three areas do not have a Sultan, matters involving the appointment and dismissal of Shariah judges are made by the Yang-Dipertuan Agong (YPDA) of Malaysia.<sup>168</sup>

The appointment of female judges in Shariah courts remains a controversial issue due to the perception that such appointments may not conform with the Shariah. Despite this perception, circumstances have evolved in modern times, and societies have become more receptive to accepting women in leadership positions as is the case in Malaysia. In the case of female Shariah judges, Selangor is the first state to elect a female as a Shariah High Court Judge.<sup>169</sup>

#### 2.4 *Sulh* (Mediation)

The act of settling disputes through *sulh* is encouraged in Islam and considered one of the highest forms of good deeds.<sup>170</sup> It is established to conciliate two disputing parties, cleanse their souls, and diminish hatred among them. *Sulh* is regarded as the greatest form of obedience when done with the aim of seeking Allah's blessings.<sup>171</sup>

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<sup>167</sup> Hj Iknor Azli Ibrahim and Md Yazid Ahmad, "*Hakim Syarie: Pemilihan, Perlantikan dan Bidangkuasa*", *USIM Journal Kajian Shariah dan Undang-Undang* 2(2005), 21-22.

<sup>168</sup> Ramizah Wan Muhammad, "Shari'ah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study", 128.

<sup>169</sup> Ramizah Wan, "*Kewibawaan Hakim Shariah Wanita Usah Dipertikai*", *Berita Harian Online* (12<sup>th</sup> Januari 2018), accessed 13<sup>th</sup> February 2020, <https://www.bharian.com.my/rencana/komentar/2018/01/374422/kewibawaan-hakim-Shariah-wanita-usah-dipertikai>

<sup>170</sup> Muhammad ibn Ibrahim ibn Abdullah Tuwayjiri, *Al-Sulh in Mukhtasar al-Fiqh al-Islami fi Daw' al-Quran wa al-Sunnah* (Al-Qasim, Buraydah: Dar Asda' al-Mujtama', 2010), 740.

<sup>171</sup> *Ibid.*

### 2.4.1 Definition and Authorities of *Sulh*

In Islamic tradition, *sulh* is viewed as a religious, ethical, and legal term.<sup>172</sup> Etymologically, the term ‘*al-sulh*’ is derived from the Arabic word *salaha* (سَلَحَ) which means to be good, right, proper, thrive, useful, practicable, serviceable, or permissible. It also means to put in order, make amends, compensate, mend, improve, fix, or ameliorate.<sup>173</sup> The opposite of *sulh* is *niza* (النزاع) or *fasad* (الفساد)

Linguistically, *sulh* means peacemaking,<sup>174</sup> peace, conciliation or reconciliation, compromise, settlement, and conclusion of peace.<sup>175</sup> *Sulh* is a noun for reconciliation which means ‘peace after conflict’ and technically is an agreement that resolves said conflict.<sup>176</sup> In Arabic philology, *sulh* simply means good faith negotiation.<sup>177</sup> Although there are differences among the Syafie, Hanafi, Hanbali, and Maliki schools of thoughts regarding multiple issues in Islam, the concept of *sulh* is one on which there is near unanimity.<sup>178</sup> For instance, Article 1531 of the *Majallah al-Ahkam al-‘Adliyyah* defines *sulh* as a contract concluded by offer and acceptance by mutual consent between parties to settle a dispute.<sup>179</sup> Al-Tuwaijiri (2010) defines *sulh* as a contract in which a dispute between two adversaries is ceased or put to an end.<sup>180</sup>

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<sup>172</sup> Işik Tamdoğan, “*Sulh* and the 18<sup>th</sup> Century Ottoman Courts Of Üsküdar And Adana”, *Islamic Law and Society*, Vol 15 (1) (Jan 2008), 63.

<sup>173</sup> Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan, 3<sup>rd</sup> Edition (New York: Spoken Language Services, 1976), 521, term for “*Sulh*”

<sup>174</sup> Ibn Qaim al-Jawziyyah, *I‘lam al-Muwaqi‘in, ‘an Rab al-‘Alamin*, vol 1, 109.

<sup>175</sup> Hans Wehr, *A Dictionary of Modern Written Arabic*, 522.

<sup>176</sup> Ibn Qaim al-Jawziyyah, *I‘lam al-Muwaqi‘in, ‘an Rab al-‘Alamin*, 109.

<sup>177</sup> Nora Abdul Hak, Sa’odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 19.

<sup>178</sup> Mohamed M. Keshavjee, *Islam, Sharia and Alternative Dispute Resolution* (London: LB Tauris & Co Ltd, 2013), 66.

<sup>179</sup> In this thesis, an English translation of the *Majallah al-Ahkām al-‘Adliyyah* is referred to. This reference is the first civil codification of Muslim Law during the Ottoman Empire. It represents an attempt to codify part of the Hanafi’s scholar on transaction. The English translation is obtained through [http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20\(Civil%20Law\).pdf](http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf).

<sup>180</sup> Muhammad ibn Ibrahim ibn Abdullah Tuwayjiri, *Al-Sulh in Mukhtasar al-Fiqh al-Islami fi Daw’ al-Quran wa al-Sunnah*, 740.

In the modern era, *sulh* is referred to as a private agreement between disputing parties to settle a dispute amicably<sup>181</sup> without having to resort to litigation. According to Nora Abdul Hak et al. (2013), the definition of *sulh* is vast enough to include every mode of amicable settlement<sup>182</sup> including conciliation, mediation, and negotiation. It could also be known as negotiated facilitation.<sup>183</sup>

The approach of *sulh* is based on reliable sources in Islam, mainly the verses of the Quran, principles derived from the Prophet's (PBUH)'s Sunnah, Muslim juridical thoughts, and the sayings of the Imams.<sup>184</sup> *Sulh* has been mentioned multiple times in the Holy Quran, such as in surah al-Hujurat, verses 9-10 where Allah SWT has decreed:

وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا ۚ فَإِنْ بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَىٰ  
فَقَاتِلُوا الَّتِي تَبْغِي حَتَّىٰ تَفِيءَ إِلَىٰ أَمْرِ اللَّهِ ۚ فَإِنْ فَاءَتْ فَأَصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا ۚ  
إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ (9) إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ  
لَعَلَّكُمْ تُرْحَمُونَ (10)

*Meaning: "And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly (9) The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy (10)"*

From these verses, it tells us that when two or more believers of Islam are caught in an argument, dispute, or fight, Allah SWT decreed to make peace between the disputants by referring to the teachings in the Holy Quran and bring contentment to both parties by

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<sup>181</sup> *Ibid.*

<sup>182</sup> Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, xxii.

<sup>183</sup> Mohamed M. Keshavjee, *Islam, Sharia and Alternative Dispute Resolution*, 66.

<sup>184</sup> *Ibid.*

achieving *islah* among them justly, fairly, and without bias. The term *islah* here refers to peacemaking.<sup>185</sup>

Also, Allah SWT has decreed in surah al-Nisaa', verse 128:

وَإِنْ امْرَأَةٌ خَافَتْ مِنْ بَعْلِهَا نُشُورًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا وَالصُّلْحُ خَيْرٌ وَأُحْضِرَتِ الْأَنْفُسُ الشُّحَّ ۗ وَإِنْ تُحْسِنُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا (128)

*Meaning: "An if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them – and settlement is best. And present in (human) souls is stinginess. But if you do good and fear Allah – then indeed Allah is ever, with what you do, Acquainted."*

For this verse, some Muslim scholars elaborated that the 'ال' in ((الصلح محمدا)) means that the verse refers to amicable settlements in marital disputes only.<sup>186</sup> However, Yasin Muhammad Yahya contended that this textual evidence may generally be applied in any form of dispute, and this opinion was supported by the three main scholars of Islam minus the Syafi'e scholar, who excluded *sulh al-ingkar* from the equation.<sup>187</sup>

*Sulh* does not only bring benefits to those who conciliate. Islam puts a high status for people who conciliate disputes, as mentioned in surah al-Nisaa', verse 114:

لَا خَيْرَ فِي كَثِيرٍ مِّنْ نُّجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ بَيْنَ النَّاسِ ۗ وَمَن يَفْعَلْ ذَلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا (114)

*Meaning: "No good is there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between*

<sup>185</sup> Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan, 3<sup>rd</sup> Edition (New York: Spoken Language Services, 1976), 522-523, word "ح "

<sup>186</sup> Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam* (Gombak: IIUM Press, 2011), 28.

<sup>187</sup> Yasin Muhammad Yahyā, 'Aqd al-*Ṣūlḥ* Bayna Al-Syari'ah al-Islāmiyyah wa al-Qanūn al-Madani: Dirāsāt Muqāranah (Lebanon: Dār al-Fikr al-'Arabī, 1978), 142.

*people. And whoever does that seeking means to the approval of Allah – then We are going to give him a great reward.”*

Prophet Muhammad PBUH is reported to have said:

" الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِينَ إِلَّا صُلْحًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا وَالْمُسْلِمُونَ عَلَى شُرُوطِهِمْ إِلَّا شَرْطًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا "

*Meaning: “Reconciliation is allowed among the Muslims, except for reconciliation that makes the lawful unlawful, or the unlawful lawful. And the Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful.”<sup>188</sup>*

Prophet Muhammad PBUH also mentioned to his companions:

*“May I tell you of a work better than praying, fasting, and charity, they replied by saying, yes messenger of Allāh. He said that is to mediate between those who had a conflict between them.”<sup>189</sup>*

#### **2.4.2 Correlation Between *Sulh* and Mediation**

The terms *sulh* and mediation are often used interchangeably.<sup>190</sup> In Islam and modern practice, mediation is often understood as the process of, or a part of, *sulh*. Many scholars equated *sulh* to mediation, where both are used as a platform for disputants to settle their disputes amicably without resorting to litigation.<sup>191</sup> Both processes are similar in terms of execution, where *sulh* and mediation both involve a neutral third party. The decisions and agreements made are based on the parties' consent and the nature of the unbinding settlement.

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<sup>188</sup> Soleh ibn Fauzan ibn Abdullah al-Fauzan, “*I’aanah al-Mustafid bi-syarh Kitab al-Tauhid :AL-Sabi’ Wa Arba;uun: Ihtiram Asma Allah,*” Mu’assasah al-Risalah 2(2002), 185.

<sup>189</sup> Sunan Abī Dāwud, adīth 4273

<sup>190</sup> Hakimah Yaakob, “*Alternative Dispute Resolutions (ADR) Expanding Options in Local and Cross Border Islamic Finance Cases: Mediation*” (Kuala Lumpur: International Shari’ah Research Academy for Islamic Finance (ISRA), 2012), 43.

<sup>191</sup> Mohammad Hafiz bin Mohd Zaki et.al, “*Mediation v. Sulh: A Comparative Study*” (ICDR 2017: Modern Trends in Effective Dispute Resolution Proceedings, Ahmad Ibrahim Kulliyah of Laws, 2017) 225.



In its purest form, mediation can be viewed as the facilitation by an impartial third party of a negotiated agreement by two or more disputants or their representatives. During the facilitation, the third party, known as the mediator, does not decide the outcome of the dispute. Instead, he or she would facilitate communication and problem-solving efforts made by the disputing parties themselves. Although many scholars defined *sulh* as mediation, some viewed it otherwise.

Said Bourheraoua identified *sulh* as conciliation. On the other hand, mediation is viewed as another process entirely. According to him, the common terms used for mediation are '*Wasaatah*' which is applied in Islamic Judiciary; '*al-Shafaa*', '*al-Jaryu*', '*Husnu al-Sifara*,'<sup>192</sup> '*Tawasut*' by Al-Jahshiary; and the longest term for mediation is '*al-Mashyu Bayna al-Mutanaziinah*' which means 'walking between disputants.'<sup>193</sup> Practically, a mediation process that abides by the principles of Shariah is known as *sulh* or *wisatoh*, which is a contract that ends disputes voluntarily and with consent.<sup>194</sup>

According to Muhammad Rafiqul Hoque and Muhammad Mustaqim Mohd Zarif, *sulh* means mediation. The term '*sulh*' refers to Alternative Dispute Resolutions (ADR) from a wider perspective, but from a narrower perspective, *sulh* refers to a process or method of ADR in which a third party assists parties to settle their dispute amicably.<sup>195</sup>

As this research places a high emphasis on the process of contemporary *sulh* practitioners, the author would also like to highlight the preference for similar meaning between mediation and *sulh* in Malaysia. By all odds, the *sulh* process is highly valued in

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<sup>192</sup> Said Bourheraoua, "Foundation of Mediation in Islamic Law and its Contemporary Application", 2.

<sup>193</sup> Al-Jahshiary, *Kitab al-Wuzarā*, 142 and 187.

<sup>194</sup> Zainul Rijal Abu Bakar and Nurhidayah Muhammad Hashim, "Selesai Kes Secara Mediasi" in *Keistimewaan Islam dan Undang-Undang Shariah Di Malaysia* (Kuala Lumpur: Institut Terjemahan & Buku Malaysia, 2016), 81.

<sup>195</sup> Muhammad Rafiqul Hoque and Muhammad Mustaqim Mohd Zarif, "The Paradoxical Use of the Term Sulh: An Analytical Study from the Quranic Perspective", *Journal of Ma'alim al-Quran wa al-Sunnah*, 16(1)(2020), 1- 14.

Malaysia for settling family disputes amicably. Although there are slight arguments about the similarities and differences between mediation and *sulh*, the author has decided to put aside the differences and view mediation as equivalent to *sulh* in this research for better understanding when discussing the approach and practise of contemporary mediators under the Shariah jurisdiction.

### 2.4.3 Types of *Sulh*

*Sulh* has been given various classifications by Muslim jurists. The classifications are made based on how the term ‘*sulh*’ is understood by the major schools of thought.<sup>196</sup> Generally, the types of *sulh* can be categorised into three forms, as mentioned below:

#### i. Types of *sulh* based on its nature

Based on its nature, *sulh* can be divided into two categories which are permissible *Sulh* (الصلح الجائز)<sup>197</sup> and disapproved *Sulh*.<sup>198</sup> The term ‘permissible’ here refers to just or fair *sulh*. Permissible *sulh* can be defined as a form of negotiated settlement whose basis pleases Allah’s injunctions and the parties. In this settlement, disputing parties negotiate and stand to benefit from the settlement.<sup>199</sup> In order for the *sulh* settlement to remain permissible, any agreements made must be within the rules stipulated in fiqh rulings and sources of Islam, including what is halal or haram.<sup>200</sup>

Disapproved *sulh*, on the other hand, is the opposite of permissible *sulh*. Any form of settlement that opposes the characteristics of permissible *sulh* is considered unjust,

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<sup>196</sup> Nora Abdul Hak, Sa’odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam* (Gombak: IIUM Press, 2011), 28.

<sup>197</sup> Muhammad ibn Ibrahim ibn Abdullah Tuwayjiri, *Al-Sulh in Mukhtasar al-Fiqh al-Islami fi Daw’ al-Quran wa al-Sunnah*, 742.

<sup>198</sup> Nora Abdul Hak, Sa’odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam* (Gombak: IIUM Press, 2011), 28.

<sup>199</sup> Md. Mashiur Rahman (2018), “*Sulh: Towards a More Comprehensive Understanding*”, *Journal of Asian and African Social Science and Humanities*, 4(1), 43-44.

<sup>200</sup> *Ibid.*

unfair, and disapproved under Islamic Law.<sup>201</sup> Also, anything that contradicts the teachings of Islam is not allowed. Therefore, such settlements that fit this criterion are automatically considered void.

**ii. Types of *sulh* based on its subject matter and parties involved in the *sulh* process.**

For this type of *sulh*, *sulh* can be divided into five categories<sup>202</sup> which are *Sulh* between Muslims and non-Muslims, *sulh* between government and rebellions, *sulh* in marital disputes, *sulh* in matters that are not related to property, and *sulh* in transactions between disputing parties over property. An example for *sulh* in matters that are not related to property is *sulh* between the victim or the victim's guardian and the criminal in *Qisas*. Between these processes, the most important aspect of life where *sulh* is applied can be seen in the area of marital disputes, whether the process is done formally or informally.<sup>203</sup>

**iii. Types of *Sulh* based on Hanafi's school of thought**

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<sup>201</sup> Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 28-29.

<sup>202</sup> Nora Abdul Hak, Umar A. Oseni and Nurah Sabahiah Mohamed, *Comparative Perspectives on Alternative Dispute Resolution with Reference to Malaysia*, 68. See also Raihanah Azahari, *Sulh dalam Kes Kekeluargaan Islam*, 31-32 and Md Mashiur Rahman (2018), "Sulh: Towards A More Comprehensive Understanding of the Process", *Journal of Asian and African Social Science and Humanities*, 4(1), 44-45.

<sup>203</sup> Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam* (Gombak: IIUM Press, 2011), 31.

The Hanafi classification of *sulh* is greatly influenced by the procedural circumstances under which the parties arrive at a settlement agreement.<sup>204</sup> Hanafi scholars divided *sulh* into three categories, which are:

- *Sulh al-Iqrār*: This means settlement on the admission of the defendant. The dispute ends when the defendant admits that there is a proof against him on the subject matter of a dispute.
- *Sulh al-Sukūt*: This means settlement on the silence of the defendant. A settlement becomes possible when the defendant neither admits nor denies an allegation or claim.
- *Sulh al-Inkārah*: This means settlement on the denial of the defendant. A settlement takes place when the defendant denies an allegation or claim made by the other party, and the latter may decide to negotiate the terms of settlement.

#### 2.4.4 Nature and Conditions of *Sulh*

*Sulh* is a method of dispute resolution recommended and encouraged in Islam. There are certain limitations that must be adhered to when executing the process of *sulh*. For example, Muslims cannot resort to *sulh* in cases involving *huquq Allah*, such as hudud and qisas. Throughout the process, the mediator and disputants must avoid any form of unfairness throughout the whole process and in the settlement agreement, should the conciliation turn out to be successful.

Although generally not binding, an agreement made based on *sulh* becomes binding once it is voluntarily agreed upon by the parties, written by the mediator, and later

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<sup>204</sup> Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam* (Gombak: IIUM Press, 2011), 32-34.

endorsed by the judge. A *sulh* agreement could be passed outside of court settings, either between the disputing parties themselves or with the help of a private mediator.<sup>205</sup> Nonetheless, this opens up the risk of the annulment of the settlement if one of the disputants is denounced by a qadi in court.<sup>206</sup> Therefore, a *sulh* agreement ratified by a judge in court is more enforceable compared to one agreed outside the institution.<sup>207</sup>

There are several essential elements for a valid *Sulh* agreement under Islamic Law:

- i. *Al-Musālih Alaihi* (Alternatives to matter in disputes)
- ii. *‘Āqidān* (Disputing Parties)
- iii. *Al-Musālih Anhu* (Matter of Dispute)
- iv. *Al-Ījāb wa al-Qabūl* (Pronouncement of Offer and Acceptance)

First of all, *sulh* requires an affirmative statement from the disputants in order to end the dispute. This affirmation is made through an *‘aqd* through *ijab* and *qabul*. Islamic Law dictates that *ijab* and *qabul* for *sulh* have to be executed in one setting. The offer (*ijab*) must be followed by acceptance (*qabul*) and if *qabul* is delayed, it is viewed as rejected. Delay of *ijab* and *qabul* would otherwise indicate unwillingness of the party to sign the settlement.<sup>208</sup>

Meanwhile, modern western mediation sets four basic principles for mediation: neutrality of the mediator, voluntary participation of the parties, confidentiality between

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<sup>205</sup> Mathieu Tillier, “Arbitration and Conciliation in the first Centuries of Islam: Theories, Practices and Social Uses”, *Review of the Muslim Worlds and the Mediterranean*, Issue 140 (Dec 2016), 1-22.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> Raihanah Azahari, “Modifikasi Teori Sulh Dalam Fiqh Klasik Berasaskan Data-dataKajian Terbaru,” *Jurnal Pengajian Melayu* 17 (2006), 234.

the mediator and the parties, and procedural flexibility available to the mediator.<sup>209</sup> These principles coincide with the nature of *sulh* in Islam.

#### 2.4.5 Third-Party Intervener in *Sulh* Process

The third-neutral party in a *sulh* process is known as a mediator. Because the mediator in a *sulh* process has no authority to make a settlement binding, a judge is required to endorse the *sulh* settlement. A settlement agreement only becomes a contract once it has been agreed upon by the parties and approved by the judge.

Muhammad Amanullah (2015) lists the criteria for a qualified mediator as follows:<sup>210</sup>

- i. All jurists unanimously agree that a mediator should attain the age of puberty or be an adult, not a minor.
- ii. Muslim jurists also agree that a mediator should be sane because, without sanity, the person cannot understand the different aspects of mediation, and becomes unable to conduct it.
- iii. The person should have knowledge of how and what to do for mediation. Islam encourages to acquire knowledge in all fields or aspects of human life, including mediation.
- iv. The person should have the experience and capability of practising mediation because, without experience, the work of mediation may not be done properly.

There is debate among classical Muslim jurists on how a judge should determine to resolve a dispute, whether to judge the case or promote *sulh* to the disputants. During adjudication, a judge may delay trial for a day or two to make way for *sulh* with the

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<sup>209</sup> Nora Abdul Hak Umar A. Oseni and Nurah Sabahiah Mohamed, *Comparative Perspectives on Alternative Dispute Resolution with Reference to Malaysia* (Gombak, IIUM Press, 2016), 73-75.

<sup>210</sup> Muhammad Amanullah, "Islamic Code of Conduct For Mediation: A Case Study of the Code of Conduct of Malaysian Mediation Centre (MMC), *Proceeding of the 2<sup>nd</sup> International Conference on Management and Muamalah 2015 (2<sup>nd</sup> ICoMM)*, (16<sup>th</sup> – 17<sup>th</sup> November 2015), 4.

consent of the disputing parties. If a judge finds a case difficult and obscure, he may promote *sulh* to disputing parties.<sup>211</sup>

#### 2.4.6 *Sulh* in Malaysia

The practise of *Sulh* can be identified in the history of Malaysia. It began informally as part of the society's customs, which preferred amicable settlements to litigation. Now, *sulh* is formalised in different institutions in Malaysia, and multiple laws and regulations have been gazetted to govern the *sulh* system. It is made part of the mandatory process in Malaysian Shari'ah litigation whenever the courts see fit. In Shariah courts, people who are appointed as mediators to resolve cases under the Shariah jurisdiction in Malaysia are known as *sulh* officers. Examples of laws and regulations set for the state of Selangor concerning *sulh*, listed by Sa'odah Ahmad and Nora Abdul Hak (2010), are as follows:<sup>212</sup>

- i. The Administration of Islamic Religious Enactment 2003.
- ii. The Shariah Court Civil Procedure Enactment 2003.
- iii. The Civil Procedure (*Sulh*) Rules 2001.
- iv. The Islamic Family Law Enactment 2003.
- v. The *Sulh* Work Manual, Department of Shariah Judiciary, Malaysia (JKSM) 2002.
- vi. The *Sulh* Officer Ethical Code, JKSM 2002.
- vii. The Selangor Shariah Court Chief Justice General Order 9/2002 [Jurisdiction of *Sulh* Officer (Judge)].
- viii. The Practice Direction JKSM 3/2002 (Application of *Sulh*).

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<sup>211</sup> Aida Othman, ““And Amicable Settlement Is Best”: *Sulh* and Dispute Resolution in Islamic Law”, *Arab Law Quarterly* 21(2007), 78.

<sup>212</sup> Sa'odah Ahmad and Nora Abdul Hak, “*Sulh* (Mediation) in the State of Selangor: An Analysis of Legal Provisions and Application”, *IJUM Law Journal* 18(2) (2010), 215.

- ix. The Practice Direction JKSM 7/2002 (Method of Storing and Dissolving *Sulh* Record).
- x. The Practice Direction JKSM 8/2002 (*Sulh* Notice Procedure)

## 2.5 Tahkim (Arbitration)

While some view tahkim as an integral part of *sulh*,<sup>213</sup> *tahkīm* is also another alternative designed by Islam to promote amicable settlements. It is actually a form of *sulh*.<sup>214</sup> Similar to *sulh*, *tahkīm* was also in existence before the coming of Islam.<sup>215</sup> Islam acknowledges the systems of *sulh* and *tahkīm*, and both continue to flourish afterward in a more systematic manner.<sup>216</sup> One of the best-known examples of *tahkīm* in Islamic history was the replacement of the black stone (*al-Hajar al-Aswād*) of the Ka'abah by Prophet Muhammad P.B.U.H before his prophethood.<sup>217</sup>

### 2.5.1 The Definition and Authorities of Tahkim

*Tahkim* is derived from the Arabic word *hakkama*, which means making someone an arbitrator (*hakam* or *muhakkam*).<sup>218</sup> In this case, the *hakam* is submitting himself to the Quran<sup>219</sup> to settle the dispute. This term can also be applied when someone requests a judge to decide his case.<sup>220</sup> Article 1790 of the *Majallah al-Ahkām al-`Adliyyah*, or the *Majelle*, defines the process of tahkim as follows:

<sup>213</sup> Mohamed M. Keshavjee, *Islam, Sharia and Alternative Dispute Resolution*, 67.

<sup>214</sup> Sa'adah Ahmad and Nora Abdul Hak, "Family Mediation and *Sulh*: An Alternative Dispute Resolution in Malaysia," *International Journal of Social Policy and Society* 7(2010), 8.

<sup>215</sup> Fatimah Muhammad al-`Awwa, "*Al-Tahkīm taqlīd `Arabī Qadīm*" in "*`Aqd al-tahkīm fi al-shari`ah al-Islamiyyah : Dīr`āsāt li-taqnīn al-fiqh al-Islamī wa-al-ta'thīr al-tashri`i li-Majallat al-Ahkām al-`Adliyyah*" (Beirut: Al-Maktab al-Islami, 2002), 207.

<sup>216</sup> Fatimah Muhammad al-`Awwa, "*Qadhāyā Tahkīmiyyat Tārikhiyyat*" in "*`Aqd al-tahkīm fi al-shari`ah al-Islamiyyah : Dīr`āsāt li-taqnīn al-fiqh al-Islamī wa-al-ta'thīr al-tashri`i li-Majallat al-Ahkām al-`Adliyyah*" (Beirut: Al-Maktab al-Islami, 2002), 209.

<sup>217</sup> *Ibid.*

<sup>218</sup> Mahmud ibn `Umar Ahmad al-Zamahkhshari, "*Asās al-Balāghah Vol.1: Hakkama*" (Beirut: Dār al-Kutub al-Ilmiyyah, 1998), 206-207.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*



*“Arbitration consists of the parties to an action agreeing together to select some third person to settle the question at issue between them, who is called an arbitrator (hakam).”<sup>221</sup>*

The above definition corresponds with that of ‘Abdul Karīm Zaidān, who defined *tahkīm* as a process through which disputing parties agree to appoint an individual to act as an arbitrator (hakam) for the settlement of the disputing issue between them. The application of *tahkim* in family conflicts can be identified in verse 35, surah al-Nisaa’:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا  
يُوفِّقِ اللَّهُ بَيْنَهُمَا إِنْ اللَّهُ كَانَ عَلِيمًا حَكِيمًا (35)

*“If you fear a breach between them (the man and his wife), appoint two arbitrators, one from his family and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed, Allah is Ever All-Knowing, Well-Acquainted with all things.”<sup>222</sup>*

The effects of the *tahkim* process, particularly an arbitration award given by the hakam, is binding. This is based on verses in the Quran in Surah al-Nisaa’, verses 58 and 65:

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ ۗ إِنَّ  
اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا (58)

*Meaning: “Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing (58)”*

فَلَا وَرَبِّكَ لَا يُؤْمِنُونَ حَتَّىٰ يُحَكِّمُوكَ فِي مَا شَجَرَ بَيْنَهُمْ ثُمَّ لَا يَجِدُوا فِي أَنْفُسِهِمْ حَرَجًا مِّمَّا  
فَضَيْتَ وَيُسَلِّمُوا تَسْلِيمًا (65)

*Meaning: “But no, by your Lord, they will not (truly) believe until they make you, (O Muhammad), judge concerning that over which they*

<sup>221</sup> In this thesis, an English translation of the *Majallah al-Ahkām al-‘Adliyyah* is referred to. This reference is the first civil codification of Muslim Law during the Ottoman Empire. It represents an attempt to codify part of the Hanafi’s scholar on transaction. The English translation is obtained through [http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20\(Civil%20Law\).pdf](http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf).

<sup>222</sup> Surah al-Nisaa’, verse 35.

*dispute among themselves and then find within themselves no discomfort from what you have judged and submit in (full, willing) submission (65).”*

### 2.5.2 Concept and Nature of *Tahkim*

*Tahkim* can be divided into three stages. The first stage is the agreement of the disputing parties to resort to *tahkim* to settle their dispute instead of adjudication, followed by the agreement between said parties and the person to be appointed as a hakam. The final stage involves the *tahkim* process, starting from the commencement of the *tahkim* proceeding until the issuing of the arbitral award.<sup>223</sup>

There are five basic elements under *tahkim*, which are the *muhakkimun* (disputing parties), where the rightly adjudged party is the *al-mahkum lahu* while the party against whom the award is invoked is known as the *al-mahkum ‘alaihi*,<sup>224</sup> *hakam* or *muhakkamun* (arbitrators), *sighah* (the pronouncement of offer and acceptance), *mawdu’ al-tahkim* (subject matter of *tahkim*), and lastly, *hukm* (award).<sup>225</sup>

The effects of the *tahkim* process, notably an arbitration award given by the arbitrator, are binding. This fact is based on verses in the Quran in Surah al-Nisaa’, verses 58 and 65 as follows:

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ ۗ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا (58)

*Meaning: “Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing (58)”*

<sup>223</sup> Mahdi Zahraa and Nora A. Hak, “Tahkim (Arbitration) in Islamic Law Within The Context of Family Dispute”, *Arab Law Quarterly* 20(1) (2006), 11.

<sup>224</sup> Umar A. Oseni, “Appointing a Non-Muslim as Arbitrator in Tahkim Proceedings: Polemics, Perceptions and Possibilities,” *Malayan Law Journal* 5(2014), 3.

<sup>225</sup> Nora Abdul Hak, Sa’odah Ahmad and Umar A. Oseni, Tahkim (Arbitration) in Islam in *Alternative Dispute Resolution (ADR) in Islam*, 73.

فَلَا وَرَبِّكَ لَا يُؤْمِنُونَ حَتَّىٰ يُحَكِّمُوكَ فِيمَا شَجَرَ بَيْنَهُمْ ثُمَّ لَا يَجِدُوا فِي أَنفُسِهِمْ حَرَجًا مِّمَّا  
فَضَيْتَ وَيُسَلِّمُوا تَسْلِيمًا (65)

*Meaning: “But no, by your Lord, they will not (truly) believe until they make you, (O Muhammad), judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in (full, willing) submission (65).”*

Muslim jurists concluded from the above verses that an arbitral award is binding because the parties appoint and give authority to the arbitrator, or hakam, to judge; hence, the judgement of said arbitrator is decidedly binding upon the parties. However, the issue of whether an arbitral award made by a hakam is binding or not does not have a consensus among Muslim jurists. The Syafi’i and Hanafi schools of thought hold this view with the condition that the parties agree with the terms of the arbitral award. For the Hanbali and Maliki schools of thought, the award becomes unbinding if it contains flagrant injustice.

Regardless of whether a *tahkim* process is filed in court, an arbitral award decided by the *hakam* will automatically become binding if the judge finds no fault in it. There is, however, another opinion among the Muslim jurists who believe that the award is not binding since *tahkim* is a form of conciliation, which is close to an *amicable compositeur*.<sup>226</sup> According to Aida Othman (2007), parties of husband and wife may only turn to *tahkim* when a judge is not available to them or when the couple faces difficulties in attending court. The parties are allowed to dismiss the arbitrator or withdraw from the arbitration process as long as a decision has not yet been made.<sup>227</sup>

A significant element that helps to differentiate between *sulh* and *tahkim* is the element of *syiqaq* (marital discord), as mentioned in verse 35, surah al-Nisaa’. *Sulh* or mediation processes can generally be applied to almost any form of disputes, including family

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<sup>226</sup> Mohamed M. Keshavjee, *Islam, Sharia and Alternative Dispute Resolution*, 67

<sup>227</sup> Aida Othman, “And Amicable Settlement Is Best”: *Sulh* and Dispute Resolution in Islamic Law”, *Arab Law Quarterly* 21(2007), 68.

matters while *tahkim* focuses solely on disputes where *syiqaq* is confirmed to exist between a disputed married couple. With that regard, it is important to define the term ‘*syiqāq*’ and its circumstances clearly in section 48, as they affect the judge’s verdict in determining the need for *hakam* in a case.<sup>228</sup>

### 2.5.3 Third-Party Intervener in Tahkim

The role of the third-party intervener in a *tahkim* process is known as *hakam*.<sup>229</sup> The term *hakam* can also be replaced with *muhakkam* or an arbitrator. A *hakam*’s standing is lower than that of a judge.<sup>230</sup> Unlike a *qadi*, who is appointed by the sultan, a *hakam* can either be appointed by a judge or the disputing parties. Islam also allows the appointment of multiparty *hakam*, as mentioned in surah al-Nisaa’, verse 35.

To qualify as a *hakam*, the person must abide by its qualifications. Under Islamic law, there is discussion among jurisprudence schools as to whether a *hakam* must possess similar qualifications to a judge. Although a *hakam* is not equivalent to a judge, the Shafie’ determined that the qualifications of a *hakam* must equal those of a Shari’ah judge, except in marital disputes, where a *non-mujtahid* may arbitrate the dispute.<sup>231</sup> Otherwise, the award determined by the *hakam* will be invalid.

The Hanafis stipulated that an arbitrator must be one whose testimony is admissible. He must also be a pious Muslim, of full legal capacity, and free from physical defects. Most importantly, all these traits must be present throughout the whole *tahkim* session, i.e., from beginning to end.<sup>232</sup> Stricter than the Shafi’es, the Malikis denoted that a *hakam*

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<sup>228</sup> Sa’odah Ahmad and Nora Abdul Hak, “*Sulh* (Mediation) in the State of Selangor: An Analysis of Legal Provisions and Application”, 217.

<sup>229</sup> Surah al-Nisaa, verse 58.

<sup>230</sup> Ibn Ahmad al-‘Aynī, *al-Banāyah fī Sharh al-Hidāyah* (Beirūt: Dār al-Fikr, 1980/1400), vol. 7, 66.

<sup>231</sup> Umar A. Oseni, “Appointing a Non-Muslim as Arbitrator in *Tahkim* Proceedings: Polemics, Perceptions and Possibilities,” *Malayan Law Journal* 5(2014), 2.

<sup>232</sup> Ibn Nujaym, *al-Baḥr al-Rā’iq* (Pakistan: al-Maktabah al-Mājahiyah, n.d.), vol. 7, 24.

must be legally qualified to be a *qadi* to be eligible as a *hakam*. His award will consequently be binding, enforceable, and not subject to an appeal so long as it is within the boundaries of Islamic principles and that the disputing parties have nothing to protest.<sup>233</sup> The Hanbalis stated a *hakam* is similar to a *wakīl* in a *wakālah* (representation) and is not of legal competence. Thus, the Hanbalis determined that a *hakam* is not required to have all the *qadi*'s qualifications.

Umar Oseni (2014) summed up the qualities that make up a *hakam* as follows:<sup>234</sup>

- (i) Muslim, as Muslim jurists attested that only a Muslim is truly able to understand the nature of fairness and justice in Islam, as well as possessing relevant Islamic knowledge to resolve the dispute
- (ii) Be of the legal age of majority
- (iii) Sane
- (iv) Possession of full senses
- (v) High moral integrity (trustworthy, abstain from major Islamic sins and has good human relationships)
- (vi) Freeborn (not an enslaved person)
- (vii) An expert in the field of dispute

A *hakam* may or may not have familial ties with the disputing parties. This fact coincides with Imām ‘Izz bin ‘Abd al-Salām, who said: “Similarly, being righteous is conditional in judges, caliphs, governors, and such, but if it is lacking among all the people, supervision of individuals as mentioned above is permitted.”<sup>235</sup> As to whether a

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<sup>233</sup> Al-*Dasuqi*, *Hasyiyah al-*Dasuqi* ‘alā al-*Sharh al-Kabīr** (Beirut, Dar al-Fikr, n.d), vol. 4, 136-137.

<sup>234</sup> Umar Oseni, “Appointing a Non-Muslim as Arbitrator in Tahkim Proceedings: Polemics, Perceptions and Possibilities”, *Malayan Law Journal* 5, 4-6.

<sup>235</sup> ‘Izz al-Dīn bin ‘Abdul ‘Azīz al-Sulumī, *Qawā'id al-Ahkām fī Maṣālih* (Cairo: Dār al-Nashr Maktabah al-Kuliyyah al-Azhariyah) 2, 44.

woman can become a *hakam* or not, the Shafi'ees, Malikis, and Hanbalis stipulated that only men can be appointed, as women tend to be emotional in their affairs, and this will impact their sense of justice and fairness.<sup>236</sup>

#### 2.5.4 *Tahkīm* in Malaysia

In Malaysia, *Majlis Tahkim* is at a lower level compared to the al-Qada process in Shariah courts.<sup>237</sup> The jurisdiction to conduct *tahkīm* is sanctioned by sections 47 and 48 of the Family Law Enactment Act 2003 (Selangor) (IFLE 2003). Section 47 provides that a *hakam* may be appointed if the conciliatory committee fails to reconcile parties in a contested divorce and subsequently in the event where the husband could not be ordered to pronounce *talaq* in court. It is observed that section 47(5) practically leads to the non-application of section 48. This matches Nora's observation on the Family Counseling and Development Unit of the Islamic Religious Department of Federal Territory, where the court resorted to the conciliatory committee rather than a *hakam* due to the difficulty of obtaining people with *hakam* qualifications.<sup>238</sup>

Section 48 of IFLE 2003 states that the appointment of an arbitrator or *hakam* is only applicable when there is an element of *syiqāq* for Shariah cases in Selangor. Based on this rule, two *hakams* will be appointed by order of the court as representatives for the disputing husband and wife if the court identifies constant quarrels between the parties.<sup>239</sup>

In practice, *tahkim* is used by the Shariah courts as a way to resolve cases where husbands refuse to divorce their wives ("*gantung tak bertali*") and attend court

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<sup>236</sup> Ibn Qudamah, *Al-Mughnī* (Beirut, Dār al-Kutub al-Ilmiyyah), 5, 311-312.

<sup>237</sup> Corporate Communication Division of Majlis Agama Islam Selangor (MAIS), "*Pelaksanaan Hakam: Merungkai Konflik Wanita Gantung Tak Bertali*", Official Website of MAIS, accessed on 29<sup>th</sup> Jan 2020, <http://www.mais.gov.my/konflik-wanita-gantung-tak-bertali/>

<sup>238</sup> Sa'odah Ahmad and Nora Abdul Hak, "*Sulh* (Mediation) in the State of Selangor: An Analysis of Legal Provisions and Application", *IJUM Law Journal* 18(2) (2010), 217.

<sup>239</sup> *Ibid.*

proceedings. To settle the matter, the court can either have the parties attend the conciliatory committee for counseling, and when fail with the existence of *syiqaq*, may proceed to the next option, which is *tahkim*.

Here, the Shariah courts have prepared a list of panels ready to be appointed as *hakam* when the need arises.<sup>240</sup> These panels often consist of Syarie lawyers, religious officers, or others who meet the criteria of *hakam*. They are not court officers, and hence, are not *sulh* officers either. Disputing parties may also appoint their own *hakam*. Currently, only Selangor presents a structured process for *tahkim*.<sup>241</sup>

Concerning matters involving a non-Muslim arbitrator, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) in Malaysia permits the appointment of non-Muslim arbitrators, or co-arbitrators in domestic conflicts, in certain transactions. At the same time, the institution stresses the need for these arbitrators to comply with *hukm syarak* or Islamic law, especially if the subject matter of the conflict involves Shariah-compliant transactions.<sup>242</sup> However, for Muslim family conflicts in Malaysia, the appointment of a *hakam* and the *tahkīm* process are under the jurisdiction of the Shari'ah courts. Shari'ah judges or religious officials would be appointed as *hakam*. So far, there has been no non-Muslim arbitrators appointed outside of Shari'ah courts to settle Muslim family conflicts.

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<sup>240</sup> Information is obtained post-interview through WhatsApp with Respondent 3 on 06.01.2022, with the question asked, "Can hakams be the same person as the *sulh* officer?"

<sup>241</sup> *Ibid.*

<sup>242</sup> Umar A. Oseni, "Appointing a Non-Muslim as Arbitrator in Tahkim Proceedings: Polemics, Perceptions and Possibilities," *Malayan Law Journal* 5(2014), 9-10. [https://www.researchgate.net/profile/Umar\\_Oseni/publication/289904848\\_APPOINTING\\_A\\_NON-MUSLIM\\_AS\\_ARBITRATOR\\_IN\\_TAHKIM\\_PROCEEDINGS\\_POLEMICS\\_PERCEPTIONS\\_A](https://www.researchgate.net/profile/Umar_Oseni/publication/289904848_APPOINTING_A_NON-MUSLIM_AS_ARBITRATOR_IN_TAHKIM_PROCEEDINGS_POLEMICS_PERCEPTIONS_AND_POSSIBILITIES/links/5693647908aec14fa55e38bc.pdf)  
[ND\\_POSSIBILITIES/links/5693647908aec14fa55e38bc.pdf](https://www.researchgate.net/profile/Umar_Oseni/publication/289904848_APPOINTING_A_NON-MUSLIM_AS_ARBITRATOR_IN_TAHKIM_PROCEEDINGS_POLEMICS_PERCEPTIONS_A)

## 2.6 Naṣīhah (Counseling)

The following IDR process that can be applied to resolve family conflicts is known as counseling or naṣīhah.

### 2.6.1 Definition and Authorities of Naṣīhah

Counseling is a method used to advise or guide someone.<sup>243</sup> The term is derived from the Latin word *'concilium'*<sup>244</sup> and refers to advising, reprimanding, reminding, or telling something.<sup>245</sup> In Arabic languages, several terms can be used to define counseling. For instance, *al-Irsyād*, which means to guide, is the most popular term used to describe counseling, followed by *al-hidayah* and *al-tawjih*.<sup>246</sup> Etymologically, *al-Irsyād* is referred to as *al-Hudā* or *al-Dalālah*. The second term used to define counseling is *al-Istisyārah*, which means to ask for advice or consultation.<sup>247</sup>

Another term that remains well-known as counseling is naṣīhah.<sup>248</sup> The term is derived from the Arabic word *'nasaha'* and is mentioned twelve times in the Quran. It represents sincerity, purity, and a friendly and intimate relationship encompassing the desire that encourages goodness and guides humankind from wrongdoing, consequently improving the course of life. From the Islamic perspective, counseling is a scientific discipline that

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<sup>243</sup> Ramizah Wan Muhammad, "Counseling the Apostates in Selangor: An Overview", *Journal of Counseling*, 3(1) (July 2016), 2.

<sup>244</sup> Saiful Akhyar Lubis, "*Konseling Islami dan Karakteristik Konselor Profesional*" (Article, International Seminar and Conference Guidance and Counseling, UINSU Medan, 1<sup>st</sup> August 2019), 2.

<sup>245</sup> Amaludin Ab. Rahman, "*Perkhidmatan Kaunseling Pendekatan Dalam Hikmah Berdakwah: Pengertian Kaunseling dan Dakwah*" (Kuala Lumpur, Utusan Publications & Distributors Sdn Bhd, 2008), 2.

<sup>246</sup> *Ibid*, 48.

<sup>247</sup> Saiful Akhyar Lubis, "*Konseling Islami dan Karakteristik Konselor Profesional*", 2.

<sup>248</sup> See Amaludin Ab. Rahman (2008) in "*Perkhidmatan Kaunseling Pendekatan Dalam Hikmah Berdakwah: Pengertian Kaunseling dan Dakwah*" and Nora Abdul Hak et al. (2011) in "ADR in Islam". Also, see Abu Umar Faruq Ahmad (2015) in "Can Alternative Dispute Resolution Mechanisms Resolve Islamic Finance Disputes in Malaysia".



is deeply connected to psychology, education, communication, and preaching (*da'wah*).<sup>249</sup>

Aziz Salleh (1993) defined Islamic counseling as a process whereby a counsellor helps individuals by providing guidance and advice to make their own choices or decisions to achieve a goal.<sup>250</sup> It is a two-way conversation<sup>251</sup> between the counselor and the parties. The counselor would first listen to the parties explain their situations and then proceed to give advice based on their concerns. In dispute resolution, Nora Abdul Hak et al. (2011) formulated Naṣīḥah's definition as a form of psychotherapy with a spiritual undertone to psychologically advise the parties to cool down first to persuade them to agree to negotiate a settlement.<sup>252</sup>

Naṣīḥah aims to create awareness<sup>253</sup> and self-actualisation<sup>254</sup> among disputing parties and is mentioned by several Islamic authorities. Allah SWT decrees:

وَالْعَصْرِ (١) إِنَّ الْإِنْسَانَ لَفِي خُسْرٍ (٢) إِلَّا الَّذِينَ ءَامَنُوا وَعَمِلُوا الصَّالِحَاتِ  
وَتَوَاصَوْا بِالْحَقِّ وَتَوَاصَوْا بِالصَّبْرِ (٣)

*Meaning: "By the passage of time (1) Surely humanity is in grave loss (2) Except those who have faith, do good, and urge each other to the truth, and urge each other to perseverance (3)."*<sup>255</sup>

Allah SWT also decrees in surah al-Zaariyah, verse 55:

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<sup>249</sup> A. Said Hasan Basri et al., "Pengembangan Model Kilmuan Bimbingan dan Konseling Islam Melayu Jurnal Hisbah: Jurnal Bimbingan Konseling dan Dakwah Islam", *Al-Isyraq Journal* 2(2)(December 2019), 137.

<sup>250</sup> Mohamed Sharif Mustaffa, "Islamic Counselling", *Educational Journal* 4(1)(1998), 20.

<sup>251</sup> Sulaiman Shakib Md Noor, "Model Khidmat Nasihat Keluarga Islam di Institusi Masjid" (Thesis Dissertation, Malaysian Technology University (UTM), Johor Bahru, 2012), 28.

<sup>252</sup> Nora Abdul Hak, Sa'odah Ahmad, and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 40-41.

<sup>253</sup> Amaludin Ab. Rahman, "Perkhidmatan Kaunseling Pendekatan Dalam Hikmah Berdakwah: Pengertian Kaunseling dan Dakwah," 48.

<sup>254</sup> Meimunah S. Moenada, "Bimbingan onseling dalam Perspektif Al-Qur'an dan Al-Hadits", *Al-Hikmah Journal* 8(1)(2011), 59.

<sup>255</sup> Surah al-'Asr, verses 1-3.

وَدَكِّرْ فَإِنَّ الدِّكْرَى تَنْفَعُ الْمُؤْمِنِينَ (55)

*Meaning: "But `continue to` remind. For certainly, reminders benefit the believers.*

The significance of naṣīhah in Islam can also be viewed by the hadith narrated by Tamim al-Dari, whereby Rasulullah PBUH said:

"إِنَّمَا الدِّينُ النَّصِيحَةُ". قَالُوا لِمَنْ يَا رَسُولَ اللَّهِ قَالَ " لِلَّهِ وَلِكِتَابِهِ وَلِرَسُولِهِ وَلِأَيِّمَّةِ الْمُسْلِمِينَ وَعَامَّتِهِمْ ".

*Meaning: "The religion is al-Nasihah." They said: "To whom?" The Prophet replied: "To Allah and to His Book, and to His Messenger, and to the leaders (imams) of the Muslims) and to their common folk."*<sup>256</sup>

## 2.6.2 Nature and Conditions of Naṣīhah

Naṣīhah consists of three elements: the person who gives naṣīhah (the advisor or counsellor), the person who receives naṣīhah, and the subject matter.<sup>257</sup> Compared to *sulh* and *tahkim*, naṣīhah takes a more general approach when discussing the subject matter. During the session, the subject matter should be touched on generally by the counselor and not specifically discussed. The counselor can use personal examples for the parties to follow clearly<sup>258</sup> to help the advisee by intervening early to prevent further potential problems<sup>259</sup> and settle them amicably.

When giving naṣīhah, specific guidelines need to be adhered to for the process to be acceptable and effective. First, the counselor, or advisor, must present the naṣīhah in a

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<sup>256</sup> Sunan al-Nasai 4197, Book 39, Hadith 49, <https://sunnah.com/nasai:4197>.

<sup>257</sup> Muhammad Soleh al-Munajjid, *Durus Li al-Syeikh Muhammad al-Munajjid: Ta'rif al-Naṣīhah*, Juz 252, 2.

<sup>258</sup> *Ibid*, 151.

<sup>259</sup> Abu Umar Faruq Ahmad and Hakimah Yaacob, "The Institutional Framework for Alternative Dispute Resolution in Islamic Finance: Evidence from Malaysia", *Journal of Islamic Economics, Banking and Finance* 113 (2016), 150-151.

way that does not imply the disputing parties in an accusatory manner.<sup>260</sup> Secondly, the counselor must not expect the parties to comply with the *naṣīḥah* given immediately or assume immediate outcomes.<sup>261</sup> The process is also voluntary, as the parties are free to decide whether they would accept and follow the *naṣīḥah* provided by the counselor.<sup>262</sup> At the same time, parties are highly encouraged to keep an open mind and heart and accept the points presented by the counselor.<sup>263</sup>

Although *naṣīḥah* (giving advice) is generally openly preached when directed towards the public, *naṣīḥah* as counseling should be conducted confidentially for disputing parties with family conflicts. It should be done in concealment without harming the public's interest. As such, the time, place, and way when giving *naṣīḥah* must also be appropriate. The confidential nature of *naṣīḥah* coincides with Prophet Muhammad PBUH's saying:

"المؤمن يستر وينصح والفاجر يهتك ويعير"

*Meaning: "The believer conceals (the sin of his brother) and advises (him), while the evil-doer disgraces and condemns (him)."*<sup>264</sup>

Family counselling, be it for problems between married couples or other family members, remains crucial and advantageous as it promotes family growth, mental wellness, and effective communication. Furthermore, the disputing parties are not bound to what the counsellor proffers either by force, threats, or urging. However, the nature of *naṣīḥah* may indirectly become binding if it is agreed upon and written in a settlement agreement from a *sulh* process and later is referred to court and becomes a contract. This

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<sup>260</sup> Abu Umar Faruq Ahmad and Hakimah Yaacob, "The Institutional Framework for Alternative Dispute Resolution in Islamic Finance: Evidence from Malaysia", 151.

<sup>261</sup> *Ibid.*

<sup>262</sup> Mohamed Sharif Mustafa, "Islamic Counselling", 20.

<sup>263</sup> Sulaiman Shakib, "Model Khidmat Nasihat Keluarga Islam di Institusi Masjid" (Thesis Dissertation, MARA Technology University (UiTM), Malaysia, 2012), 20.

<sup>264</sup> Ibn Rajab al-Hanbali, *Al-Farq baina al-Naṣīḥah wa al-Ta'yeer: Faslun fī Kaiḥiyah al-Naṣīḥah* (n.p., Maktabah al-Qayyimah li al-Thabā'ah wa al-Nashr, 1900), 17.

situation may occur when naṣīhah acts as the preparatory phase before conducting *sulh*, where disputing parties are encouraged to take amicable settlement into consideration in general terms.<sup>265</sup>

### 2.6.3 Third-Neutral Intervener in Naṣīhah

Unlike a judge or a mufti, who has strict requirements to act as a third neutral intervener, giving naṣīhah (sincere advice) is a general obligation for all Muslims regardless of their status, race, or age. During his time, Prophet Muhammad PBUH also counseled the Muslim society with wisdom and tact while preventing conflicts from further escalating. After his death, the Prophet's companions continued to advise and guide the Muslim community.

In a Muslim community, naṣīhah is offered by religious leaders (Imams) or Muslim counselors. In the past, religious leaders were viewed as 'ideally suited' to provide counseling in marital and family disputes since they are often very well-versed with Islamic law and authorities, and this became the basis of their intervention. Moreover, Imams also had the power to solemnise and annul marriages. Their roles as advisors become more specific in conflict resolution. Having the necessary Islamic knowledge and admirable qualities prescribed by Islam, such as truthfulness, honesty, wisdom, and ability to deliver faith,<sup>266</sup> Imams inform and advise clients on their duties and the dimensions of their problems while offering possible solutions.<sup>267</sup>

Whilst these religious leaders continue to perform well, the requirements to be a more effective counselor become stricter as society evolves with more complex situations. The

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<sup>265</sup> Norhayati Mohd Noor, "Family Counseling in Malaysia: Current Issues and Practices", *International Educational Studies* 7(13) (2014), 33.

<sup>266</sup> Mohamed Sharif Mustaffa, "Islamic Counselling", 21-22.

<sup>267</sup> Somaya Abdullah, "Islam and Counselling: Models of Practice in Muslim Communal Life", *Journal of Pastoral Counseling* (2007), 44-45.

need for professionally trained counselors becomes demanding and is highly required to ensure a high success rate in counseling. Generally, a professional counselor can be defined as a person who receives training, both theoretically and in practice, in counseling.<sup>268</sup>

Aside from traits set by Islam, he should also possess other indispensable basic skills such as listening skills, guidance and reflective skills, interpreting and summarising skills, confrontational skills, and providing information.<sup>269</sup> Most importantly, the counselor must retain the nature and conditions of *naṣīhah* throughout the whole process. Islam praises one who practises and applies what he advises to others, as Allah dislikes those who advise others, but do not follow their own words.<sup>270</sup> As society continues to be plagued by more complex family problems, the need for professional counselors becomes more demanding.

#### **2.6.4 Naṣīhah in Malaysia**

Naṣīhah (Counseling) is a very well-known and well-accepted service provided by various institutions globally. The proffering of sincere advice can be done both generally in the open public or in a private setting. Yet, in ADR, the sessions are done confidentially and in private. Formally trained counselors are usually approached to resolve a variety of problems and conflicts, including family matters and disputes.

For family conflicts, troubled married couples or family members may meet a counselor to reconcile and ameliorate their marriage relationship.<sup>271</sup> In Malaysia, counseling services can be accessed through the General Advisory Services (*Khidmat*

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<sup>268</sup> Mohamed Sharif Mustaffa, "Islamic Counselling", 21.

<sup>269</sup> *Ibid.*

<sup>270</sup> See Suraf al-Saf, verses 2-3.

<sup>271</sup> Zainab Ismail, W.A. Wan Ibrahim and H. Asyraf, "Counseling services in Muslim Communal Life in Malaysia", *Middle-East Journal of Scientific Research*, 20 (11)(2014), 1447.

*Nasihat Umum*), family complaints (*Aduan Kekeluargaan*), and the Conciliation Committee (*Jawatankuasa Pendamai, JKP*) directed by the Shariah courts. For family complaints, the disputes are not limited to marital disputes between husband and wife, but also include conflicts between family members, such as child-parent and sibling arguments.<sup>272</sup>

The Islamic Religious Departments of many Malaysian states establish counselling units and appoint religious officers to assist Muslim couples with domestic problems, restore mutual understanding, and improve family relationships.<sup>273</sup> For married Muslim couples, the Family Support Division (known as *Biro Sokongan Keluarga, BSK*) under the Department of Shariah Judiciary Malaysia also has a counselling unit called the Legal Advisory Service Unit (*Unit Khidmat Nasihat Perundangan*). This unit provides legal advice to parties regarding post-divorce claims at the Shariah courts, including claims for child support and the procedures related to executions of court orders.<sup>274</sup>

Zainab Ismail et al. (2014) reported that counseling is more popular amongst the Malay Muslim population in urban areas than in their rural counterparts, and is more successful in couples with higher education levels.<sup>275</sup> This happens as these educated couples are generally more receptive to change than less-educated ones.<sup>276</sup>

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<sup>272</sup> N.a, "Consultation Services Managing Family Institutions", MyGovernment Official Website, accessed 31.03.2022, <https://www.malaysia.gov.my/portal/content/28902?language=my>

<sup>273</sup> *Ibid.*

<sup>274</sup> Roslina Che Soh et al., "Family Support Division in Helping Children After Divorce: Extent of Effectiveness, Challenges and Comparison with the Practice of Developed Countries", *KANUN*, 29(2)(2017), 65.

<sup>275</sup> Zainab Ismail, W.A. Wan Ibrahim and H. Asyraf (2014), "Counseling services in Muslim Communal Life in Malaysia", 1447-1448.

<sup>276</sup> Zainab Ismail, "Proses Kaunseling di Kalangan Pasangan Melayu Bermasalah di Wilayah Persekutuan Kuala Lumpur: Kaitannya dengan Pendidikan." in *Islam: Past, Present AND Future*, ed. Ahmad Sunawari Long, Jaffary Awang and Kamaruddin Salleh (Selangor: *Jabatan Hal Ehwal Khas*, 2004), 327-328.

## 2.7 Fatwa of Mufti

Since the early period of Islam, fatwas have been a crucial part of the Islamic society, more so after the period of Prophet Muhammad (PBUH)<sup>277</sup> who was considered the first *mufti* in Islamic history. This practice was later followed by some of his companions, such as Umar bin Khattab, Ali bin Abi Thalib, and ‘Aisyah binti Abu Bakar, who practised the tradition of *iftā* after the death of the prophet.<sup>278</sup> Although a different process, a fatwa can be used as one of the authorities to help a *qadī* reach a decision or a judicial judgement in a court process,<sup>279</sup> and thus validates fatwas as another alternative for dispute resolution.

### 2.7.1 Definition of Fatwa

The term ‘*fatwa*’ is an Arabic term derived from the root word *iftā*, which means clarification and explanation.<sup>280</sup> Linguistically, *fatwa* (فتوى) or its plural *fatāwā* (فتاوى) means a formal legal opinion.<sup>281</sup> Technically, a fatwa can be defined as formal legal opinion in accordance with the *hukm syarak* in response to a particular question of a questioner, irrespective of whether the question is general or specific, in which case its nature is not binding.<sup>282</sup>

Abu Talib et al. (2019) mentioned that fatwa sometimes means to reflect on classical fiqh books in the sense that what is written in those books are fatwas issued by Muslim

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<sup>277</sup> Abu Talib et al., “Do Fatwas Hamper Muslim Women’s Socio-Economic Participation in Malaysia” *Journal of Nusantara Studies* 4(1) (2019), 233.

<sup>278</sup> Luthfi Assyaukanie, “Fatwa and Violence in Indonesia”, *Journal of Religion and Society*, 11 (2009), 2.

<sup>279</sup> Abdul Karim Zaydan, “*Nizām al-Qadā fī al-Syari’ah al-Islamiyyah: Ta’rif al-Qada*, 29.

<sup>280</sup> Abu Talib et al., “Do Fatwas Hamper Muslim Women’s Socio-Economic Participation in Malaysia”, 234.

<sup>281</sup> Hans Wehr, *A Dictionary of Modern Written Arabic*: 696.

<sup>282</sup> Abdul Rahman ibn Muhammad al-Dukhayyil, *Al-Fatwā: Ahammiyyatuhā – Dhawābituhā – Āthāruhā: Ta’rif ai-fatwā* (Madihah: *Ja’izat Nayif ibn ‘Abd al-‘Aziz Al Sa’ud al-‘Alamiyah lil-Sunnah al-Nabawiyah wa-al-Dirasat al-Islamiyah al-Mu’asirah*, 2007), 36.

jurists.<sup>283</sup> In the Quran, fatwas can be identified by other compound words and phrases such as *iftā*, *istefti*, *mufti*, and *yuftikum*. According to Oxford's Lexico Dictionary, fatwa is defined as a ruling on a point of Islamic law given by a recognised authority<sup>284</sup>, the authority here being identified by al-Qūnawī as a *mufti*.<sup>285</sup>

Allah decrees in surah Nisa' verse 18:

*“However, repentance is not accepted from those who knowingly persist in sin until they start dying, and then cry, “Now I repent!” nor those who die as disbelievers. For them We have prepared a painful punishment.”*

It is important to note that a key element in determining whether an opinion by a religious Muslim authority is considered a fatwa or not lies in the presence of a questioner known as a *mustafti*.<sup>286</sup> A *mustafti* is someone who asks and brings forward an issue to the *mufti*. It can either be an individual, institution, or community group.<sup>287</sup> Needless to say, opinions expressed by Muslim jurists must be a response to a question addressed by the *mustafti*. Hence, a general opinion not grounded on a specific *mustafti*'s query is not regarded as a fatwa.

### 2.7.2 The Nature and Conditions of Fatwa

In general, a fatwa issued by a mufti is non-binding. There are a few conditions for issuing a fatwa by a *mufti*. First, the mufti issuing the fatwa must be qualified as being learned or knowledgeable (*ahl al-dhikr*). Secondly, the fatwa must be in consonance with definitive

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<sup>283</sup> Abu Talib et al., “Do Fatwas Hamper Muslim Women’s Socio-Economic Participation in Malaysia”, 234.

<sup>284</sup> Meaning of Fatwa, Oxford’s Lexico Online Dictionary. Accessed on 21<sup>st</sup> November 2019 through <https://www.lexico.com/en/definition/fatwa>

<sup>285</sup> Abdul Rahman ibn Muhammad al-Dukhayyil, *Al-Fatwā: Ahammiyyatuhā – Dhawābituhā – Āthāruhā: Ta’rīf ai-fatwā*, 35.

<sup>286</sup> Luthfi Assyaukanie, “Fatwa and Violence in Indonesia”, *Journal of Religion and Society*, 11 (2009), 2.

<sup>287</sup> M. Efan Riadi, “Kedudukan Fatwa Ditinjau Dari Hukum Islam dan Hukum Positif (Analisis Yuridis Normatif)”, *ULUMUDDIN Journal* VI (January-July 2010), 471.



texts from the Quran and Sunnah. Strictly speaking, the fatwa must not contradict any definitive evidence, or it will automatically be invalid. Thirdly, the fatwa must originate from authentic and acclaimed books to ensure a fair and rightful transmission throughout the process. For unknown references, they must first be verified.

Lastly, the fatwa issued must be compatible with the customs of the *mustafti*. Suppose the mufti does not have enough knowledge of the background of the issue brought up by the *mustafti*. In that case, it is compulsory that he performs an informal investigation, including the origin of the *mustafti*, his homeland, mother tongue, customs, and such. This precautionary step is necessary as differences in customs and languages necessitate differences in fatwas and rulings.<sup>288</sup> Compared to litigation, the approach of fatwa is less conflictual and cheaper.<sup>289</sup>

### 2.7.3 The role and functions of Fatwa

In principle, the role of a fatwa is to serve as a guide or means of clarifying any form of legal and theological issue that arises in Muslim society.<sup>290</sup> Generally, the role of a fatwa has four thematic levels<sup>291</sup>, where the first of which is the use of fatwas as legal tools. Other than legal tools, fatwas can function as social instruments, political discourses, and doctrinal-reform devices.<sup>292</sup>

Legally, the fatwa has a major influence in past and contemporary society as it provides rules and guidelines for Muslim societies to follow when dealing with new

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<sup>288</sup> Badruddin Ibrahim, Muhamad Arifin and S. Z Abd Rashid, "The Role of *Fatwa* and *Mufti* in Contemporary Muslim Society", *Pertanika Journal of Social Sciences and Humanities*, 23 (2015), 317-318.

<sup>289</sup> Alexandre Caeiro, "The Shifting Moral Universes of the Islamic Traditions of *Iftā'*: A Diachronic Study of Four *Adab al-Fatwā* Manuals", *The Muslim World* 96 (October 2006), 661-685.

<sup>290</sup> Luthfi Assyaukanie, "Fatwa and Violence in Indonesia", *Journal of Religion and Society*, 11 (2009), 2.

<sup>291</sup> Alexandre Caeiro, "The Shifting Moral Universes of the Islamic Traditions of *Iftā'*: A Diachronic Study of Four *Adab al-Fatwā* Manuals", 661.

<sup>292</sup> *Ibid.*

problems.<sup>293</sup> It became a jurisprudential term in the eleventh century. Because fatwa is enunciated and practised by the authoritative discourse of Islam (which is the Holy Quran), it is accepted as a valid form of legal practice and law production. Western Muslim scholars also categorise fatwas as part of Islamic jurisprudence. The reason is because the mufti has the disposition to determine the law (*hukm*) of a particular issue.<sup>294</sup> According to Luthfi Assyaukanie (2009), ‘to speak about fatwas thus later meant to speak about Islamic legal issues or to see things from Islamic legal perspectives.’<sup>295</sup>

The nature of a fatwa may change from non-binding to binding when it is used as a tool to resolve disputes. When dealing with disputes, the mufti serves two functions under Islamic law: dispute avoidance and dispute resolution. When parties seek out the mufti’s opinion on a dispute matter, the morality of the disputing parties binds the fatwa to them.

#### 2.7.4 The Third Party to Issue a Fatwa

Because issuing a fatwa involves giving out religious opinions, not everyone is entitled to issue a fatwa. As mentioned, the person who has the authority to issue a fatwa is known as a *mufti* or a jurisconsult.<sup>296</sup> The position of a mufti is regarded as both a privilege and an influential in the Islamic world. It is one of the pillars among the elements contained in the pillars of fatwa. He is considered a knowledgeable and qualified person who solves

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<sup>293</sup> Badruddin Ibrahim, Muhamad Arifin and S. Z. Abd Rashid, “The Role of *Fatwa* and *Mufti* In Contemporary Muslim Society”, *Pertanika Journal of Social Sciences and Humanities*, 23 (2015), 315.

<sup>294</sup> M. Efan Riadi, “*Kedudukan Fatwa Ditinjau Dari Hukum Islam dan Hukum Positif (Analisis Yuridis Normatif)*”, 472.

<sup>295</sup> Luthfi Assyaukanie, “Fatwa and Violence in Indonesia”, *Journal of Religion and Society*, 11 (2009), 3.

<sup>296</sup> Abu Talib et al., “Do Fatwas Hamper Muslim Women’s Socio-Economic Participation in Malaysia”, 235.

legal problems or matters that arise pertaining to Islam<sup>297</sup> Al-Nawawi has divided *muftis* into two categories: independent *muftis* and dependent *muftis*.<sup>298</sup>

A *mufti*'s role in determining and providing solutions and answers for contemporary issues and questions is highly respected and looked upon, as they are viewed as 'descendants' of the prophets. Rasulullah PBUH has mentioned:

إِنَّ الْعُلَمَاءَ وَرَثَةُ الْأَنْبِيَاءِ، إِنَّ الْأَنْبِيَاءَ لَمْ يُوْرَثُوا دِينَارًا وَلَا دِرْهَمًا إِنَّمَا وَرَثُوا الْعِلْمَ فَمَنْ  
أَخَذَهُ أَخَذَ بِحِطِّ وَافِرٍ

*Meaning: "The learned are the heirs of the Prophets, and the Prophets leave neither dinar nor dirham, leaving only knowledge, and he who acquires it, has in fact acquired an abundant portion."*<sup>299</sup>

Al-Nawawi (1998) has set four fundamental conditions to become a mufti, whereby he must be a Muslim, a *mukallaf*, a *mujtahid*, and fair.<sup>300</sup> Muslim jurists and scholars have laid down strict criteria and conditions for the status of a mufti. They stress the importance of knowledge, integrity, and knowledge possessed by the mufti. A mufti must have the ability and the depth of knowledge required to issue a fatwa on the issue presented in order to prevent errors and inconsistencies between the fatwa and the issue.<sup>301</sup>

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<sup>297</sup> Ibtisam Ibrahim and Wan Mohd Khairul Firdaus Wan Khairuldin, "Fawta as a Medium Da'wah: Studies on the role of Mufti as a Preacher", *International Journal of Academic Research in Business and Social Sciences* 7(4) (2017), 10.

<sup>298</sup> Muhammad Jamal al-Din al-Qasimi, "*Al-Fatwa fī al-Islām*" (Beirūt: Dār al-Kutub al-'Ilmiyyah), 63-64.

<sup>299</sup> Abu Daud and al-Tarmizi, *Sunan Abi Dawud 3644 in Kitab al-'Ilm*, Book 26, Hadith 1.

<sup>300</sup> Ibtisam Ibrahim and Wan Mohd Khairul Firdaus Wan Khairuldin, "Fawta as a Medium Da'wah: Studies on the role of Mufti as a Preacher", 11.

<sup>301</sup> M. Efan Riadi, "*Kedudukan Fatwa Ditinjau Dari Hukum Islam dan Hukum Positif (Analisis Yuridis Normatif)*", *ULUMUDDIN Journal* VI (January-July 2010), 468-477.

Any person who does not hold a comprehensive set of general and religious knowledge but dares issue a fatwa, is considered ‘crazy’ among the Muslim scholars. Consequently, fatwas issued by this group of people tend to be abandoned by society.<sup>302</sup> Aside from giving opinions and answers to arising issues, a mufti also plays the role of a preacher. This means that another responsibility of a mufti includes guiding Muslims towards a better direction in life in order to avoid any Islamic misconceptions.

### 2.7.5 Fatwas and Muftis in Malaysia

Historically, the institutionalisation of the fatwa and professionalisation of ‘mufti’ began in the mid-seventh century in Malaysia.<sup>303</sup> The practice of fatwa has long been established in Malaysian history. The past Malaysian rulers have long requested *muftis* to present fatwas that touch on the important matters of the nation and Malaysian community. Nowadays, Muslim governments often appoint religious scholars to take up the role of *mufti*.<sup>304</sup> The concept of a fatwa encompasses more than just the legal opinion of a mufti. It becomes a binding piece of legislation in a delegated manner on all Muslims that attracts the force of law.<sup>305</sup>

In contemporary Malaysia, Fatwa and other Islamic matters fall under the jurisdiction of state governments, as stipulated by the Federal Constitution.<sup>306</sup> The delegation of powers between the states and the Federal Territories conforms to the state’s religious

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<sup>302</sup> M. Efan Riadi, “Kedudukan Fatwa Ditinjau Dari Hukum Islam dan Hukum Positif (*Analisis Yuridis Normatif*)”, 470-471.

<sup>303</sup> Luthfi Assyaukanie, “Fatwa and Violence in Indonesia”, *Journal of Religion and Society*, 11 (2009), 2.

<sup>304</sup> Muhammad Ifzal Mehmood, Siddiq Ali Chishti and Muhammad Junaid Mughal, “Islamic Concept of Fatwa, Practice of Fatwa in Malaysia and Pakistan: The Relevance of Malaysian Fatwa Model for Legal System of Pakistan”, *Arts and Social Science Journal* 6(3) (2015), 47.

<sup>305</sup> Muhammad Ifzal Mehmood, “Fatwa in Islamic Law, Institutional Comparison of Fatwa in Malaysia and Pakistan: The Relevance of Malaysian Fatwa Model for Legal System of Pakistan”, 1-3.

<sup>306</sup> Ahmad Hidayat Buang, Ed., *Fatwa di Malaysia* (Kuala Lumpur, MASHI Publication, 2004), 2.

head's authority, that is, the state's Sultans in the sultanate states. As for the non-sultanate states, the jurisdiction lies under His Majesty Yang Di-Pertuan Agong.<sup>307</sup>

Fatwas issued by *muftis* in the Malaysian states become binding for their respective populations<sup>308</sup> once the fatwas are published in the Gazette. This means that non-gazetted fatwas are not binding for Muslims in Malaysia.<sup>309</sup> Although the issuance of fatwas in all fourteen states of Malaysia may differ, one commonality identified is the almost-uniform enactments that contain the provisions that regulate the manners and conduct of Islamic affairs in their respective domains.<sup>310</sup> Because Islamic affairs in Malaysia fall under the jurisdiction of the states, the manner of conduct by the muftis may vary from state to state.

At the same time, the Malaysian government has also set up a coordinating body known as the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia, JAKIM*) to oversee and control all Islamic activities within Malaysia. Muhammad Ifzel Mehmood et al. defined JAKIM as the main federal government agency that is responsible for managing Islamic affairs in Malaysia, including fatwas.<sup>311</sup>

Similar to mediators, the practice of a fatwa by a mufti dictates that a mufti cannot be summoned to any Shariah or civil courts to provide explanations. Should civil courts require the *mufti* to express an opinion regarding Islamic law, the courts may request the *mufti* to do so.<sup>312</sup>

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<sup>307</sup> *Ibid*, 25.

<sup>308</sup> Zaini Nasohah “*Undang-undang Penguatkuasaan Fatwa di Malaysia*”, *ISLAMIYYAT* 27(1)(2005), 39.

<sup>309</sup> Abu Talib et al., “Do Fatwas Hamper Muslim Women’s Socio-Economic Participation in Malaysia”, 238.

<sup>310</sup> Muhammad Ifzal Mehmood, Siddiq Ali Chishti and Muhammad Junaid Mughal, “Islamic Concept of Fatwa, Practice of Fatwa in Malaysia and Pakistan: The Relevance of Malaysian Fatwa Model for Legal System of Pakistan”, 48-50.

<sup>311</sup> *Ibid*, 47.

<sup>312</sup> Zaini Nasohah “*Undang-undang Penguatkuasaan Fatwa di Malaysia*”, 29.

## 2.8 Mediation-Arbitration (Med-Arb)

The final Islamic ADR is the Mediation-Arbitration (Med-Arb) process.

### 2.8.1 Definition and Authorities of Med-Arb

Med-Arb is a hybrid process that Islam has long prescribed for more than 1,400 years. It is a two-tier hybrid process in which the parties initially submit their dispute to mediation, and if no agreement is reached, they agree to refer the matter to arbitration.<sup>313</sup> As such, the Med-Arb process involves both mediation (*sulh*) and arbitration (*tahkim*) to reach an amicable resolution in a dispute.<sup>314</sup>

The authority of Med-Arb process can be seen in surah al-Nisaa', verse 35:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَأَبْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا  
يُوقِفِ اللَّهُ بَيْنَهُمَا ۗ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا (35)

Although most interpretations interpret the verse above as representing arbitration, the use of arbitral language in this verse also acts as a confirmation that while mediators may be profoundly involved in the disputed negotiations, reconciliation as the fundamental outcome remains to be determined by the disputing parties. That being the case, the mediators are simply concerned with finding the voice of the disputing parties.<sup>315</sup>

Another possible interpretation is to view mediation in Islamic family disputes as a combined process where the mediator's role is not only limited to assisting the discussion, as is the case in standard mediation, but also serves as a problem-solver, negotiator, guide, and possibly arbitrator. If such is the case, then the verse may function as a general

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<sup>313</sup> Abdul Wahid (2018), "Using Islamic Law for Alternative Dispute Resolution: Is Sharia Sufficient?", *PM World Journal*, Vol. VII(X11), 6.

<sup>314</sup> Nora Abdul Hak et al. (2011), "Alternative Dispute Resolutions in Islam", 44.

<sup>315</sup> Ratno Lukito, "Religious ADR: Mediation in Islamic Family Law Tradition", *Al-Jami'ah* 44(2)(2006), 337-338.

expression of the divine will regarding resolving family conflicts, where the whole process's technical aspects are left undefined.<sup>316</sup>

### 2.8.2 Nature and Conditions of Med-Arb

As defined above, Med-Arb is a step towards amalgamating<sup>317</sup> mediation and arbitration to achieve a common goal in dispute resolution. The nature and conditions of Med-Arb are similar to mediation for the mediation part of Med-Arb, and arbitration for the arbitration part of Med-Arb. The whole process of *sulh* in Med-Arb is no different than general *sulh*. Rather, *sulh* simply becomes an initial preparatory part of tahkim,<sup>318</sup> and parties would only proceed to tahkim if *sulh* fails.

The basic starting point of Med-Arb is generally the disputing parties' consent and agreement to conduct the process, where parties would first go through *sulh*.<sup>319</sup> This is the key to ensuring that the Med-Arb process may be conducted smoothly. Ratno Lukito (2006) commented the following:

*“Using a combination of mediation and arbitration as their approach, the mediators from both the husband's and wife's sides can thus work together to resolve the dispute between the parties.... As long as the husband and wife are still willing to find a resolution to their conflict, -having ruled out divorce as an option-, the mediators they send to negotiate the resolution can approach the process in such a hybrid way.”<sup>320</sup>*

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<sup>316</sup> *Ibid.*

<sup>317</sup> Nora Abdul Hak et al. (2011), “Alternative Dispute Resolutions in Islam”, 45.

<sup>318</sup> Rafidah Mohamad Cusairi and Mahdi Zahraa, “Conditions and Qualifications of A Mediator-Arbitrator in the Resolution of Family Disputes”, *Journal of Islam and Science* 2(2) (2015), 263.

<sup>319</sup> Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 45.

<sup>320</sup> Ratno Lukito, “Religious ADR: Mediation in Islamic Family Law Tradition”, 342.

As it ends with tahkim, Med-Arb naturally becomes binding. Ratno continued to add that, on a practical level, Med-Arb can be approached in three ways as long as it is conducted with the parties' consent:<sup>321</sup>

- (i) By mediating between the parties at the initial stage, and when the conciliation approach fails, proceeding to an arbitral approach
- (ii) By inserting mediation into an ongoing arbitration process, should the disputing parties be dissatisfied with the initial arbitral proceedings,
- (iii) By conducting mediation upon the parties' request after an unsuccessful arbitration session while leaving open the possibility to resume the arbitral sessions should the mediation conducted fail.

### **2.8.3 Third-Neutral Intervener in Med-Arb and its Application in Malaysia**

In many cases, Islam promotes the hybrid process as applying the Med-Arb approach, which is considered an obligation for the arbitrators in Islamic jurisprudence.<sup>322</sup> In Med-Arb, a neutral third party is involved from the beginning of the process. Often, the third party acts as a mediator first to try to reconcile the dispute in a friendly and informal manner.<sup>323</sup> Some say it is an arbitrator's duty to attempt reconciliation through mediation before conducting arbitration.<sup>324</sup> If the negotiation to settle amicably comes to a standstill, the arbitrator may resume his responsibility to continue the session via arbitration.<sup>325</sup> The third neutral party in Med-Arb is hence called a mediator-arbitrator.<sup>326</sup>

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<sup>321</sup> *Ibid.*

<sup>322</sup> Umar A. Oseni, "A Comparative Legal Analysis of the Role of Arbitration in Maritime Dispute Resolution" (Masters thesis, International Islamic University Malaysia, 2009), 99.

<sup>323</sup> Nora Abdul Hak et al. (2011), "ADR in Islam", 44

<sup>324</sup> Abdul Wahid, "Using Islamic Law for Alternative Dispute Resolution: Is Sharia Sufficient?", 10.

<sup>325</sup> Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 45.

<sup>326</sup> *Ibid.*, 44.



There is discussion about whether the mediator-arbitrator in Med-Arb can continue to participate in both mediation and arbitration sessions. As mentioned above, Abdul Wahid (2018) explains that the arbitrator is the same person who mediates the same case if mediation fails.<sup>327</sup> However, the decision for the mediator to continue involving himself as the arbitrator is up for the disputing parties to decide.<sup>328</sup> As far as observations go, there has yet to be a formal application or proper discussion of Med-Arb in settling family conflicts under Shariah jurisdiction.

Based on the overall understanding, the roles of third-neutral interveners in all six IDRs found suitable for family conflicts can be correlated as shown in Figure 2.1:

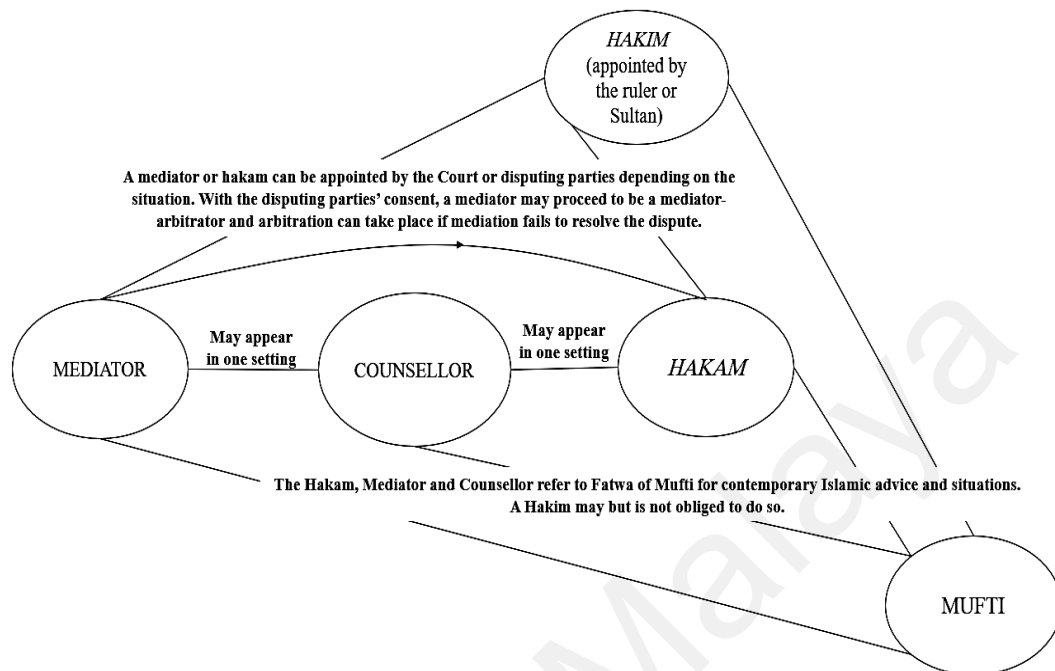
**Figure 2.1. Correlation of third-neutral interveners in all six IDR processes**

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<sup>327</sup> Abdul Wahid (2018), "Using Islamic Law for Alternative Dispute Resolution: Is Sharia Sufficient?" *PM World Journal* 7(12) (2018), 14.

<sup>328</sup> *Ibid.*

## 2.9 Conclusion



To conclude, the fact that Islam has provided mankind with various solutions for family conflicts proves that it is indeed a religion where *silaturrahim* in family relationships is highly revered in Islam. Muslims, if not all human beings, generally avoid dispositions that can sever these ties. The only limitation set is that the matters discussed and decisions made must not contravene the teachings of Islam or include matters of *hadd*.

Other than *wali al-mazālim* and *muhtaşib* (ombudsman), there are six Islamic Dispute Resolutions (IDRs) found suitable to be applied in family conflicts; al-Qada', *Şūlh* Tahkīm, Naşīhah, Fatwā, and lastly, a hybrid process called Mediation-Arbitration (Med-Arb). Each process has its own benefits and advantages. Society needs to understand the nature and application of these processes well to maximise their strengths and achieve the best possible outcome. Most importantly, the role of the neutral third party in each process must be made clear.

Although it is undeniable that al-qada (adjudication) seems to be the preminent method for settling family disputes in Malaysia among these alternatives, it cannot be

overlooked that *sulh* (mediation) offers one of the best mechanisms to resolve family disputes because of its voluntary, confidential, and binding nature. Disputants are given time to express their thoughts, leaving them feeling lighter and more inclined to reach an amicable settlement. In the words of Nora Abdul Hak (2013): “*Reference of family disputes to court may adversely affect family unity.*”

Universiti Malaya

## CHAPTER 3: SHARIAH MEDIATION INSTITUTIONS IN MALAYSIA

### 3.1 Introduction

The development of *sulh* in Malaysia has significantly broadened over the past decades. Originally started as a culture of settling disputes, the approach of *sulh* was later incorporated into the Malaysian Shariah legal systems by virtue of the Federal Acts and State Enactments. In line with the Islamic teachings of encouraging Islamic mediation, or *sulh*, the process has proven to continuously assist the courts with the backlog of cases.

Chapter Three focuses on the institutions that are responsible for the administration and execution of Islamic mediation in Malaysia. This chapter elaborates on how Islamic mediation institutions and units take part in and contribute to the administration and development of *sulh* in the Malaysian Islamic system. Each institution will cover the background, administrative, and procedural systems under the institution or unit and the authorities responsible for the development and practice of mediation in Malaysia. Chapter Three also includes the Islamic mediation procedures, rules and regulations related to the mediation process, and fees, if any.

### 3.2 Mediation (*Sulh*) in the Malaysian Legal History

Historically, the practice of *sulh* has long existed in Malaysia before the arrival of the Dutch, Portuguese, and British.<sup>329</sup> The approach of amicable settlement through mediation was a popular norm instilled among the historical Malaysian society of different races, consisting of the Malays, Chinese, and Indians. Based on old records, the Malacca Sultanate indeed had a proper legal structure, or hierarchy, of courts where the

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<sup>329</sup> Raini Hassan, Hanna Ambaras Khan and Imad Fakhri al-Shaikhli (2013), "Setting-Up a *Sulh*-based, Community Mediation-Type of Online Dispute Resolution (ODR) in Malaysia", *International Conference on Information and Communication Technology for the Muslim World 2013*, 26.03.2012-27.03.2013, 2.

Sultan or the village headman resolved conflicts.<sup>330</sup> The laws initially consisted of customary laws but were added a later version combining the Islamic law.<sup>331</sup>

In the past, mediation was favoured and preferred by the society, particularly the Malays, because it fit their nature to conceal any conflicts amongst family members, or at least limit the facts to a few people.<sup>332</sup> Through *sulh*, the people were able to protect each other's rights while performing their duties without the need to go to Court.<sup>333</sup> The role of the mediator was often played by authoritative local figures such as the *Ketua kampung* (head chief), *Penghulu* (community leaders), *Imams* (religious leaders), and *Panglima*, the first and second being the preferred mediators. They performed their responsibilities according to the customs and Islamic laws.<sup>334</sup>

As mentioned by Shabanaj (2016), the Malay Sultanate of Malacca was the epicentre of the 'Islamisation' in the Malay Archipelago.<sup>335</sup> The laws that governed the Malacca empire were known as the Malacca Digest. It was a compilation of Islamic laws based on the Syafi'e school of thoughts and the Malay customary laws, such as certain aspects of Muslim marriage law, the law of sales, and some laws related to legal procedures.<sup>336</sup> Most importantly, it contained a section related to amicable settlement in Chapter 32.2 that stated *sulh* (amicable settlement) is lawful if the defendant acknowledges the claim, and

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<sup>330</sup> Ramizah Wan Muhammad, "The Administration of Islamic Justice: Position and Jurisdictions of Shariah Court in Malaysia", *International Journal of Liberal Arts and Social Science*, 8(4) (April 2020), 45.

<sup>331</sup> Raini Hassan, Hanna Ambaras Khan and Imad Fakhri al-Shaikhli (2013), "Setting-Up a *Sulh*-based, Community Mediation-Type of Online Dispute Resolution (ODR) in Malaysia", 2.

<sup>332</sup> Nora Abdul Hak and Hanna Khan (2013), "Mediation as a Means in Resolving Community Dispute in Peninsula Malaysia: A Historical Perspective", 1-6.

<sup>333</sup> Ramizah Wan Muhammad, "The Administration of Islamic Justice: Position and Jurisdictions of Shariah Court in Malaysia", 45.

<sup>334</sup> Nora Abdul Hak and Hanna Khan (2013), "Mediation as a Means in Resolving Community Dispute in Peninsula Malaysia: A Historical Perspective", 6.

<sup>335</sup> Defrim Shabanaj, "Common Law of Malaysia: A Practical Approach". *E-Journal of Law*, 2(2) (2016), 53.

<sup>336</sup> Abdul Kadir Abdullah, "*Sistem Kehakiman dalam Islam dan Pelaksanaannya di Negeri Sabah*", (Diploma in Law and Administration of Islamic Judiciary, International Islamic University Malaysia, 1993), 16.

otherwise if he or she denies it.<sup>337</sup> In 1511, after the decline of the Malacca empire, other Malay states such as Pahang, and later Perak, Kedah, and Johor began to adopt and implement the Malacca Digest.<sup>338</sup> The status of Islamic law as the law of the Malay lands can be seen in the case of Shaik Abdul Latif and another Shaik Elis Bux (1915) where the judge Edmonds J. stated: “*Before the first treaties, the population of these states consisted solely of Muhammadan.*”<sup>339</sup>

However, British intervention in the legal administration has greatly affected how the Malaya society resolves its conflicts. On 20<sup>th</sup> January 1874, British residents were appointed to run the administration of the Malayan states. While they had agreed not to interfere with the matters of Islam and Malay customs, the British still managed to slip into these matters unofficially as they introduced a court system modelled after the English courts. British judges were appointed to run the courts.<sup>340</sup>

Throughout the era of British colonisation, the Sultan's jurisdiction, as well as the positions of the judges and officers under Shariah courts were greatly compromised. After Malaysia gained her independence, the Malaysian courts remained with the adjudicative adversarial approach to settle disputes. In 1998, improvements were made by the government to strengthen the Shariah jurisdiction, including the establishment of the Malaysian Shariah Judiciary Department (JKSM).<sup>341</sup> Later in 2001, *sulh* was officially

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<sup>337</sup> Nora Abdul Hak and Hanna Khan (2013), “Mediation as a Means in Resolving Community Dispute in Peninsula Malaysia: A Historical Perspective”, 5.

<sup>338</sup> Ramizah Wan Muhammad (2020). “The Administration of Islamic Justice: Position and Jurisdictions of Shariah Court in Malaysia”, *International Journal of Liberal Arts and Social Science*, 8(4) (April 2020),46.

<sup>339</sup> See case Shaik Abdul Latif and other v Shaik Elias Bux (1915), *Federated Malay States Law Report*, vol.1 (204), 214.

<sup>340</sup> Ramizah Wan Muhammad (2020). “The Administration of Islamic Justice: Position and Jurisdictions of Shariah Court in Malaysia”, 47.

<sup>341</sup> *Ibid*, 46.

re-introduced by JKSM in the Malaysian Shariah Courts as an alternative method to resolve disputes.

### **3.3 Malaysian Shariah Judiciary Department (JKSM)**

The establishment of the Shariah Judicial Department of Malaysia is one of the greatest accomplishments achieved in the context of Islamic judicial administration in Malaysia. Since its establishment, there have been great improvements in matters related to the Malaysian Shariah Courts as it acts as a coordinator to standardise the Malaysian Shariah Courts' administration, management, and law implementation.<sup>342</sup> On 1<sup>st</sup> March 1998, a centralised federal department known as the Department of Shariah Judiciary Department (*Jabatan Kehakiman Shariah Malaysia, JKSM*) was established by the Malaysian federal government via the Prime Minister's Department due to administration problems in the Shariah courts' system.

#### **3.3.1 The Administration and role of JKSM in *Sulh***

To ensure a well-ordered administration, JKSM has set up a proper hierarchical system in its organisation. It consists of various divisions, sections, and units. Several of these divisions play essential supporting roles in the development of *sulh*. The authorities and divisions responsible for the development of *sulh* under JKSM include:

##### **i) The Registration, Secretariat, and Records Division (BPKR)<sup>343</sup>**

The Registration, Secretariat, and Records Division (*Bahagian Pendaftaran, Keurusetiaan dan Rekod, BPKR*) is under the Senior Director of JKSM and is divided into four sections: The Appeal Registration Section, the Secretariat Section, the Records

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<sup>342</sup> Ramizah Wan Muhammad (2020). "The Administration of Islamic Justice: Position and Jurisdictions of Shariah Court in Malaysia", *International Journal of Liberal Arts and Social Science*, 8(4) (April 2020),46.

<sup>343</sup> N.a, "*Bahagian Pendaftaran, Keurusetiaan dan Rekod*", *Official Website of the Malaysian Shariah Judiciary Department*, accessed 14 July 2020, <http://www.jksm.gov.my/index.php/ms/profil-jabatan/pengenal/bahagian/53-bahagian-pendaftaran-keurusetiaan-dan-rekod>

Section, and the *Sulh* Section. For the *sulh* section, the BPKR is responsible for conducting systematic and efficient monitoring on the implementation and management of *sulh* at the Shariah Judicial Departments and Shariah Courts in all Malaysian States. The *sulh* section in JKSM oversees the development of *sulh* cases in Shariah courts through working visits to coordinate the *sulh* procedures and deal with problems faced by *sulh* officers. It needs to ensure that *sulh* cases run smoothly.

More importantly, the *sulh* section is in charge of regulating and monitoring the progress of *sulh* cases in Shariah courts throughout Malaysia and supervising the collection of monthly statistics for *sulh* cases. BPKR is also responsible for assembling the Shariah Civil Procedure Acts, Enactments, or Ordinances, the *Sulh* manual, practice directions, JKSM or state's Shariah Chief Justice's Circulars and other regulations related to *sulh* cases for the reference and knowledge purposes of the *sulh* officers throughout Malaysia.

## **ii) The Family Support Division (FSD)**

The Family Support Division (FSD), or the *Bahagian Sokongan Keluarga* (BSK), is a division established under JSKM that aims mainly to enforce maintenance orders issued by the courts. There are several criteria for an applicant to apply for the services offered by FSD, which include being a Muslim applicant, underprivileged, and a party, or witness in a Shariah court proceeding, participating in a mediation session under the Legal Aid Department, or *sulh* session under Shariah courts. Although not directly involved in *sulh*, FSD helps to assist and ensure parties are able to attend *sulh* or court proceedings by



providing services such as temporary accommodation and safety to underprivileged parties and those travelling long distances.<sup>344</sup>

Most importantly, FSD helps ensure court orders are complied, including those issued based on agreements in *sulh* proceedings. In collaboration with JKSM's Information Technology Division, FSD has adopted a mechanism known as the 'E-Maintenance' whereby a court order will automatically be integrated into the FSD database whenever it is issued. The database will allow access to the officer in charge to follow up with the respective claimant and inquire about maintenance payment.<sup>345</sup> Through this approach, *sulh* agreements, which later become court orders, could be executed more smoothly. Consequently, disputing parties will also be more serious on executing court orders and avoid violating the court orders.

**iii) Mediation training for Shariah officers and *sulh* officers**

To ensure the *sulh* officers' competency in courts, JKSM established a training division to provide Shariah officers with various trainings, including mediation training and thorough explanations on a mediator's role.<sup>346</sup> Amongst the training programmes conducted by JKSM and attended by the *sulh* officers include E-Faraid management course, and discussions on the matrimonial property from the legal and management aspects. Other diverse courses planned by JKSM also include courses such as Understanding the Alternative Dispute Resolution Techniques, Contemporary Law (Land Law), Body Language Courses, and webinars on *Qawa'id al-Maqasid*. Shariah officers

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<sup>344</sup> (n.a), “*Khidmat Bantuan Bahagian Sokongan Keluarga*”, *MyGovernment*, accessed 22<sup>nd</sup> December 2020, <https://www.malaysia.gov.my/portal/content/28866?language=my>

<sup>345</sup> Asari KN et al., “Iddan Maintenance: Concept, Issues and Methods of Enforcement”, *PERTANIKA Journal of Social Science and Humanities*, 25, 150.

<sup>346</sup> Hanis Wahed, “*SULH: Its Application in Malaysia*”, *IOSR Journal of Humanities and Social Science*, 6(2) (June 2015), 75.

also attend courses such as Islamic Family Law Reading course and Law Reading course to strengthen their theoretical and practical aspects on related laws.<sup>347</sup>

At the same time, many *sulh* officers believe that aside from their hard skills, it is also vital for them to master their soft skills when dealing with clients.<sup>348</sup> As such, Shariah officers are also provided with training, such as the Neuro-Linguistic Program (NLP) training, that covers matters related to effective communication and understanding the clients.<sup>349</sup> All these trainings are crucial for current and new *sulh* practitioners to acquire knowledge about mediation, while nurturing and sharpening their skills. JSKM also provides Shariah officers, consisting of Syarie judges and *sulh* officers with the opportunity to attend private mediation training known as The Accord Group. These officers attend the training to further explore and broaden their knowledge, skills, and capabilities to facilitate a successful mediation.<sup>350</sup>

### 3.4 The Shariah Court-Annexed Mediation

Shariah Court-Annexed Mediation, commonly known as *sulh* proceedings (*'Majlis Sulh'*) in Shariah courts, refers to the process where *sulh* is conducted under the jurisdiction and supervision of the Shariah courts. At Shariah courts, Shariah officers are appointed as mediators, known as *sulh* officers. Its implementation lies under the structure

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<sup>347</sup> Ruzita Ramli et al., "The Roles and Competencies of Women *Sulh* Officers in Malaysian Shariah Courts", 318.

<sup>348</sup> *Ibid.*

<sup>349</sup> N.a, "Takwin Program Latihan JKSM 2018", Malaysian Open Data Portal, accessed 25<sup>th</sup> December 2020, [https://www.data.gov.my/data/ms\\_MY/dataset/takwim-program-latihan-jabatan-kehakiman-Shariah-malaysia/resource/08e8c31a-340e-4823-8516-5dabc82efd62?view\\_id%252525253D0b07a352-5473-4d00-890e-c6c8c8cdd464](https://www.data.gov.my/data/ms_MY/dataset/takwim-program-latihan-jabatan-kehakiman-Shariah-malaysia/resource/08e8c31a-340e-4823-8516-5dabc82efd62?view_id%252525253D0b07a352-5473-4d00-890e-c6c8c8cdd464)

<sup>350</sup> Noor Aini Baba, "Kursus Pengurusan Mediasi", E-Shariah website, accessed on 28<sup>th</sup> December 2020, <http://www.eShariah.gov.my/portal/page/portal/Portal%20E-Shariah%20BM/Portal%20E-Shariah%20Arkib/Portal%20E-Shariah%20Arkib%202008/Jun/Portal%20E-Shariah%20Berita%2020062008>

and administration of Shariah courts based on the provisions and statutory state laws, as will be discussed.<sup>351</sup>

#### 3.4.1 Background of Shariah Courts in Malaysia

Even though JKSM is established to support matters related to the Shariah courts, the Shariah courts still have the power to make rules for the following matters;<sup>352</sup> the procedure and practice of the registries of a Shariah court; the fees, allowances, and costs payable in respect to the proceedings of the Shariah Court Civil Procedures; the procedure for *sulh*; the forms, books of accounts, reports, and other documents to be used in respect of any act or thing done under or in pursuance of the Shariah Court Civil Procedures; as well as the conduct of Court, form, and method of execution of instruments; and the appointment of agents of the courts. The courts are where trials are held and *sulh* proceedings are executed under the guidance of *sulh* officers.

Shariah courts are well-known for their association and involvement with the Muslim society in Malaysia. Before its reconstruction in 1998, the Shariah court faced multiple administrative issues, such as the absence of proper operating procedures and guidelines for the management of Shariah courts and the absence of its own complex. Before the year 1948, the Shariah courts were initially a part of the Malaysian federal systems, but were later demoted to the state courts with minimal jurisdiction due to British interference with the judicial system.

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<sup>351</sup> Nurzakiah Ramlee and Nurul Hikmah Hidzam, “The Practice of Sulh in the New Norm in Brunei and Malaysia”, 61.

<sup>352</sup> The Shariah Court Civil Procedure (Federal Territories) Act 1998, (Section 247/1998).

### 3.4.2 Administration of Court-Annexed Mediation (*Sulh*) in Shariah Courts

Alwi Abdul Wahab (2017) positioned mediation as an adjunct to court systems.<sup>353</sup> This section will be divided into three parts; the legal provisions of *sulh*, the *sulh* process, and the authorities who conduct *sulh*. *Sulh* proceedings in Shariah courts are conducted by mediators known as *sulh* officers.<sup>354</sup> On 1<sup>st</sup> August 2001, *Sulh* was first enforced as an alternative dispute resolution method and later operated officially on 1<sup>st</sup> May 2002 at Malaysian Shariah Courts. After the enforcement, ten contractual positions of Shariah Officers Grade L3 were appointed in Selangor by the state government to serve as *sulh* officers in nine Shariah lower courts and one other appointment at the Shah Alam High Court.

#### 3.4.2.1 Legal provisions for *sulh*<sup>355</sup>

Various studies have explained the Malaysian Shariah legal provisions related to *sulh*, such as Hanis Wahed (2015),<sup>356</sup> Nor Khalidan Dahlan et al. (2017),<sup>357</sup> and Nor'Adha Abdul Hamid et al. (2019)<sup>358</sup> Said legal provisions consist of state acts, manuals, circulars, and practice directions. The primary provision of *sulh* can be seen in section 99 of the Shariah Court Civil Procedure (Selangor) Enactment 2003. It promotes the execution of *sulh* at any stage of the court proceeding<sup>359</sup> while procedures related to *sulh* can be found

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<sup>353</sup> Alwi Abdul Wahab, "Court-Annexed and Judge-Led Mediation in Civil Cases: The Malaysian Experience" (PhD Thesis, Victoria University of Melbourne, Melbourne, 2013), 121.

<sup>354</sup> Raihanah Azahari, "Perkembangan dan Pelaksanaan *Sulh* dalam Kes-Kes Pertikaian Keluarga di Dunia Islam: Sorotan Terhadap Perkembangan Terkini Pelaksanaannya di Mahkamah-Mahkamah Shariah di Malaysia" in *Islam: Past, Present and Future*, ed. Ahmad Sunawari Long, Jaffary Awang and Kamaruddin Salleh (Selangor: Department of Theology and Philosophy, 2004), 178.

<sup>355</sup> See <https://www.jakess.gov.my/hakam/sulh.pdf> for more information.

<sup>356</sup> Hanis Wahed, "*SULH*: Its Application in Malaysia", *IOSR Journal of Humanities and Social Science*, 20(6) (June 2015), 75-76.

<sup>357</sup> Nur Khalidah Dahlan, "Alternative Dispute Resolution Methods from the Shariah Perspective in Malaysia", *Journal of Nusantara Studies*, 2(1) (2017), 94-95.

<sup>358</sup> Nor' Adha Abdul Hamid et al., "Judgement with Consent: Analysis of *Sulh* Innovation", *International Journal of Law, Government and Communication*, 4(17) (December 2019), 102-111.

<sup>359</sup> Section 99, Shariah Court Civil Procedure (Federal Territories) Act 1998, Part XIII – Settlement, Withdrawal and Discontinuance.

under section 247(1)(c) of the same enactment, where the Shariah Court Methods Committee are empowered to enact jurisdictions related to *sulh*.

On top of that, there are the JKSM *Sulh* Work Manual, and the *Sulh* Officer Code of Ethics issued by JKSM on how *sulh* is executed in court and the ethical codes of conduct determined for *sulh* officers. There are also Practice Directions which are updated from time to time by JKSM to ensure smooth performance in the *sulh* implementation. These practice directions are elaborated further under the process of *sulh*.

#### **3.4.2.2 The process and procedure of *Sulh* in Shariah Courts**

As mentioned, in conformity with section 99 of the Shariah Court Civil Procedure (Selangor) Enactment 2003, disputing parties may attempt to practise *sulh* at any stage of the court proceedings.<sup>360</sup> Practice Direction Number 1 Year 2010 determines the 18 specific cases that are required to go through *sulh* first as the initial court procedure. These cases are listed as follows:<sup>361</sup>

1. Claim for engagement compensation
2. Claim for *Muta'ah*
3. Claim for matrimonial property
4. Claim for wife's maintenance
5. Claim for maintenance for the Disabled Party
6. Claim for maintenance security (*Cagaran Nafkah*)
7. Claim for *Iddah* maintenance
8. Claim to alter maintenance order
9. Arrears of maintenance

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<sup>360</sup> Section 99 *Sulh*, Part XIII – Settlement, Withdrawal and Discontinuance, Shariah Court Civil Procedure (Federal Territories) Act 1998

<sup>361</sup> Practice Direction Number 1 Year 2010.

10. Claim for child maintenance.
11. Claim to alter child custody / maintenance order
12. Claim to alter settlement for child custody / maintenance order
13. Claim for child custody
14. Claim for marriage damages
15. Claim for residential rights
16. Claim for order for the husband to live together
17. Claim for the wife to remain faithful
18. Claim for dowry

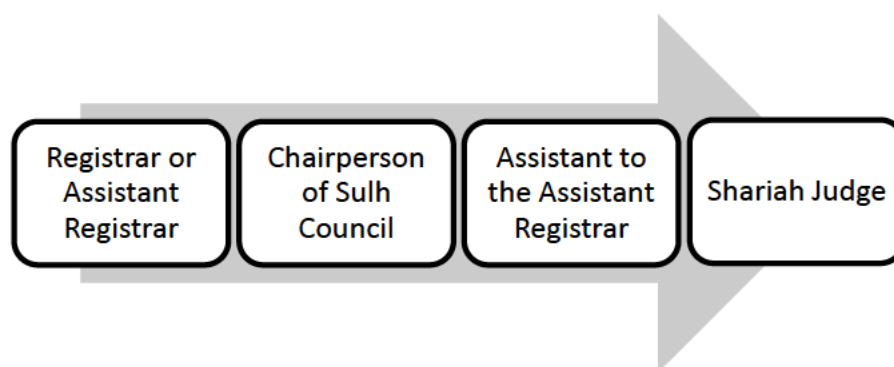
Unlike the cases listed above, ex-parte (interim) cases are not mandated to go through *sulh*. During case registration, cases that have gone through mediation at the Legal Aide Department (LAD) are also not required to go through *sulh* at court.<sup>362</sup> It is important to note that Practice Direction Number 1 Year 2010 needs to be read together with Practice Direction Number 1 Year 2000 (Registration Codes for Cases), Practice Direction Number 9 Year 2003 (Addendum and Amendment to Codes of Case Registration), Practice Direction Number 14 Year 2004 (Additional Codes to Case Registration), and Practice Direction Number 14 Year 2005 (Additional Codes to Case Registration).

For the registration and issuing of court orders, there are four authorities designated to ensure the process of *sulh* run smoothly from the beginning until the end. Figure 3.1 below shows the flow of the designations involved in the process:

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<sup>362</sup> *Ibid.*

**Figure 3. 1. Four Shariah authorities involved in sulh**



The first role in the *sulh* process is that of the Registrar or the Assistant Registrar. Upon new case registrations through applications or summons, the Registrar will receive the case files from the Assistant to the Assistant Registrar.<sup>363</sup> The person will first sort out all applications, and depending on his experience, he will determine which cases are suitable for *sulh*.<sup>364</sup> For cases that are deemed suitable for *sulh*, the Registrar or the Assistant Registrar shall not fix a date for the trial within a period of three months from the receipt of the summons or the application.<sup>365</sup> Instead, he will set a date for a *sulh* session termed the *Sulh* Council (*Majlis Sulh*) within 21 days after the application is made.

For cases registered for *sulh*, instead of the regular *mal* summon documents, a *sulh* notice will be issued to summon the ‘defendant’ of the case to attend the *Majlis Sulh*.<sup>366</sup> Once a date has been set, the next person in charge will be the Chairperson of the *sulh* council, that is, the mediator. According to Rule 5 of the Shariah Court Civil Procedure (*Sulh*) (Selangor) 2001, the Chairperson can either be the Registrar or any public officer appointed for such purposes by the Shariah Chief Judge. In fact, the term ‘public officer’

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<sup>363</sup> N.a, “Process of Conducting *Sulh* Session at Shariah Court”, E-Shariah Official Portal, accessed 28<sup>th</sup> July 2020, <http://www.eShariah.gov.my/portal/page/portal/Portal%20E-Shariah%20BI/Portal%20E-Shariah%20Arahan%20Amalan/Portal%20E-Shariah%20Sulh/Portal%20E-Shariah%20Pengendalian%20Sulh/Portal%20E-Shariah%20Pengendalian%20Sulh1>

<sup>364</sup> Nurah Sabahiah, “Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of its Application in Malaysia”, 180-181.

<sup>365</sup> Rule 3. Fixing date of *sulh*, Shariah Court Civil Procedure (*Sulh*) Selangor Rules 2001.

<sup>366</sup> Nor’ Adha Abdul Hamid et al., “Judgement with Consent: Analysis of *Sulh* Innovation”, 105.

typically refers to the *sulh* officer who acts as the Chairperson. The Chairperson will guide and assist disputing parties to resolve their dispute based on the subject matters raised by the parties. During the process, the Chairperson is allowed to take evidence from the parties, accept any document submitted and if necessary, adjourn the *sulh* council from time to time.<sup>367</sup>

If the *sulh* is successful and a *sulh* agreement is made, the *sulh* officer will draft the contract based on the content of the session<sup>368</sup> and submit the document to be enforced as a court order. If no agreement is reached, only then would a date be set for the trial. If an agreement is reached, whether wholly or only parts of the issues raised, the Assistant to the Assistant Registrar will record the agreement and submit the draft order to the judge.<sup>369</sup> If one or both of the disputing parties have previously appointed a lawyer, the Registrar or the Assistant Registrar will submit the draft order to the parties with or without making any amendments. He will later receive the final order from the parties to seal and sign the draft order.

Finally, the judge will enforce the *sulh* agreement as a court order. The order is only enforceable if both parties have signed the agreement before the Shariah judge. The judge will then pass judgment and the Order of Approval by signing and sealing the draft order. As a result, the *sulh* agreement legally becomes a court order. Once this happens, the Registrar or the Assistant Registrar will deliver the order to all parties involved. Figure 3.2 summarises the process of *sulh* at the Shariah Courts:

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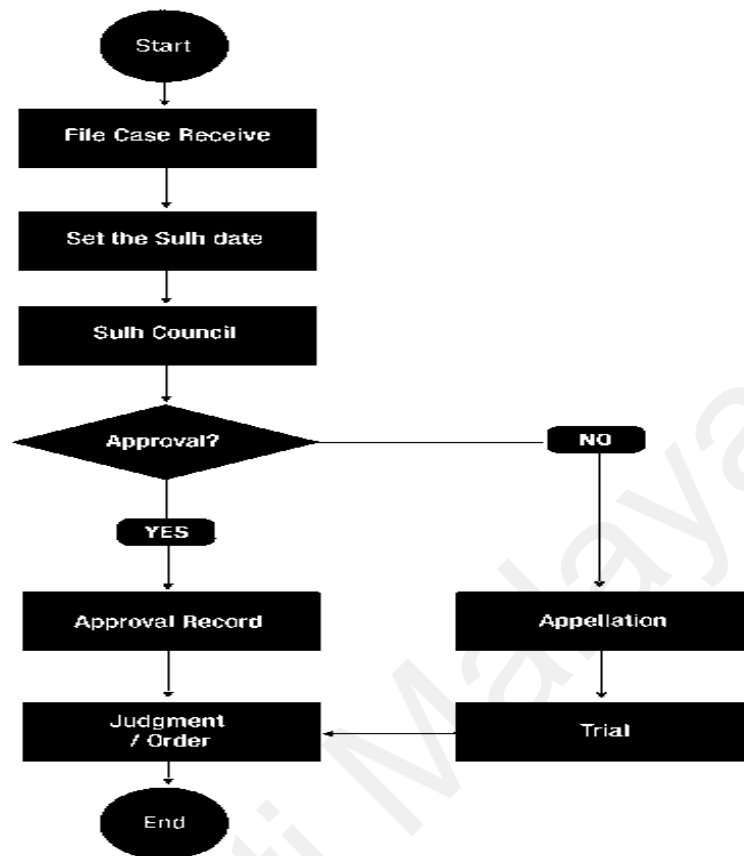
<sup>367</sup> Rule 5, Shariah Court Civil Procedure (*Sulh*) Selangor Rules 2001.

<sup>368</sup> Interview with Mohamed Fadzil Esa (Shariah Lower Court Judge, Tangkak Shariah Court) on 5<sup>th</sup> March 2021.

<sup>369</sup> N.a, "Process of Conducting *Sulh* Session at Shariah Court", E-Shariah Official Portal, accessed 28<sup>th</sup> July 2020, <http://www.eShariah.gov.my/portal/page/portal/Portal%20E-Shariah%20BI/Portal%20E-Shariah%20Arahan%20Amalan/Portal%20E-Shariah%20Sulh/Portal%20E-Shariah%20Pengendalian%20Sulh/Portal%20E-Shariah%20Pengendalian%20Sulh1>



Figure 3.1. The *Sulh* Flow Chart



Source: E-Shariah Official Portal<sup>370</sup>

Because the *sulh* procedure is done mainly to reduce the backlog of cases, only a registration fee of RM8.00 is required for filing a summon when the party files his or her case in Court.<sup>371</sup> Aside from the registration fee, there is no charge allowed for the services of *sulh* officers in Shariah courts. This rule is as stated in rule 9 of the Shariah Court Civil Procedure Rules 2001.

<sup>370</sup> *Sulh* Flow Chart, E-Shariah Official Portal, accessed 29<sup>th</sup> July 2020, <http://www.eShariah.gov.my/portal/page/portal/Portal%20E-Shariah%20BI/Portal%20E-Shariah%20Arahan%20Amalan/Portal%20E-Shariah%20Sulh/Portal%20E-Shariah%20Pengendalian%20Sulh>

<sup>371</sup> Nurah Sabahiah Mohamed, “Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of its Application in Malaysia”, 187.

From the practical aspect, there are cases where disputants break the *sulh* agreement and defy the enforced court orders. The rescission made by either one of the parties leaves the Court no choice but to bring the case to trial.

#### 3.4.2.3 Mediators at the Shariah Courts

For *sulh* in the Shariah courts, there are several authorities that are responsible for the execution of *sulh*. With several alternative dispute resolution processes available in Court, the third-neutral party that leads the processes also differs. Aside from the Shariah judge, a third neutral party in a *sulh* process is referred to as the *sulh* officer in a Shariah court, while in Shariah arbitration, the third neutral party is known as the *hakam*.

##### i. Shariah Judges

According to scholar Wahbah al-Zuhaili (1985), among the responsibilities of a judge is to resolve disputes either by amicable settlements or compulsory law.<sup>372</sup> In court, the Shariah judge holds the ultimate power in Shariah adjudication. He is one of the most significant figures throughout the whole administration of Shariah courts. Viewed as a respectable, wise, and fair role model, a judge in a Shariah court carries heavy responsibilities to ensure justice and peace are achieved. His decisions, verdicts, and commands in a court trial must be respected and adhered to. Any person who disobeys, defies, ridicules, or insults court orders made by the judge is guilty of an offense, and if liable, may be charged with a fine not exceeding RM3,000.00 or imprisonment not more than two years or both.<sup>373</sup>

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<sup>372</sup> Wahbah Zulaili, *al-Fiqh al-Islami wa Adillatuhu* (Damshiq, 1985), Vol.6, 487.

<sup>373</sup> Shariah Criminal Offenses (Federal Territories) Act 1997 Act 559 (Section 10 Disobeying Court Orders/1997)

Generally, the role of a judge is to adjudicate and make judgments in court. Nonetheless, the Shariah judges also play an important role in promoting *sulh*. Practice Direction Number 1 Year 2001 states that the judge's ethics include encouraging disputing parties to resolve their dispute and achieve an amicable settlement by *sulh* in *mal* cases.<sup>374</sup> At the same time, the judge may also practice *sulh* (mediation), and this is referred to as judge-led mediation. Because of the higher authority carried by the judge compared to *sulh* officers, some parties tend to be more confident with judge-led mediation.<sup>375</sup>

However, judge-led mediation does have its limitations. For example, the judge who conducts the trial may stop the proceeding for *sulh*, but he is not allowed to become the mediator for the case that he is in charge of during adjudication. Still, both the normal *sulh* process and judge-led mediation possess similar advantages as long as the mediator sticks to the common rules of mediation itself.<sup>376</sup>

ii. *Sulh* officers

*Sulh* officers are court officials specifically appointed by JKSM to assist Shariah courts in resolving disputes and enforcing mediation.<sup>377</sup> Compared to Shariah judges, they are juniors in rank and position.<sup>378</sup> However, the role of *sulh* officers is significantly important, as they have the authority and capability to end a dispute.

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<sup>374</sup> See Practice Direction Number 1 Year 2001, *Jabatan Kehakiman Shariah Malaysia*.

<sup>375</sup> Dato' Dr Haji Mohd Na'im Mokhtar, "Application of Mediation in Shariah Courts of Malaysia" (Online Webinar, 1<sup>st</sup> September 2020).

<sup>376</sup> *Ibid.*

<sup>377</sup> Nur Khalidah Dahlan et al. (2018), "*Sulh*: Justice Without Court Trial in Fulfilling the Needs of Islamic Finance in Malaysia", *Journal of Law and Society*, 5.

<sup>378</sup> Alwi Abdul Wahab, "Court-Annexed and Judge-Led Mediation in Civil Cases: The Malaysian Experience" (PhD Thesis, Victoria University of Melbourne, Melbourne, 2013), 54.

According to Hammad Md Dahalan and Mohamad Azhan Yahya (2016), a person is eligible to become a grade LS41 *sulh* officer if he or she has at least a Shariah degree holder from any recognised university and a Diploma in Islamic Law Administration. A LS44 grade officer may also be appointed as a *sulh* officer in several courts in Malaysia and this eligibility is equivalent to that of a Shariah judge.<sup>379</sup> This is supported by Nur Khalidah Dahlan et al. (2018), who mentioned that a qualified *sulh* officer must possess a qualification in Islamic studies and an additional qualification in the Diploma of Judicial Administration.<sup>380</sup> A person does not necessarily have to be an accredited mediator to be appointed as a *sulh* officer.<sup>381</sup>

The *sulh* officer's role and responsibilities include assisting the Registrar by conducting *sulh* or counseling and preparing *sulh*-related reports to be presented to the judge. As stated by Nur Khalidah Dahlan et al. (2018), only an experienced *sulh* officer would lead the *sulh* proceeding. The experienced officer would have acquired communication skills in psychology and counseling, as well as the required knowledge related to civil law. Whether or not this case is further discussed in Chapter Four.

### iii. Hakam

A *Hakam* can be considered as a form of *sulh* exclusively for the dissolution of marriage. The hakam does not practise mediation. Rather, the hakam at Shariah courts is a neutral third party Shariah arbitrator appointed by the Court when the Court is certain that there are constant quarrels (*shiqaq*) between a married couple. Through arbitration (*tahkim*), a hakam is best appointed in situations where the husband refuses to divorce his

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<sup>379</sup> Hammad bin Mohamad Dahalan and Mohamad Azhan Yahya, “*Kedudukan Pegawai Sulh di Mahkamah Syariah*”, *IRSYAD 2016*, 5083.

<sup>380</sup> Nur Khalidah Dahlan et al. (2018), “*Sulh: Justice Without Court Trial in Fulfilling the Needs of Islamic Finance in Malaysia*”, 5.

<sup>381</sup> Nurah Sabahiah (2013), “*Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of its Application in Malaysia*”, 185.

wife. Matters related to *hakam* can be referred to section 47 and 48 of the Islamic Family Law Enactment (Selangor) (2003) whilst approaches to a *hakam* are provided in the Hakam Rules (Selangor) 2014.<sup>382</sup>

According to section 48 of the above enactment, the Court may appoint two *hakams* for a case. Preferably, the *hakam* appointed are close relatives of the couple who possess knowledge of the circumstances of the case.<sup>383</sup> The appointed *hakam* will then execute arbitration based on *hukum syarak* and directions provided by the Court. During the process, only a close family member of each party is allowed to be present. This means that no other person or Shariah lawyer shall be allowed to be present or represent the parties in the presence of the *Hakam*. *Hakams* may be replaced if the Court deems their performance unsatisfactory.

Different from a *sulh* officer, a *hakam* holds the authority to divorce a disputing couple. Overall, it is important to distinguish that a *sulh* officer and *hakam* hold different roles and authorities in the Shariah court administration. Table 3.1 below summarises the different roles between a *hakam* and a *sulh* officer in court<sup>384</sup>:

**Table 3.1. Differences between *sulh* officer and *hakam***

<i>Sulh</i> officer in a <i>Sulh</i> Proceeding	Hakam in an Arbitration process
Decisions in a <i>sulh</i> proceeding is determined and agreed between parties and cannot be enforced by the <i>sulh</i> officer.	Decisions can made entirely by the <i>Hakam</i> and will be brought before the judge.

<sup>382</sup> Also known as *Kaedah-Kaedah Hakam (Negeri Selangor) 2014*.

<sup>383</sup> Section 48, Part V Dissolution of Marriage, Islamic Family Law Enactment (Selangor) (2003), [http://www2.eShariah.gov.my/eShariah/mal/portalv1/enakmen/State\\_Enact\\_Upd\\_nsf/f831ccddd195843f48256fc600141e84/6c72135f6bd8fcb848257115000d6a0e?OpenDocument](http://www2.eShariah.gov.my/eShariah/mal/portalv1/enakmen/State_Enact_Upd_nsf/f831ccddd195843f48256fc600141e84/6c72135f6bd8fcb848257115000d6a0e?OpenDocument)

<sup>384</sup> “Differences between *Sulh*, Negotiation, *Hakam*, Court Trial and Counselling” Pamphlet. Accessed on 17<sup>th</sup> January 2021 through [https://jksns.ns.gov.my/images/Sulh\\_Kit/PERBEZAAN-SULH.pdf](https://jksns.ns.gov.my/images/Sulh_Kit/PERBEZAAN-SULH.pdf)

Acts as the Chairman in a <i>sulh</i> proceeding and assists parties to reach an agreement.	Will make the decisions, but not fully responsible to ensure disputing parties reach an agreement.
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### 3.5 Shariah Mediation at Legal Aid Department

Aside from court-annexed mediation, private mediation, or non-court mediation has been introduced and developed in various countries. This process began in the United States and was later followed by others, such as Australia, Hong Kong, Singapore, and United Kingdom.<sup>385</sup> Apart from the Shariah courts, another government institution that has the authority to exercise legal practice is the Legal Aid Department (LAD). Whereby Shariah courts' jurisdiction only covers *sulh* for Muslims, the LAD is a civil institution that provides several legal services for both civil and Shariah jurisdictions, including Shariah mediation services.

#### 3.5.1 Background of Legal Aid Department

The Legal Aid Department (LAD) was established in September 1970 and initially known as the Legal Aid Bureau (LAB). Originally, it was placed under the Attorney-General's Chambers in 1985, but later transferred under the Ministry of Law in May 1995. On June 1995, the LAB came under the wing of the Legal Affairs Division of the Prime Minister's Department and remained so until now. The LAB changed its name to "Legal Aid Department" on 16<sup>th</sup> January 2011.<sup>386</sup>

The LAD is a government agency that provides legal advice and assistance to low-income groups of society who cannot afford the services of private lawyers in disputes

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<sup>385</sup> Nurah Sabahiah Mohamed (2013), "Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of its Application in Malaysia", 46.

<sup>386</sup> Official Portal of Legal Aid Department, "Historical Background", Legal Aid Department Website, accessed on 4<sup>th</sup> October 2019, <http://www.jbg.gov.my/index.php/en/info-jbg/history>

related to contentious legal matters.<sup>387</sup> This is because it has a vision of providing professional legal aid services of the highest quality to qualified citizens to ensure access to justice. As stated in the Second Schedule under the criminal jurisdiction and the Third Schedule under the civil jurisdiction of the Legal Aid Act of 1971, the LAD also has a number of duties, including providing legal advice and assistance on all legal proceedings in Malaysian courts within the jurisdiction, as well as mediation services.<sup>388</sup>

In 2011, due to high demand from those who could not afford legal representation, the scope of cases handled by the LAD was expanded in both civil and Shariah cases for the second time, the first being in 1982.<sup>389</sup> The expansion of jurisdiction commenced on 1<sup>st</sup> January 2012. For both civil and Shariah cases, the cases were initially limited to family cases related to maintenance, custody, divorce, and jointly acquired property. After the amendment, the expansion would cover proceedings on engagement loss, marriage debt, alimony, as well as living bequests and wills linked to family cases.<sup>390</sup> Whilst for civil cases, the LAD provides legal services in Sabah and Sarawak in matters related to the application for maintenance, adoption, and estate administration. Before the expansion of jurisdiction, these services were also offered in West Malaysia.<sup>391</sup>

Supporting section 8 (1) of the Federal Constitution<sup>392</sup>, the services provided by LAD is limited to certain requirements. A person is only eligible to request the services of LAD if they fall under either one of the two categories:

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<sup>387</sup> Nurah Sabahiah Mohamed, "Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of its Application in Malaysia", 84.

<sup>388</sup> Official Portal of Legal Aid Department, "Functions", Legal Aid Department Website, accessed on 4<sup>th</sup> October 2019, <http://www.jbg.gov.my/index.php/en/info-jbg/functions>

<sup>389</sup> N.a, "Bidang kuasa Jabatan Bantuan Guaman diperluas," Utusan Malaysia, February 19<sup>th</sup>, 8.

<sup>390</sup> Legal Aid (Amendment of the Third Schedule) Order, 2011. (No.1 and 2 under Shariah Court Proceedings)

<sup>391</sup> Bernama, "Legal aid for civil and Shariah from Jan 1," *The Borneo Post*, 21<sup>st</sup> January 2012, 17.

<sup>392</sup> Section 8(1) of the Federal Constitution dictates that all persons are equal before the law and entitled to the equal protection of the law.

- i. Applicants whose annual financial resources amounting to RM30,000 or below.
- ii. Applicants whose annual financial resources exceed RM30,000, but are below RM50,000.<sup>393</sup>

An online qualification test is first required to assess the applicant's financial status to determine whether a person is eligible or not to use the services provided by the LAD. For example, an applicant whose yearly financial resources are below RM30,000 is not required to pay the contribution amount at all<sup>394</sup> except for a small registration fee of RM10.00. The RM10.00 registration fee and contribution payable, if any, will be paid into the trust account established under section 9 of the Financial Procedure Act 1957 (Act 61) as a means to administer the legal aid services.<sup>395</sup>

### **3.5.2 Administration of Legal Aid Department**

The organisational administrative chart of the LAD is presented below in Figure 3.3.<sup>396</sup>

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<sup>393</sup> Official Portal of Legal Aid Department, "Eligibility of the Applicant", Legal Aid Department Website, accessed on 4<sup>th</sup> October 2019, <http://www.jbg.gov.my/index.php/en/legal-aid/eligibility-of-the-applicant>

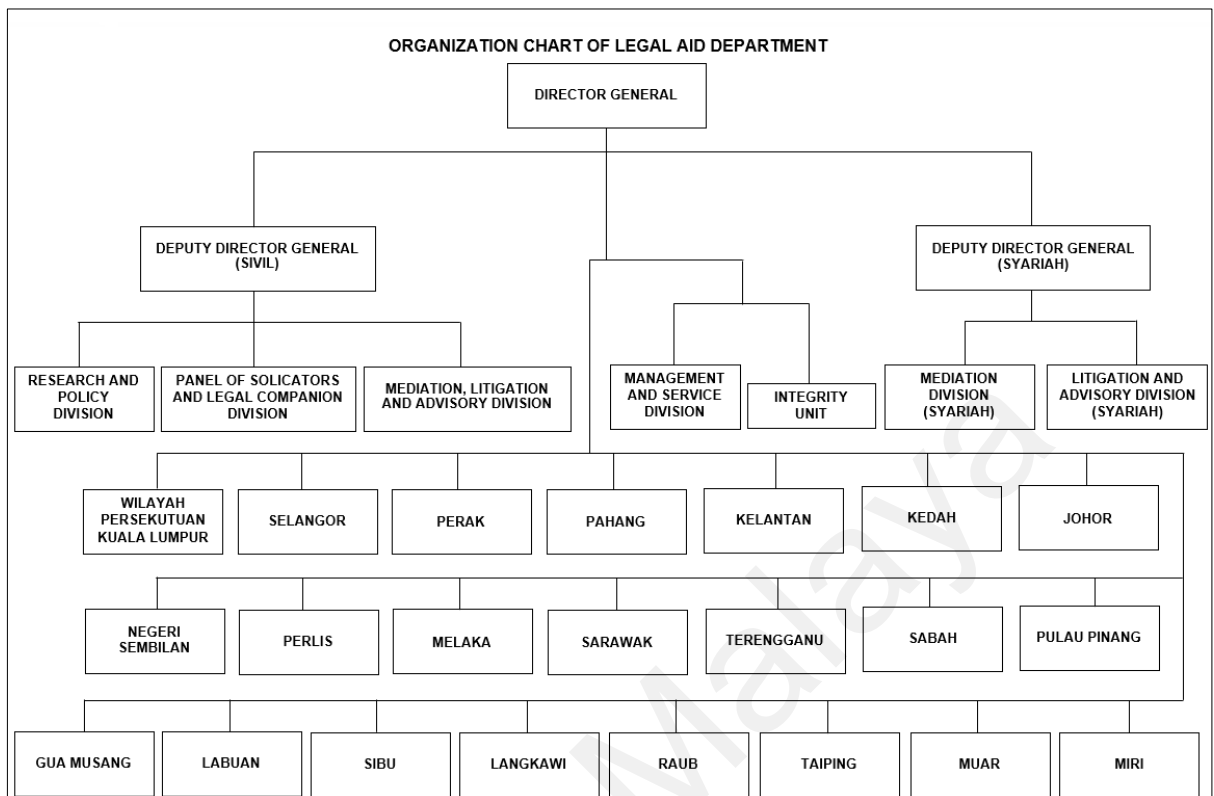
<sup>394</sup> Legal Aid (Fees and Contributions) Regulations 2017, (No. 3/2017) Also see Sub regulation 3(1) of the Second Schedule of the same Act.

<sup>395</sup> Legal Aid (Fees and Contributions) Regulations 2017, (No. 4/2017).

<sup>396</sup> Official Portal of Legal Aid Department, "Information", Legal Aid Department, accessed 19<sup>th</sup> July 2020, <http://www.jbg.gov.my/index.php/en/info-jbg/org-chart>.



**Figure 3.2. The organisation chart of Legal Aid Department**



Source: Official Portal of Legal Aid Department

Based on the above figure, the administration of LAD is led by the Director General. Since the LAD has jurisdiction over both civil and Shariah cases, the General Director is therefore assisted by two Deputy Director Generals. Under the Deputy Director General of the Civil Jurisdiction, there are three other divisions, which are the Research and Policy Division, the Panel of Solicitors, and Legal Companion Division, as well as the Mediation, Litigation, and Advisory Division. On the other hand, the Deputy Director General for the Shariah Jurisdiction has only two divisions, particularly the Mediation Division for Shariah cases and the Litigation and Advisory Division. Each division performs specific tasks to ensure a smooth administration of the LAD.

When it comes to mediation, one administrative difference between the civil and Shariah divisions is that the civil LAD combines mediation with litigation and legal advisory, whereas the Shariah division separates Shariah mediation in one division and

another for litigation and legal advisory. Besides from providing mediation services, the Shariah mediation division also supervises, monitors, and provides any required assistance to the LAD branches related to mediation, just as the Shariah and Advisory division does so in terms of legal aid and advice. The latter also offers oral legal advice in any Shariah matters, as stipulated in the Fourth Schedule of the Legal Aid Act 1971, and represents the client in Shariah proceedings, as stipulated in the Third Schedule.<sup>397</sup>

The LAD has 22 branches scattered across Malaysia. These branches can be found at the Federal State of Kuala Lumpur, Selangor, Negeri Sembilan, Melaka, Johor, Muar, Pahang, Raub, Terengganu, Kelantan, Gua Musang, Perak, Taiping, Pulau Penang, Kedah, Langkawi, Perlis, Sabah, Wilayah Persekutuan Labuan, Sarawak, Miri, and Sibul.<sup>398</sup> Unlike civil and Shariah courts, whose jurisdictions are limited to a specific part of the law, the LAD manages cases in both civil and Shariah areas.

In terms of rules and procedures, the LAD has its own set of acts and regulations for it to adhere to, mainly the Legal Aid Act 1971, Legal Aid (Amendment of Third Schedule) Order 2011, Legal Aid (Amendment) Act 2017, Legal Aid Regulation 2017, Legal Aid (Fees and Contributions) Regulations 2017, and the Legal Aid (Criteria and Means Test) Regulations 2017. These rules are used throughout the legal processes taking place under LAD.

To ensure maximum service, the LAD refers to its Clients Charter when dealing with clients. The Clients Charter is implemented from the beginning of the mediation process, where LAD needs to ensure that the client's waiting time at the counter does not exceed

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<sup>397</sup> N.a, "Divisions", *Legal Aid Department Official Website*, accessed on 22<sup>nd</sup> July 2020, <http://www.jbg.gov.my/index.php/en/info-jbg/division#>

<sup>398</sup> N.a, "Branches", *Legal Aid Department Official Website*, accessed on 19<sup>th</sup> July 2020, <http://www.jbg.gov.my/index.php/en/info-jbg/cawangan#kedah>

15 minutes before they are attended. Under the Clients Charter, the LAD also needs to ensure that their mediation services are concluded within 30 days from the date of both parties' consent for mediation. The pleadings for mediation cases are completed within 21 days from the date of the conclusion of mediation sessions. The cases are then filed within 14 days after the completion of pleadings. At the end, a fair judgment or order also needs to be established and served on the clients within seven days upon receipt from the Court.<sup>399</sup>

### 3.5.3 Shariah Mediation at the Legal Aid Department

As mentioned, mediation at the LAD is divided into civil mediation and Shariah mediation. At each LAD branch, the same mediators will handle both civil and Shariah cases, except for the Headquarters branch, where mediators who graduated with a Shariah background will only mediate Shariah cases.<sup>400</sup> The LAD mediators are subject to the Legal Aid (Mediation) Regulations 2006, including their ethical code of conduct. Mediators at the LAD are appointed and allowed to conduct mediation sessions under Act 29A of the Legal Aid Department (Amendment) Act 1971<sup>401</sup>, which stipulates the following:

*“29A. (1) The Minister may authorize the Director General Legal Aid to provide mediation services to persons assisted.*

*(2) Every mediation session shall be conducted by an intermediary (mediator) or more.”*

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<sup>399</sup> Official Portal of Legal Aid Department, “Clients Charter”, Legal Aid Department Website, accessed on 6<sup>th</sup> October 2019, <http://www.jbg.gov.my/index.php/en/clients-charter/client-s-charter>

<sup>400</sup> Interview via WhatsApp Text with Respondent 6, an experienced mediator from the LAD on 27.10.2021.

<sup>401</sup> See Act 29A Provision for Mediation Services of the Legal Aid Department (Amendment) Act 2017 (Act A1548)

Overall, mediation service is provided to the aided person in disputes related to any proceedings stated in the Third Schedule of the Legal Aid Act 1971. The LAD offers Shariah mediation services for 12 types of cases under the Shariah jurisdiction:<sup>402</sup>

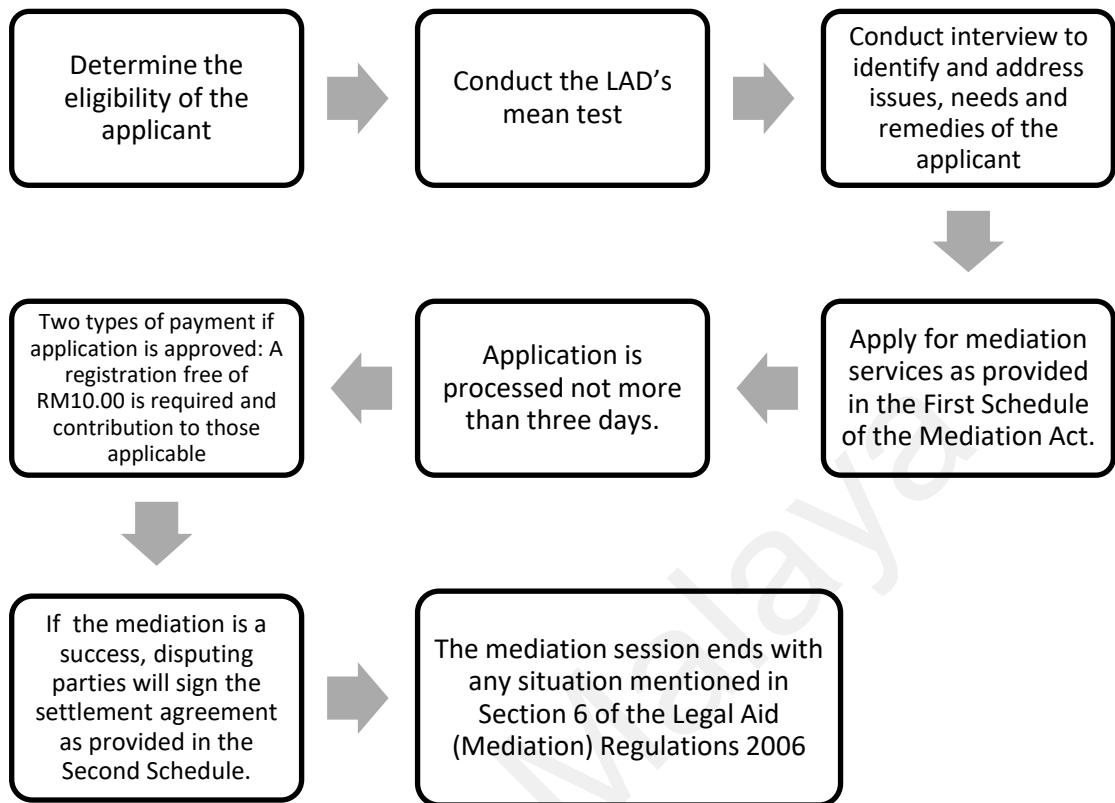
- i) Maintenance of wife
- ii) Iddah maintenance
- iii) Maintenance of children
- iv) Arrears of maintenance
- v) Variation of maintenance orders
- vi) Child custody
- vii) *Mut'ah*
- viii) Grants (*Hibah*)
- ix) Wills
- x) Marital debts
- xi) Betrothal damages
- xii) Matrimonial properties

The process and procedure conducted in a LAD mediation session are summarised below in Figure 3.4:

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<sup>402</sup> N.a, "Mediation", *Legal Aid Department Official Website*, accessed on 23.07.2020, <http://www.jbg.gov.my/index.php/en/services/mediation>

**Figure 3.3. The procedure in a LAD mediation session**



In order to determine whether a person is eligible to seek legal aid from the LAD, he or she must be a Malaysian citizen aged 18 years old and above. If the applicant is under 18 years of age, the applicant's parents or guardian can apply on behalf of the applicant.<sup>403</sup> As mentioned before, the applicant also has to go through a mean test and an interview set by the LAD. The function of the mean test is not to determine whether a person is eligible to apply for LAD services or not. Rather, it is used to determine whether the applicant is required to pay a contribution amount to the LAD or otherwise. The contribution amount varies among the applicants depending on their annual income.

Different from the mandatory *sulh* proceedings in Shariah courts, the parties attending the mediation setting at the LAD must come out of their own volition and are allowed to

<sup>403</sup> General, the Legal Aid Department Official website. Accessed on 03.01.2022 through <https://www.jbg.gov.my/index.php/en/faq/general#8-am-i-still-eligible-to-the-legal-aid-even-if-my-case-is-beyond-the-jurisdiction-of-the-legal-aid-department>

withdraw at any time throughout the mediation session.<sup>404</sup> During the session, more than one mediator is allowed to be present.<sup>405</sup> After the session, the outcomes will be written down in an agreement that must be signed by the disputing parties. Only then would the mediation contract become binding.<sup>406</sup> Like any other mediation, any form of communication throughout the process is confidential<sup>407</sup> unless the client offers himself as a witness in a court trial. If so, any relevant information from the mediation process that the court deems necessary must be disclosed.<sup>408</sup>

Under the LAD mediation procedure, a mediation session ends in the event of one of the following situations mentioned in section 6 of the Legal Aid (Mediation) Regulations 2006:

- i) Should any party withdraw himself from the session by filling in the form set under the Third Schedule of the Legal Aid (Mediation) Regulations 2006
- ii) Should any party withdraw himself from the session under the sub regulation 4(4)
- iii) An understanding or a settlement has been reached, written and signed by the parties within thirty days from the date the settlement agreement (to conduct the session) was signed
- iv) A settlement is not reached within thirty days from the date the settlement agreement was signed
- v) The mediator decides to withdraw for any reason stated in the Mediation Code of Ethics in the Fourth Schedule

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<sup>404</sup> Legal Aid Act, 1971 (No. 29C / 1971)

<sup>405</sup> Legal Aid Act, 1971 (No. 29A / 1971)

<sup>406</sup> Legal Aid Act, 1971 (No. 29D, 1971)

<sup>407</sup> Legal Aid (Mediation) Regulations, 2006 (No.5/1971)

<sup>408</sup> Legal Aid Act, 1971 (No. 29E, 1971)

- vi) The mediator is instructed by the General Director of the Legal aid to withdraw from the mediation session

Shariah Mediation at the LAD provides great assistance to the *sulh* proceedings in Shariah courts as it helps to minimise the burden on the *sulh* officers in the courts to identify successful and failed mediation cases. The reason for this being so is mainly because cases that have gone through mediation at the LAD are not required to attend *sulh* proceedings during case registration at the Shariah courts, as determined by Practice Direction Number 1 for 2010.<sup>409</sup>

### **3.6 Shariah Lawyers with Mediation Accreditation (SLMAs)**

A Syarie' lawyer acts based on the principle of *wakalah bi al-khususmah* and acts as a certified representative for disputing parties in court.

#### **3.6.1 Administration and Legislations of Shariah Lawyers in Malaysia**

Generally, the appointment of Syarie lawyers is regulated by the Legal Profession Act 1976,<sup>410</sup> Professional Practice Code of Practice and Politeness (Amendment) 1978 and 1994.<sup>411</sup> These laws govern, regulate, and provide the opportunity for Syarie lawyers to represent their clients in court. The governance and admission of Shariah lawyers reside under Malaysian state jurisdiction.<sup>412</sup> Each respective state also has its own

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<sup>409</sup> Practice Direction Number 1 Year 2010.

<sup>410</sup> Also known as *Akta Profesyen Undang-Undang 1976*.

<sup>411</sup> Also known as *Kaedah-Kaedah Profesyen Undang-Undang Amalan dan Kesopanan (Pindaan) 1978 & 1994*.

<sup>412</sup> Hammad Mohamad Dahalan et al, "Shariah Lawyers in Malaysia: Analysis on Its Implementation Process at the Shariah Courts", *JUUM*, 25(2019), 6.

provisions on the appointment of Syarie lawyers.<sup>413</sup> However, the term ‘*Peguam Syarie*’ is only defined in Selangor and remains undefined in other Malaysian states.<sup>414</sup>

Section 2 of the Islamic Administration Enactment of Selangor (Enactment No. 1 of 2003) defines a Syarie lawyer as the person appointed under section 80 of said enactment. Primarily, the person must have sufficient knowledge of Islamic Law to represent parties in a proceeding before the court.<sup>415</sup> With the approval of His Majesty the Sultan, rules and regulations related to Syarie lawyers in Selangor are under the jurisdiction of the Islamic Religious Council of Selangor<sup>416</sup> and such matters also include the procedure, qualification, and admission fees. Subjected to section 80(3), members of the Judicial and Legal Service or anyone appointed under section 3 of the Legal Aid Act 1971 could also represent clients as Syarie lawyers.<sup>417</sup>

The admission requirements as a Syarie lawyer for a qualified person is set out in section 12(1) of the 2019 Act, namely the applicant has attained the age of 21 years; a Muslim; is either a citizen or permanent resident of Malaysia; is of good character; has not been convicted in Malaysia or elsewhere of any criminal offence; has not been adjudicated as undischarged bankrupt; has attended and passed the courses of instruction, training, education, interview, or examination prescribed by the Board, where applicable; and has served the period of pupillage as required under section 13 which is currently set at six months.<sup>418</sup>

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<sup>413</sup> Muhammad Ilhamuddin Arsad and Mohd Norhusairi Mat Hussin, “Syarie Lawyers’ Ethical Violations: A Study in State of Selangor”, *Journal of Shariah Law Research*, 5(1), 56.

<sup>414</sup> Farid Sufian Shuaib, Tajul Aris Ahmad Bustami and Mohd Hisham Mohd Kamal, *Administration of Islamic Law in Malaysia: Text and Material: Peguam Syarie (Syarie Lawyer) in Malaysia* (Malaysia, Malayan Law Journal Sdn Bhd, 2001), 516.

<sup>415</sup> Section 80(1), Islamic Administration Enactment of Selangor (Enactment No.1 of 2003).

<sup>416</sup> Section 80(2), Islamic Administration Enactment of Selangor (Enactment No. 1 of 2003).

<sup>417</sup> Section 80(3), Islamic Administration Enactment of Selangor (Enactment No. 1 of 2003).

<sup>418</sup> Ashgar Ali Ali Mohamed, “Syarie Legal Profession: With Reference to Syarie Legal Profession (Federal Territories) Act 2019, *Current Law Journal*. 4 (2020), vii.



A pupil shall serve his period of pupillage with a master who is and has been in active practice in the Federal Territories for a total period of not less than seven years immediately preceding the date of commencement of his pupillage. The Majlis Peguam Syarie may, however, exempt any qualified person who has served as a Shariah officer for a period of at least one year from serving any period of pupillage under section 13. Under the now-repealed Peguam Syarie Rules 1993, pupillage is not a condition for admission as Peguam Syarie. Now contained in the 2019 Act, the pupillage aims to expose the pupils to both the handling of civil and criminal litigation in the Shariah courts and non-litigation work. Once appointed, Syarie lawyers are bound to abide by the Ethics of Peguam Syarie 2001.<sup>419</sup>

### 3.6.2 The role of Shariah Lawyers in *Sulh* and Mediation

The nature of any lawyer is conceptually and practically different from that of a mediator. Lawyers are trained to work in adversarial settings and advocate for their clients' best interests.<sup>420</sup> In some cases, lawyers are seen as an obstacle to the practice of mediation. Parties who appoint lawyers would not settle for mediation to solve their dispute unless advised by their lawyers, who possess more knowledge and experience of legal processes.<sup>421</sup> In the case of *sulh* at Shariah Courts, the parties may attend the *sulh* proceeding on their own or accompanied by their lawyers<sup>422</sup> with permission from the *Sulh* officer.<sup>423</sup>

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<sup>419</sup> Practice Direction Number 4 Year 2002, JKSM.

<sup>420</sup> Janelle Wolbaum, "Child Custody Mediation", *Expert Evidence*, 7(1999), 153 – 155.

<sup>421</sup> Alwi Abdul Wahab, "Court-Annexed and Judge-Led Mediation in Civil Cases: The Malaysian Experience" (PhD Thesis, Victoria University of Melbourne, Melbourne, 2013), 289.

<sup>422</sup> Hammad Mohamad Dahalan, "081 Pengurusan *Sulh*: Peranan, Pelaksanaan dan Keberkesanannya Oleh Pegawai *Sulh*", *International Research Management and Innovation Conference 2014*, Kuala Lumpur (17-18<sup>th</sup> November 2014), 562

<sup>423</sup> Nurah Sabahiah Mohamed, "Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of its Application in Malaysia" (Doctoral Thesis, University of Malaya, Kuala Lumpur, 2013), 187.

A new phenomenon over the past few years is the increased credibility of Shariah lawyers who have attained mediation certification from the Accord Group Australia. From a conceptual prospect, adjudication, which often requires the legal representation of lawyers, and mediation are two different, if not opposite, processes. As such, one would wonder about the prospect of Syarie lawyers serving as private mediators for family cases at the Shariah courts. Considering there has been little to no information about their practices and approaches to balancing these two contradictory professions, the research therefore addresses these matters and turns them in the subsequent chapter.

### **3.7 Conclusion**

To sum up, the administrative structure of mediation (*sulh*) has made great progress from the period of pre-British colonisation until today. Presently, the implementation and practice of *sulh* in the Shariah courts have continuously proven to be a successful and dynamic mechanism. The solid structure, dynamics, and cooperation between the Malaysian Shariah Judicial Department (JKSM), LAD, Shariah courts, and Syarie lawyers prove that these institutions work vigorously to ensure justice and peace amongst the Malaysian Muslim community. The role of mediators in resolving family conflicts, which consisted of various figures in the past, are now generally delegated to *sulh* officers under Shariah jurisdiction, and occasionally to Shariah judges, with the new phenomenon of Syarie lawyers applying for the mediation accreditation and certificate.

From this chapter, we can conclude that mediation by *sulh* officers in Shariah courts and Shariah mediators in the Legal Aid Department is monitored and governed by their respective rules and regulations. However, private Shariah mediators in Malaysia are not bound by any regulations despite going through similar training as the government mediators. Their procedures and practices for settling family disputes are further discussed in the next chapter.

## **CHAPTER 4: PRACTICES AND APPROACHES OF MEDIATORS UNDER THE SHARIAH JURISDICTION IN RESOLVING FAMILY CONFLICTS IN MALAYSIA**

### **4.1 Introduction**

This study attempts to identify the practices and approaches of mediators under Shariah jurisdiction, particularly Syarie lawyers with mediation accreditation, while attempting to compare them with government mediators under Shariah jurisdiction. It identifies whether the theory of a mediator matches the reality of a mediator's practice. This chapter first identifies the existence of private and government mediators under the Shariah jurisdiction, followed by their practices and approaches in resolving family cases under the Shariah jurisdiction in Malaysia.

Additionally, this study explored the mediators' factors to accepting clients, procedures, and approaches in mediation/*sulh* when dealing with clients and the court, as well as the legal and ethical aspects they are bound to throughout their practice. This chapter provides a thorough report on the research findings and analysis that answered the final two research objectives. The qualitative data obtained through interviews were transcribed, coded, categorised into themes, analysed, and supported by library research.

### **4.2 Background information of the Respondents**

For this research, two groups of people who practised family mediation under the Shariah Courts' jurisdiction were involved. The first one were those appointed as Shariah officers (*Pegawai Shariah*) by the Malaysian government under the LS41 Scheme. These officers belonged to various positions, such as the Shariah judge, *sulh* officer, Shariah research officer, and mediator at the Legal Aid Department (LAD).

Another group of mediators was the private mediators, specifically Syarie lawyers possessing a mediation certificate (herein known as SLMAs) after undergoing training by

the Accord Group, Australia. The Accord Group is an international dispute resolution firm located in Sydney, Australia, and remains to be Australia's oldest firm of its kind. Its mediation training programmes are internationally recognised, including in Malaysia, and they provide people and organisations with proper training to become effective dispute resolvers.<sup>424</sup>

In total, ten respondents were interviewed to provide sufficient and saturated findings. Eight respondents were interviewed as practitioners, while the researcher deemed two others as authoritative figures in the areas of *sulh* and mediation. Of the ten respondents, six represented Syarie lawyers with Mediation Accreditation (SLMAs). In contrast, four others represented government officers that conduct or administer *sulh* (mediation) for cases at Shariah courts, particularly the Head for all *sulh* units under JKSM, a veteran mediator from the Legal Aid Department, a high court Syarie judge, and a *sulh* officer. All respondents interviewed possess a Mediation Accreditation from Accord Group, Australia, except Respondent 6, who received her mediation training from New Zealand. Two respondents are trainers and assessors for the mediation training under PPMM. More information on the respondents is presented below:

#### 4.2.1 Respondent 1

Respondent 1 (R1) is a very well-experienced **lawyer** for both civil and Shariah jurisdictions. She received her credentials as an advocate and solicitor in 1998 and received her Syarie credentials in 2000 in Selangor. She practised as both a Syarie and civil lawyer for ten years before establishing her own firm in 2010. Respondent 6 received her mediation certificate under the Accord Group in 2012 and later became one of the mediation trainers under the Muslim Lawyers Association of Malaysia, also known as

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<sup>424</sup> "Background", (n.a), Official Website of the Accord Group, accessed on 24.10.2021 through <https://www.accordgroup.com.au/>

Persatuan Peguam Muslim Malaysia (PPMM). Her interview was conducted on 6<sup>th</sup> August 2021 for approximately 1 hour and 40 minutes.

#### 4.2.2 Respondent 2

Respondent 2 (R2) is a female **Syarie Lawyer** who began her career as a civil lawyer in 2002 after graduating with a double degree in Law (LLB and LLBS) at the International Islamic University Malaysia (IIUM). She started her journey as a Syarie lawyer in 2005 in several states, including Wilayah Persekutuan Kuala Lumpur, Selangor, Kelantan, Terengganu, and Perak. Respondent 2 received her mediation certification in 2012 under the Accord Group, Australia, conducted by Persatuan Peguam Muslim Malaysia (PPMM). R2 holds the position of Exco under PPMM and is also a coach, trainer, and assessor for the mediation training conducted by PPMM and recognised by the Accord Group, Australia. Her interview was conducted online on 16<sup>th</sup> August 2021.

#### 4.2.3 Respondent 3

Upon recommendation, Respondent 3 (R3) **represents another Syarie lawyer** with a mediation certificate. After graduating from the International Islamic University Malaysia (IIUM) with a double degree in Law and Shariah Law (LLB and LLBS), R3 began his practice as a lawyer, advocate, and solicitor for two years. He is also a certified Syarie lawyer in the Federal Territories, Kuala Lumpur. He completed his mediation training in 2019 under the Accord Group and is now a certified mediator. Respondent 3 has a 7-year of experience working as the special officer for the Director-General or the Syarie Chief Judge at JKSM. Presently, he is a Shariah Officer at one of the states' Islamic Judiciary Department as a research officer. He is also one of the contributors for "Think Tank," a special committee set up by JKSM to focus on improving the management and development of *sulh* in Malaysian Shariah Courts. His interview session lasted 2 hours and 30 minutes on 7<sup>th</sup> April 2021.

#### 4.2.4 Respondent 4

Respondent 4 (R4) is a male **Syarie Lawyer** who is also a certified mediator. He opened his own firm in 2010 and received his mediation certificate from the Accord Group in 2017. Later, he established a consultation company for the purpose of social education and offering mediation services. In short, R4 has an experience of eleven years in the Shariah field, dealing with various family conflicts under the Shariah Court's jurisdiction. He graduated with a degree in Shariah and Law from the University of Malaya and possessed a Postgraduate Diploma in Law and Administration at Universiti Teknologi MARA (UiTM). His interview session was conducted on 3<sup>rd</sup> September, 2021 for an hour and a half.

#### 4.2.5 Respondent 5

A graduate with a double degree in law from IIUM IN 2012/2013, Respondent 5(R5) owns her own firm and has an experience of almost 10 years practising law in both civil and Shariah jurisdictions. As a **Syarie lawyer**, she possesses credentials for various states, including the Federal Territories of Kuala Lumpur, Selangor, Negeri Sembilan, Penang, Perak, and Kedah. She received her mediation certificate from the Accord Group, Australia in 2013 and was also involved in organising mediation training under the Persatuan Peguam Muslim Malaysia (PPMM). Despite being a civil and Syarie lawyer, Respondent 5 mainly focuses her career on Shariah cases. Her interview session was conducted on 19<sup>th</sup> May 2021 for approximately 1 hour 30 minutes.

Overall, eight respondents were interviewed for this research. The researcher also interviewed two authoritative figures who the researcher believes have high influence in the government and private mediation sectors for Muslims to provide more insights into mediation under Shariah jurisdiction:

#### 4.2.6 Respondent 6

Respondent 6 (R6) is a very well-experienced **mediator from the Legal Aid Department (LAD)**, Malaysia. After graduating with a Diploma in Law from Universiti Teknologi Mara (UiTM), she started her career in 1993 as a lawyer at the LAD under the LS41 Scheme. She brought various cases to both civil and shariah courts. She was one of the first batches of officers under LAD to attend a 40-hour mediation course in New Zealand. In August 2009, Respondent 6 began her career as a mediator dealing with civil and Shariah cases in court and, until now, has continued to serve as a mediator dealing with Shariah family cases under LAD. The interview with Respondent 6 was conducted on the 27<sup>th</sup> March, 2021 for approximately 2 hours.

#### 4.2.7 Respondent 7

Respondent 7 (R7) is a female **Shariah High Court Judge** in Negeri Sembilan who has a wide range of experience with matters under the Shariah jurisdiction. In 2001, she was appointed as a Shariah officer under the Department of Shariah Judiciary Malaysia (JKSM). Under the appointment of LS41, she became the Federal Syarie Lawyer at the Attorney General's Chamber. From 2003 to 2005, she transferred to the research division, JKSM. From 2005 to 2008, she was the Head of the *Sulh* Unit at the Federal Territories Shariah Courts. She dealt with matters pertaining to JKSM's *sulh* and record sections. In 2010, she was transferred to Negeri Sembilan as the Head of Syarie Prosecutor, the Head of Registrar in 2011; and currently provides her services as a High Court Shariah judge in Negeri Sembilan. The interview with Respondent 7 took place on 2<sup>nd</sup> June 2021 for 1 hour 30 minutes through Google Meet.

#### 4.2.8 Respondent 8

Respondent 8 (R8) is a ***sulh* officer** stationed at the Selangor Shariah Court. In 2008, she was appointed as a Shariah officer under the LS41 Scheme. Under Shariah

jurisdiction, she began her career as the Assistant Director for the Family Support Division (*Bahagian Sokongan Keluarga, BSK*) until 2013. Later, she was promoted to an LS44 Grade Shariah officer and became a senior research officer at the Kuala Lumpur Shariah Court. In January 2020, Respondent 8 was assigned a *sulh* officer post and now continues to serve at the Shariah courts in Wilayah Persekutuan, Kuala Lumpur. She has yet to receive her mediation accreditation from accredited mediation training services. The interview with Respondent 8 was conducted on 27<sup>th</sup> April, 2021 for 1 hour and 45 minutes.

#### 4.2.9 Respondent 9

Datin Maszuriyati Abdul Aziz (R9) is the Chief Assistant Director of the Registration, Secretariat, and Records Division (BPKR), JKSM. She is also the **Head of the *Sulh* Unit** for the *sulh* division. Datin Maszuriyati oversees all the *sulh* units at JKSM and the Shariah courts, which consist of 14 states and 93 *sulh* officers throughout Malaysia. Her interview was conducted on 12<sup>th</sup> October, 2021 for 2 hours and 30 minutes.

#### 4.2.10 Respondent 10

Dato' Zainul Rijal bin Abu Bakar (R10) is the **President of Persatuan Peguam Muslim Malaysia (PPMM)**. Dato' Zainul initiated and shed light on the mediation training conducted by the Accord Group, Australia. He is a well-known mediator in Malaysia, trained by the Accord Group in 2006, and has mediated more than 500 mediation cases. He led the mediation training under the Accord Group in Malaysia and has since trained and accredited more than 300 mediators in various countries, such as Malaysia, Brunei, Indonesia, Bahrain, and Hong Kong. He replied to his interview questions through email in written form on 19<sup>th</sup> October, 2021.

This research viewed R9 and R10 as authoritative representatives with credentials to provide better insights into the research objectives. To avoid confusion, the term



‘mediator’ in this research will refer strictly to all the mediation practitioners that practice and deal with family conflicts under Shariah jurisdiction, unless specified so.

#### 4.3 The Practices and Approaches of Mediators under the Shariah Jurisdiction in Resolving Family Conflicts in Malaysia

The findings and discussions of this research covering the above title are presented below:

##### 4.3.1 Finding 1: Affirmation of the existence and role of mediators under the Shariah jurisdiction in resolving conflict management formally and informally

In their interviews, government and private respondents were required to express their roles in conflict management, particularly in family conflicts. The responses are presented below:

**Table 4.1. Existence of government and private mediators under the Shariah jurisdiction**

Respondent	Interview Details
R1	<i>“Saya adalah peguam Syarie. Mewakili satu pihak. Tapi pada yang sama jugak, cuba untuk menjadi pengantara dari segi skills sahaja... Tapi macam saya, saya jugak advocate and solicitors. Saya juga peguam Syarie. Saya boleh apply sijil mediator tu for both cases. Sivil pun boleh, Shariah pun boleh.”</i>
R2	<i>“Sebenarnya saya adalah peguam bela dan peguam cara.. dan saya dapat sijil mediator ni pada tahun 2012.”</i>
R3	<i>“Basically, in conflict management, I would say that I have two. Informal and formal roles in managing conflict management.”</i>
R4	<i>“Sebagai peguam syar’ie.. saya buka firma guaman sendiri pada tahun 2010 sehinggalah sekarang. Dan pada tahun 2017 as a mediator lah... selain daripada hal-hal berkaitan Shariah, mahkamah Shariah ni, apa-apa juga yang berbidang kuasa, jadi kita ambil alih jugaklah berkenaan dengan apa-apa hal yang boleh melibatkan mediasi.”</i>
R5	<i>“Sekarang ni saya punya main course memang Shariah lah. Walaupun saya buat sivil jugak. Cuma, sivil saya banyak uruskan pusaka. Yang berkaitan dengan pentadbir, geran kuasa semualah. Yang shariah semua. Yang berkait. Tapi the main course, boleh katakan 80% memang buat Shariah lah. Dan batas saya dalam mediation ni, saya dapat sijil mediasi daripada Australian Accord Group. Masa tu, dalam February 2013 lagi.”</i>

- R6 *“Pada tahun 2005, JBG baru ada mediator kan. Baru nak, akta tu ada. So bila akta tu ada, saya dilantiklah.”*
- R7 *“Apabila kita dah menjawat jawatan hakim ni dia terhadlah untuk kita kendalikan secara pengurusan konflik untuk menyelesaikan, err, kalau sebagai hakim, lebih kepada proses perbincaraanlah... cuma sebab bila kita ada latar belakang pernah mengendalikan proses sulh ya.. bila saya tengok keadaan sebegini, pendekatan yang saya ambil bila pada hari pendengaran kes, macam tulah saya buat pendekatan sulh , tapi sulh yang saya maksudkan ini bukanlah proses sulh secara rasmi yang diamalkan di mahkamah eh... dapat sijil mediasi Accord Group pada tahun 2006..”*
- R8 *“Tugas saya sebagai pegawai sulh .. kita adakan sesi majlis sulh. Yang mana pegawai sulh tu merupakan pengerusi kepada majlis sulh tu.. Kita cuba untuk berunding antara pihak-pihak tu dalam usaha nak mencapai penyelesaian kes itu secara persetujuan bersama..”*
- R9 *“Position saya adalah KPP, Ketua Penolong Pengarah, di Bahagian Keurusetiaan dan Rekod JKSM, di mana saya memegang Unit Sulh . Jadi saya adalah Ketua Unit Sulh untuk menjaga unit-unit Sulh di Jabatan Kehakiman Syariah Negeri dan juga Mahkamah Syariah Negeri... saya sendiri pernah mengikuti kursus MMC sebagai Mediator bertauliah”*
- R10 I am a mediator since 2006 trained by The Accord Group Australia. Since 2007 I have done more than 500 mediation cases and become a trainer for The Accord Group. I have since taught and accredited more than 300 mediators in Malaysia, Brunei, Indonesia, Bahrain and Hong Kong.
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Based on the above responses, it can be affirmed that all respondents possess the qualifications and are, therefore qualified to offer mediation services. Aside from R9 who manages the administrative matters related to *sulh*, all respondents mentioned and indirectly acknowledged that their roles in conflict management involve providing mediation services, be it government or private.

The admission of all respondents as mediators fits M. Tamudin and Cholidah Utama’s definition of a mediator: a judge or any other neutral party possessing a mediation certificate to assist parties in the negotiation process to find various possible solutions voluntarily. As government mediators, R6, R7, R8, and R3 have specific roles and responsibilities in *sulh* or mediation services. R7’s role as a judge requires her to focus more on managing conflicts through adjudication. Be that as it may, R7 commented that even as a judge, she makes use of mediation skills when she deems them necessary. Her

approach coincides with that of R3 who also applies mediation tactics in his post as a court registrar, and R1, whose main profession is a Syarie lawyer, but applies mediation skills when dealing with legal clients.<sup>425</sup>

Bringing attention to R3's response, he found himself practising mediation formally and informally. Explaining what he meant by formal and informal roles, R3 quoted:

“As a Syarie officer, and also because I have legal background, I always have my relatives, friends, and outsiders who always reach (out to) me and asking me about their family matters, family conflicts, okay. And indirectly, I need to, how to say, address this issue with them. And sometimes I consult them, I contact them, sit down with them, trying to resolve their conflict. That's why I said, the first category is the informal conflict management. And the second one is, by way, the formal way. Even though I am not a *sulh* officer at the shariah court, but since I've been given a task, or *tauliah*, to become the court registrar... And we as the court registrar, we face, or we meet clients who have conflicts every day. It's like in one day, I could say that, perhaps 20 disputes altogether. So that is indirect involvement of conflict management.”

R3, who has experience working as a Registrar, shared that when meeting with clients and going through case files, he has also informally or indirectly used his mediation skills to persuade clients to reach an amicable settlement even before they entered the *Majlis sulh*. From here, it is noticed that there is a difference in understanding between R2, R3, and R7 on one's role in formal and informal mediation. From R3's response, he shared that not only does he use mediation to assist clients at the court, but family members, friends, and other anonymous parties also seek him out to settle their conflicts through mediation.

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<sup>425</sup> M. Tamudin and Cholidah Utama, “Implementasi Peraturean Mahkamah Agung RI No. 1 Tahun 2016 Tentang Tatacara Mediasi di Pengadilan Agama Sumatera Selatan”, *Nurani Journal* 19(2) (2019), 215.

His explanation coincides with Nora Abdul Hak (2020)'s<sup>426</sup> view, that there exist two modes of mediation practised within the Malay-Muslim community when resolving family disputes in Malaysia. The first mode is the informal mediation conducted by imams, village headmen, and family members. This mode was highly celebrated in the past, regardless of whether a married couple was still together or had separated. The other mode of family mediation is the structured mediation known as *sulh* mandated at the Shariah courts<sup>427</sup> since 2002 by virtue of Practice Direction No. 1 Year 2010 and the Registrar's discretion.

R3's opinion on informal and formal mediation, however, slightly differed from that of R2 and R7. In her interview, R7 views formal mediation as *sulh* sessions conducted by *sulh* officers, while informal mediation is mediation conducted at court by other Shariah officers, such as Shariah judges and registrars:

*“Makna tak rasmi ni, maksud saya tak rasmi ni bukan sulh yang disebutkan di dalam perkhidmatan sulh . Selain daripada itu, kita akan sebut adalah perkhidmatan yang tak rasmilah. Haa, sama jugak dengan pengurusan pendaftar tadi sebutan di hadapan dia. Begitu jugak dengan hakim tadi, walaupun proses itu proses rasmi, tapi pengendalian sulh itu adalah secara tidak rasmi. Yang rasmi ada satu tu sajalah iaitu yang dikendalikan oleh pegawai yang dinamakan pegawai sulh . Itu apa nama.. perkhidmatan sulh secara rasmi di mahkamah Shariah. Makna proses-proses lain itu tidak dipanggil secara rasmilah.”<sup>428</sup>*

R7's view was supported by R2, who defined informal mediation: “Informal *ni maknanya bila*, normally, *pihak-pihak tu just minta advise sahaja*”. The term ‘*pihak-pihak*’ here referred to R2's clients. From their responses, R2 and R7 viewed mediation as part of a working profession, depending on who performs the role of the mediator. If a person is not specifically appointed as a *sulh* officer or mediator, yet uses the skills and approaches

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<sup>426</sup> Nora Abdul Hak, Ahmad Muhklis Mansor and Roslina Che Soh (2020), “Literature Review on Mediation/*Sulh* in Child Custody Disputes in the Shariah Courts in Malaysia”, *44<sup>th</sup> International Scientific Conference on Economic and Social Development* (19-20<sup>th</sup> December 2019), 371 – 384.

<sup>427</sup> *Ibid.*

<sup>428</sup> Interview with R7 through Google Meet on 02.06.2021.

of mediation, they consider it informal mediation. To conclude, R2 and R7 viewed that any mediation that is not conducted by *sulh* officers is considered informal mediation, even if the mediation process takes place in a formal setting, such as the application of mediation skills conducted by registrars or lawyers.

R2 and R7's understanding of informal mediation supported R3's practice of applying mediation skills as a court registrar, where the job scope of a registrar does not necessarily involve mediating disputing parties. Alwi Abdul Wahab (2013) acknowledged this approach and viewed registrars as internal court mediators for court-referred mediation. She reported that there are indeed court registrars in civil courts who conduct mediation within the court system.<sup>429</sup>

From the responses above, the researcher reaffirmed that the role of mediators under Shariah jurisdiction exists in both the government and private sectors to resolve family conflicts, where mediation for family conflicts can be conducted formally or informally in the government and private sectors.

#### **4.3.2 Finding 2: Understanding factors encouraging respondents to become mediators under the Shariah jurisdiction**

In this research, R1-R8 and R10 were asked what encouraged them to be mediators. The results produced six possible reasons for this question: appointment by the government as government officers; inclination towards achieving a win-with situation in a legal situation; exposure to other ADRs in civil cases, knowledge and research purposes; and business purposes.

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<sup>429</sup> Alwi Abdul Wahab (2013), "Court-Annexed and Judge-Led Mediation in Civil Cases: The Malaysian Experience" (*PhD Thesis Dissertation*, College of Law and Justice, Victoria University of Melbourne), 75.

#### 4.3.2.1 Appointment by the government

As elaborated in Chapter Two, government mediators such as R6, R7, and R8 were automatically entrusted to conduct *sulh* or mediation by the government upon their appointment as government officers, as stated:

**Table 4.2. Sulh Officers and LAD mediators appointed by the government**

Respondent	Interview Details
R6	<i>“Bila orang tu dah berpindah, dah ditempatkan ke tempat lain, so ketua pengarah arahkan saya untuk ambil alih.”</i>
R7	<i>“Pada peringkat permulaannya, ... melihat satu keperluan untuk semua pegawai sulh yang ada pada ketika itu, tak silap saya tahun 2004.. bermula di peringkat awal tersebut untuk diberi pendedahan dari segi teknik, proses yang perlu diuruskan sewaktu mengendalikan majlis sulh. Dengan sebab itu satu usaha yang telah diambil oleh JKSM sebenarnya ya.”</i>
R8	<i>“Kalau kita ni memang kita dapat arahan. Arahan daripada jabatan kan. Ha, tiba-tiba kita dilantik sebagai pegawai sulh .”</i>

#### 4.3.2.2 Preference of legal practitioners toward achieving a win-with situation in a legal setting

R1, R2, R5, and R10 responded that their interest in pursuing the mediator profession was due to their natural inclination towards reaching amicable settlements in disputes instead of a ‘win-lose’ setting.

**Table 4.3. Mediation compliments one’s natural preference for a win-win situation**

Respondent	Interview Details
R1	<i>“Dari awal saya praktis, memang saya lebih cenderung, lebih minat.”</i>
R2	<i>Saya lagi suka pada mediation. Haa, saya taktau kenapa, mungkin masuk dengan saya punya jiwa kot.”</i>
R5	<i>“Sebab saya nampak yang kadang-kadang bila kita lawan kes ni, kita lawan kes yang takde merit pun... Dan kadang-kadang bila kita nak fight kes ni, kadang-kadang benda tu boleh settle, kenapa nak bazir duit nak fight kes?”</i>

R10 “In general mediations appeal me compared to litigation due to its objective to achieve win-win situation, focusing on further and needs rather than who is right, who is wrong.”

Mediation appeals to legal practitioners who lean towards reaching amicable settlements rather than ‘win-lose’ settlements that are often the norm in litigation. Similarly, Greenberg pointed out that a lawyer’s nature when considering justice also includes understanding that winning a case does not necessarily rule out the chance that the other side could also win.<sup>430</sup> With such understanding and complimenting lawyers of similar nature, a win-win solution increases the SLMAs or any other lawyer’s personal satisfaction in work,<sup>431</sup> subsequently increasing their work efficiency, as life satisfaction is intertwined with work outcomes.<sup>432</sup>

#### 4.3.2.3 Legal practice in civil jurisdiction

It is also noted that having experience and exposure as civil lawyers and other ADR alternatives contributed to R1 and R2’s practice in mediation. R10 shared similar reasoning.

**Table 4.4. Legal Practice in civil jurisdiction encourages mediation practice**

Respondent	Interview Details
R1	<i>“Masa saya buat chambering tu, saya ada peluang untuk buat kes accident, kes sivil. Dan pada yang sama juga, buat kes Shariah... kita bukan saja wakil anak guam untuk file in court, tapi sebenarnya kita membantu pihak-pihak ni. Kadang-kadang kita duk jadi pengantara antara pihak-pihak. So daripada situ, saya rasa memang perlu ada skill untuk pengantara tu.”</i>

<sup>430</sup>430 Elayne E. Greenberg, “Ethical Compass: Settlement Fever: Lawyers, Have You Updated Your Philosophical Map?”, *New York Dispute Resolution Lawyer* 14(2) (2021), 6.

<sup>431</sup>431 Margeret M. Severson and Tara V. Bankston, “Social Work and the Pursuit of Justice Through Mediation”, *Social Work* 40(5) (1995), 683 – 691.

<sup>432</sup>432 Sheryl Chummar, Parbudyal Singh and Souha R. Ezzedeen, “Exploring the Differential Impact of Work Passion on Life Satisfaction and Job Performance via the Work-Family Interface”, *Personnel Review* (2019), 2. DOI: <https://doi.org/10.1108/PR-02-2017-0033>.

- R2                    *“Sebab masa saya praktis dekat civil dekat firm mula-mula saya praktis dulu kan pun saya banyak buat negotiation. Banyak buat settlement. Sebab dia banyak melibatkan syarikat pembinaan .. dan di syarikat pembinaan neh dia well-known laa developer dekat Malaysia tapi kebanyakan projek dia semua projek sakit. Dia punya rumah tak siap. So we act as a developer. Bila dalam kes macam ni, purchaser saman kita dan kesalahan tu memang sebenarnya pada developer... kita tak boleh defence... kita dah stuck, haa, tapi kita nak settle benda neh jugak .. so nak taknak, kita kena buat settlement out of court.”*
- R10                    A mediator does not limit himself to a particular area. Shariah is one of many areas in my mediation practice other than labour, community, education and interfaith mediations.
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Attending civil cases such as accident-related cases, R1 shared that her experience as a neutral third party in civil and Shariah cases helped her realise the need for mediation, whilst R2 managed out-of-court settlements for construction companies and viewed dispute resolution as a solution to settle unresolved cases. R10 shared that aside from Shariah cases, he also provides mediation services for labor, community, education, and interfaith cases. As Whiting reported, many lawyers hold dual practicing legal certificates in civil and Shariah systems, thus allowing them to practise and represent clients in both jurisdictions.<sup>433</sup> These responses also attested that mediation is a flexible means to resolve human disputes in multiple areas.<sup>434</sup>

#### **4.3.2.4 Keen interest in knowledge**

Next, R3 and R5 stated that having knowledge about mediation is beneficial for one’s life and profession.

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<sup>433</sup> Amanda Whiting, “The Training, Appointment, and Supervision of Islamic Lawyers in the Federal Territories of Malaysia, *Washington International Law Journal*, 21(1) (2012), 134.

<sup>434</sup> Daniel G. Brown, “Divorce and Family Mediation: History, Review, Future Directions”, *Concil. Cts. Rev.* (20) (1982), 1.



**Table 4.5 Having a keen interest in knowledge encourages mediation practice**

Respondent	Interview Details
R3	“First and foremost, because I decided to concentrate my PhD studies in mediation... since I decided to pursue my PhD in mediation. I think I could become an expert. I need to have the proper training and be a certified mediator to enhance my skills and knowledge... Because previously I only read books, read articles and discussions. But when I attended the courses, the courses have been divided into two. Practical and also substance. Okay, so I learned both.”
R5	“Dia macam start dah buat program mediasi apa semua.. <i>ilmu ni kalau kita cari sendiri, kita akan appreciate more, sebab kita tahu benda ni kita akan guna sampai bila-bila. Tu yang buat saya macam, okay I have to join this mediation course.</i> ”

For R3, pursuing his studies became the main factor in becoming an accredited mediator. Even though he’s had experience practising as a lawyer, a court registrar, and a research officer, the accredited mediation course provided him with both substance and practical knowledge in understanding his area of study in mediation, thus contributing to his professionalism to become an expert mediator. This indirectly increases R3’s confidence to practise as an expert mediator. Similarly, R5 emphasised that acquiring knowledge is perpetually beneficial.

Dosunmu and Adeyemo addressed these respondents’ commendable pursuit of knowledge. They provided that lifelong learning positively impacts one’s professionalism and career advancement by adding value to employment and supporting career progression.<sup>435</sup> Research also indicates that people developing a lifelong learning mindset progress towards career success<sup>436</sup> as it functions as a progressive step towards career

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<sup>435</sup> Akinola George Dosunmu and Kolawole Samuel Adeyemo, “Lifelong learning, human capital development and the Career Advancement of Women in the Telecommunications Industry in South Africa”, *Industry and Higher Education*, 32(3), 192-199.

<sup>436</sup> David W. Drewery et al, “Lifelong Learning Mindset and Career Success: Evidence from the Field of Accounting and Finance”, *High Education, Skills and Work-Based Learning* 10(3) (2020),

development and, in this case of legal practitioners, enhances professionalism and reliability in both legal and mediation areas. Lifelong learning is a continuously supportive process that stimulates and empowers individuals. It helps them acquire all the knowledge, values, skills, and understanding required throughout their lifetimes with confidence, creativity, and enjoyment in all roles, circumstances, and environments.<sup>437</sup>

#### 4.3.2.5 Business purposes

As he established a subsidiary company under his legal firm for mediation and educational purposes, R4 shared that mediation appeals to him as it helps expand his services as a legal practitioner.

**Table 4.6. Mediation services expand legal business**

Respondent	Interview Details
R4	<i>“As seorang peguam syar’ie, sudah tentu saya pun mempunyai firma guaman sendiri, dan orientasi kita adalah bisnes lah. Jadi alangkah baik kalau kita mengembangkan lagi scope service yang kita boleh tawarkan kepada pelanggan... Nothing to lose. Actually, it’s an added value.. ada satu benda lain yang boleh tawarkan kepada client sekiranya client bukan hanya nak kepada khidmat peguam syar’ie, ataupun khidmat perundingan kekeluargaan Islam lah, ha yang berkaitan dengan mahkamah.”</i>

Hensler supported R4’s practice by stating that mediation has indeed become a line of business for lawyers.<sup>438</sup> In fact, Nolan-Haley explained that in the present day, mediation is a major business for both lawyers and non-lawyers.<sup>439</sup> These facts show that lawyers can provide mediation services as a source of income, even if their approaches tend to be

<sup>437</sup> Roberta L. Duyff, “The Value of Lifelong Learning: Key Element in Professional Career Development”, *Journal of the American Dietetic Association* 99(5) (1999), 538 – 43.

<sup>438</sup> Deborah R. Hensler, “Suppose It’s Not True: Challenging Mediation Ideology”, *Journal of Dispute Resolution* 2002(1) (2002), 81.

<sup>439</sup> Jacqueline M. Nolan-Haley, “Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective”, *Harvard Negotiation Law Review* 7 (2002), 235.

contradictory. Based on all the factors listed, some level of understanding is achieved on how private mediators came to be under Shariah jurisdiction.

### 4.3.3 Finding 3: Factors that mediators under the Shariah jurisdiction take into consideration for mediation in family conflicts

Aside from R9, respondents were asked about the factors they consider when accepting family mediation cases under Shariah jurisdiction. The findings are divided into government mediators and private SLMA mediators.

#### (i) Government mediators

As explained in Chapter Three, there are 18 types of cases listed under Practice Direction No. 1 for the year 2010 mandated to go through *Majlis Sulh* conducted by *sulh* officers at the Shariah courts. Except at the court registrar's discretion, *sulh* officers are not entitled to determine or choose which family conflict they wish to assist through mediation.<sup>440</sup> R7, R8, and R9 also established these facts in their interviews.

**Table 4.7. Family cases for *sulh* officers are already predetermined**

Respondent	Interview Details
R7	<i>“Memanglah daripada ketua pendaftar tetapi, ianya ada arahan amalan ya. Apa kes yang boleh sulh, apa kes yang tidak boleh sulh. Maknanya itu dah jelaslah, makna tidak ada perlu apa perlu pertimbangan apa-apa lagilah sebab dah ada, dah jelas.”</i>
R8	<i>“Nak tak nak kita tak boleh tolak kes. Terima je kes mana yang didaftarkan.”</i>
R9	<i>“Dia memang fixed. Memang fixed. Kalau kita failkan kes, terus je pergi dekat Sulh. Lepas daripada Sulh baru masuk mahkamah. Wajib, untuk 18 kes sahaja. 18 kes sahaja. Yang selain daripada 18, atas budi bicara registrar.”</i>

<sup>440</sup> Refer to Chapter 3.

Such is also the case for LAD mediators, who can only entertain clients who are eligible under the LAD rules and regulations.<sup>441</sup> Even so, this does not mean that mediation practice, i.e., *sulh* in Shariah courts is limited to the above factor. For judge-led mediation, R7 shared two factors she considers when conducting mediation. First, she considers it a good opportunity to conduct mediation if she identifies that the parties did not attend any previous *sulh* session due to nonattendance: “*Pertama, kita tengok fail dulu, Sebab dalam laporan fail tu ada, kalau didapati pihak-pihak ni, biasa defendan lah, tak pernah hadir lagi ke majlis sulh , menyebabkan kes itu diangkat ke hadapan saya, saya melihat itu satu peluang untuk kita buat sulh lah.*” The second factor would depend on case facts, for instance, matrimonial cases that involve “only a few properties and not millions of company shares.”<sup>442</sup>

R7’s mediation approach was backed by Sao’dah Ahmad and Nora Abdul Hak (2010). They explained that Shariah judges are not limited or obliged to follow through with a case trial through the commonly-practiced adversarial method.<sup>443</sup> ‘Ainan Husnaa and Raihanah Abdullah further support R7 by stating that if a judge believes that a case can be resolved amicably while the trial is ongoing, the judge is open to practising judge-led mediation without needing to postpone the trial.<sup>444</sup> R7’s decision to conduct judge-led mediation corresponds with Practice Direction No. 7 for 2019.<sup>445</sup> This practice direction allows a judge to use an inquisitorial approach specifically in *mal* cases, which generally

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<sup>441</sup> Refer to Chapter 3.

<sup>442</sup> Interview with R7 through Google Meet on 02.06.2021

<sup>443</sup> Sa’odah Ahmad and Nora Abdul Hak. “*Sulh* (Mediation) in the State of Selangor: An Analysis of Legal Provisions and Application”, *IIUM Journal* 18 (2) (2010), 213-237.

<sup>444</sup> ‘Ainan Husnaa Muhd Saifullah and Raihanah Abdullah, “A Brief Overview on the Inquisitorial Method in Malaysian Shariah Courts”, *Journal of Shariah Law Research* 6(1) (2021), 80.

<sup>445</sup> Practice Direction No. 7 Year 2019.

involve family conflicts such as property-related matters (wills and inheritance), premarital issues, divorce, and post-dissolution marriage issues.<sup>446</sup>

Another factor shared by R7 is the existence of blood ties (familial bonds) between the parties: *“Saya melihat dari aspek lain, hubungan kekeluargaan itu sendiri, makna ada sesuatu yang tidak kena bilamana anak menuntut membawa kes ke mahkamah.. anak tegang, ayah tegang.”* In this case, R7 shared that she found it perplexing when a child sued his father and deemed it necessary to apply judge-led mediation after studying the case file beforehand. Using her mediation skills, the case was successfully settled amicably through a court order, with both father and son reconciled and their family bonds unified.<sup>447</sup> Her consideration for familial bonds tallied with Rafidah, who established that family mediation places a strong emphasis on preserving family institutions. Concern for children, their feelings, emotions, and especially their future well-being are the core concerns of family mediation.<sup>448</sup>

(ii) SLMA mediators

For SLMAS, no record or information was detected on how they determine the factors when accepting family conflicts under the Shariah’s jurisdiction. When inquired about, here are the factors shared by the six SLMA respondents:

- i. Parties’ openness and willingness to participate
- ii. Parties’ accessibility to attend mediation
- iii. Parties’ objectives

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<sup>446</sup> ‘Ainan Husnaa Muhd Saifullah and Raihanah Abdullah, “A Brief Overview on the Inquisitorial Method in Malaysian Shariah Courts”, 74.

<sup>447</sup> Interview with R7 on 02.06.2021 through Google Meet.

<sup>448</sup> Rafidah Mohamad Cusairi, “The Application of Islamic Shari’ah to the Muslim Minority Living in the UK: A Comparative Study on Family Mediation between English Law and Faith-Based Med-Arb at Shari’ah Councils” (Unpublished thesis, Glasgow Caledonian University, 2013).

- iv. Parties' emotional conditions
- v. Cause of conflict
- vi. No domestic violence
- vii. Type of case (Contested vs non-contested)
- viii. Chances to win a case litigiously

#### 4.3.3.1 Parties' openness and willingness to participate

As stipulated by mediation's conditions, parties' openness and willingness to enter a mediation session is the opening factor towards mediating a conflict:

**Table 4.8. Parties' openness and willingness to participate in mediation**

Respondent	Interview Details
R1	<i>"Mediasi ni mesti syarat utama dia kedua belah pihak memang nak melaksanakan satu perbincangan. Dia bukan sebelah pihak.. Sebab dua-dua kena ada consent, dua-dua kena ada hasrat untuk menyelesaikan masalah."</i>
R3	"Secondly, the willingness of parties to mediate on such issues that are not listed in cases that are suitable for mediation."
R4	<i>"Dengan syarat itulah, pihak lawan kita tu, ada hasrat untuk buat settlement, buat penyelesaian... Selain daripada kehendak, dan juga keredhaan kedua-dua pihak untuk pergi kepada settlement atau mediasi. . Cuma kita tengok, sebab juga, anak guam, ataupun pelanggan yang nak, dia nak settlement ke dia nak gaduh, nak hak dia. Which one."</i>
R10	"3. Openness of the parties."

R1, R3, R4, and R10 replied that both sides of the disputing parties must be willing and open to discussing the matters causing their dispute. This factor agrees well with Syahrizal, who commented that disputing parties must have the desire to settle the agreement by being open to hearing the opposing party's point of view.<sup>449</sup> Rachmat seconded his point, saying that the main contributor to resolving a conflict is the parties'

<sup>449</sup> Sharizal Abbas, "Mediasi dalam Hukum Syariah" in *Mediasi: Dalam Hukum Syariah, Hukum Adat, dan Hukum Nasional* (Jakarta: Prenada Media Group, 2017), 170.

desire and good faith to end it.<sup>450</sup> This factor also fits the voluntary characteristic of mediation, in which parties are not involved without their consent. By agreeing to the mediation approach, parties must fully understand the mediation session they are attending, including the pros and cons, arising issues, their rights, the opportunity to seek further legal advice, and the agreement's effect on them.<sup>451</sup>

To compare with *sulh* in Shariah courts, the nature of willingness and voluntariness may be debatable as *sulh* is mandated as part of the court procedures. In this matter, society needs to understand that voluntariness in mediation is not just the parties' willingness to participate, but also their agreement to the process's outcomes. Complementary to Wan Azimin's statement of modifying the *sulh* application to celebrate the concept of *siyāsah al-syar'iyah* and achieve the public interest (*maslahah*),<sup>452</sup> parties are given the push and exposure to settle their disputes amicably through mandatory *sulh*. The power to voluntarily and willingly agree to the outcomes remains within the parties' control. The fact that the public still lacks awareness and knowledge crucially signifies that *sulh* and mediation as a whole need to be enforced by law to ensure that they are recognised and usable, especially as they have countless proven to be great supports of the legal system.

#### **4.3.3.2 Parties' accessibility to attend mediation**

R3 said that parties' accessibility to attend mediation also needs to be considered before conducting mediation.

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<sup>450</sup> Rachmat Rizki Aulawi, "Efektifitas Mediasi Dalam Perkara Perceraian Di Pengadilan Agama Dompu" (Master Thesis, Indonesian Islamic University, 2019), 27.

<sup>451</sup> Interview with R3 through GoogleMeet on 07.04.2021.

<sup>452</sup> Wan Azimin Wan Adnan and Ahmad Hidayat Buang, "Enhancing *Sulh* Application in Real Estate Property Claims in Malaysian Shariah Courts" *Kanun: Malaysian Law Journal* 33(1) (2021), 145.

**Table 4.9. Parties' accessibility to attend mediation**

Respondent	Interview Details
R3	The accessibility of parties to attend mediation is also one of the factors to be considered. Although preferably the session is to be conducted face to face, except in unavoidable circumstances, online mediation may occur.”

Nowadays, online mediation has become a prerequisite to reducing the backlog of cases in Shariah courts, especially during the Covid-19 pandemic phase. As brought up by R3, online mediation has been adapted as a pathway for easier access for parties who are unable to access mediation services offline. Online mediation provides easy access for both parties and the mediator should the parties shift from negotiation into facilitated collaboration or evaluative decision-making. Parties with different physical abilities can also easily access mediation online through modern technology such as handphones, iPads, and desktop channels.<sup>453</sup> Easier access encourages parties to consider mediation and lessens the probability of it being rescheduled.

Yet, Zakaria Jamil commented that parties sometimes do not take online *sulh* sessions seriously as they are not held face-to-face, resulting in parties who dare to forget they have *sulh* sessions. Other challenges include poor internet connection, noise disturbances such as children and surrounding background noises, and the involvement of other third parties who are not part of the *sulh* session, where these uninvited parties tend to provide ‘guidance’ to the involved parties from the sidelines.<sup>454</sup> To avoid such inconveniences, the mediator and disputing parties thus need to consider and confirm not just their

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<sup>453</sup> Amy J. Schmitz and Leah Wing, “Beneficial and Ethical ODR for Family Issues”, *Family Court Review* 59(2) (2021), 255-257.

<sup>454</sup> Tuan Zakaria Jamil is currently a Shariah Officer at the Shariah Courts of Selangor. “*Sulh Settle (Norma Baharu)*” (*Kefahaman Undang-Undang Shariah Webinar – Siri 32, Jabatan Kehakiman Shariah Selangor, 28<sup>th</sup> August 2021*).



attendance to access mediation, but also other conveniences to ensure a smooth and productive mediation session.

#### 4.3.3.3 Parties' objectives

R1 and R10 pointed out that they also consider the parties' objectives when considering mediation cases:

**Table 4.10. The objectives of the disputing parties**

Respondent	Interview Details
R1	<i>"Pertama, apa yang dia nak... Dan apa tindakan yang dia nak buat..."</i>
R10	2. Objective of parties – not to pursue revenge

Understanding the parties' objectives is necessary to estimate the success probability in mediation, especially when identifying common objectives shared by disputing parties. R10 particularly mentioned that the pursuit of revenge must not be entertained. Cloke validated R10's point by stating that mediators frequently deal with parties whose anger has overtaken their self-interest.

To steer parties away from such situations, Cloke presented a list of fifty ways for divorcing couples to practise forgiveness and reconciliation. Some of these questions include asking both parties how they feel about reconciliation while making sure each side listens while the other talks, encouraging parties to risk being honest about their thoughts, contemplating the meaning of forgiveness, and applying role reversals. Unless they have settled the issues, the mediator should subtly and indirectly encourage forgiveness to avoid coming across as siding with the opposite side.<sup>455</sup>

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<sup>455</sup> Kenneth Cloke, "Revenge, Forgiveness, and the Magic of Mediation", *Mediation Quarterly* 11(1) (1993), 67 – 78.

To not entertain revenge, however, does not mean rejecting the party's chance for mediation. Mediators should celebrate those who wish to attempt reconciliation or an amicable settlement. At the same time, they need to navigate revenge or any other harmful causes that contradict Islamic rulings away from such settlements. The researcher notes that the parties' objectives tend to be a considered factor when SLMAs practise informal mediation (further discussed in part 4.4.5.1). Otherwise, the standard mediation process allows the parties to express their wishes during the mediation session itself.

#### 4.3.3.4 Chances of winning the case litigiously

Similar to the above factor, this factor too exists in mediation advocacy. Unless directly approached as mediators, R1 and R4 disclosed that for any family conflict under Shariah jurisdiction, they would first consider themselves Syarie lawyers before becoming mediators. As such, whatever factors they take into consideration as Syarie lawyers in a case will be the same factors they consider before suggesting mediation. They would first determine the chances of winning the case litigiously, as given in the table below:

**Table 4.11. Determining chances of winning the case litigiously**

Respondent	Interview Details
R1	<p><i>“Lepas tahu apa yang dia nak, kita akan siasat apa possibility untuk kes dia tu... Kita tengok dari segi pembuktian dia. Dari segi fakta-fakta kes dia. Cerita dia macam mana. Adakah dia mempunyai alasan yang kukuh untuk kita teruskan. Tengok kenapa yang dia nak buat tu? Ataupun 50-50? Maknanya, kita akan advise perkara yang terbaik untuk dia mengikut apa yang dia nak...</i></p> <p><i>Especially dalam kes-kes bila kita amik keterangan dia, atau kita takde bukti yang kukuh, dakwaan dia tu macam tak berapa nak kuat. Takde bukti yang kukuh. Takde evidence, ... saya akan advice dia untuk selesai secara baik... faktor kewangan, ekonomi, dari segi fees semua tu, kita ambil kira jugak. Maknanya, kalau orang rujuk kita untuk lantik jadi mediator, yes, okay.”</i></p>
R4	<p><i>“Kita tengok kalau kata pertelingkahan tu, punca pertelingkahan tu tak besar. Kalau punca pertelingkahan tu sebenarnya kecil je, jadi kita</i></p>

*nasihatkanlah kalau boleh kita menuju kepada jalan penyelesaian yang lebih mudah, kita pergi kepada perkara tersebut.”*

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The above findings demonstrate that SLMAs would consider and rationalise elements such as the case facts, the storyline, the cause(s) of conflict, the client’s financial stability, and insufficient or unsupportive evidence exhibited by the client before going for mediation. These elements help them determine how to resolve the case and when to use their mediation skills. Wilk and Blum attested to this approach. They explained that during the preliminary case evaluation stage, lawyers would thoroughly analyse the case’s strengths and weaknesses before agreeing to represent the client. This analysis includes case facts, existing laws, the anticipated time and cost, the availability and reliability of evidence and witnesses, and the impact of litigation on the client’s future and the lawyer’s career. At some point where litigation may not be favourable, the mediation approach is then suggested.<sup>456</sup>

#### **4.3.3.5 Parties’ emotional conditions**

It is advisable to consider the parties’ emotional conditions before mediation can commence, as R4 and R10 stated in the table below.

**Table 4.12. The parties' emotional conditions are considered**

Respondent	Interview Details
R4	<i>“Dan kemudian kita cut lah apa-apa perkara yang emotional, yang tidak fokus kepada penyelesaian masalah tu. Sebab selalunya pihak-pihak ni tiba-tiba je dia akan teringat-ingat benda-benda emosi kan, sebab pihak-pihak yang bertelagah ni mesti.. Dia akan sifat buruk la. Ni semua sebab</i>

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<sup>456</sup> Michael S. Wilk and Henry J. Blum, “Helping Attorneys See Beyond the Case: Return to Objectivity”. Accessed online on 08.08.2022 through <https://www.attorney-mediators.org/Resources/Documents/Helping%20Attorneys%20See%20Beyond%20the%20Case.pdf>.

*bila benda-benda tu berlaku.. proses penyelesaian, proses mediasi tersebut gagal.”*

R10 1. Suitability of time whereby parties are not too emotional at that time

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While conflict admittedly prompts negative emotions, parties need to have reasonable control of their emotions. Supported by A. Muhajidin,<sup>457</sup> R4 believed that beginning mediation with conflicting emotions would jeopardise the session, considering the parties' emotional states would influence the mediation outcome and may further escalate the tension as conflicting people tend to say negative things about each other. R10 stipulated that mediation should be conducted when parties have a good hold on their emotions. This corresponds with Susilo, who specifies emotional parties as a deterrent to settling disputes and would disrupt the overall mediation flow. Nonetheless, expressing the right emotions is crucial to giving relief and understanding to the parties. Thus, the mediator must be assertive throughout the mediation sessions and facilitate these parties in addressing the necessary matters.

#### 4.3.3.6 Absence of domestic violence

Domestic violence can be defined as violence between intimate couples living together or who have previously cohabitated<sup>458</sup> in various forms that cause an individual, be it male or female, to be in fear of the other person. In their interviews, R3 and R5 replied that any family matter involving domestic violence is unsuitable for mediation.

**Table 4.13. Mediators do not take domestic violence cases**

Respondent	Interview Details
R3	"In family matters, if involves domestic violence cases, child abuse case, I think mediation is not appropriate to begin with."

<sup>457</sup> Ahmad Mujahidin, "*Ruang Lingkup dan Praktik Mediasi Sengketa Ekonomi Syari'ah*" (Indonesia: Deepublish, 2018), 147.

<sup>458</sup> Daleleer Kaur Randawar and Sheela Jayabalan, "The Definition of Domestic Violence in Malaysia: A Cross-National Comparison, *Akademika*, 88(3) (September 2018), 77 – 89.

R5 “Ah, contoh, macam domestic violence lah. Yang tu memang kita tak bawa mediasi lah... Sebab nya lah, bila kita ni jadi lawyer, kita memang fighter, tapi kita ni fight in our own way lah. Tak semestinya kita kena fight dekat court. Tapi ada benda yang kita boleh settle kan. Tu, bila kita ada mediation punya ni lah. Tapi, let’s say kalau kita nak fight, kita fight betul-betul lah. Contohnya kalau kes tu memang genuine teruk, memang kena belasah, memang lelaki tu tak berhati perut langsung. Buat apa nak bincang benda-benda macam ni kan, ha..”

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The responses above indicate that private mediators generally reject domestic violence cases, and studies such as Nancy Thoennes, Peter Salem, and Jessica Pearson (1995)<sup>459</sup> agreed with this. For instance, Nur Farahiyah et al. concluded that not all family disputes can be resolved through mediation and that the current mediation practice in Malaysia does not accept cases with a history of domestic violence.<sup>460</sup> Wheeler reasoned that an equal footing of power is necessary to achieve a successful mediation. Yet, such a condition does not exist in domestic violence, as ‘the abuser has taken away the power through physical or emotional abuse,<sup>461</sup> and this would severely affect the foundation and success of mediation.

Such is also the case for *sulh* in Shariah courts. Suppose the *sulh* officer or any other Shariah officer identifies any sign of domestic violence, in that case, the session will be stopped, and the case will be reported and handed over to the civil court.<sup>462</sup> Even at the beginning, such *sulh* cases already have a low success rate, as the victims become fearful for their safety when summoned to court, which may deter them from attending *majlis*

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<sup>459</sup> Nancy Thoennes, Peter Salem and Jessica Pearson. “Mediation and Domestic Violence: Current Policies and Practices”, *Family Court Review* 33(1) (1995), 7-8.

<sup>460</sup> Nur Farahiyah et al., “Mediating Family Disputes Involving Violence in Malaysia”, *International Journal of Asian Social Science* 8(12) (2018), 1120 – 1129.

<sup>461</sup> Laurel Wheeler, “Mandatory Family Mediation and Domestic Violence”, *S. III ULJ* (26) (2001), 559.

<sup>462</sup> Nur Farahiyah Md Nasir et al., “Prospect and Challenges of Using Online Mediation in Domestic Violence in Muslim Family Disputes”, *Humanities & Social Sciences Reviews* 8(1) (2020), 873-880.

*sulh*.<sup>463</sup> Mediators need to be observant and trained to identify signs of domestic violence, as proceeding with the settlement may cause the batterer to have child custody over the children as the battered would be scared to object, which would cause the children's further suffering.

Even so, studies such as Landrum,<sup>464</sup> Nur Farahiyah et al.,<sup>465</sup> and Fernand S. Rossi et al.<sup>466</sup> have suggested online mediation as an alternative to allow parties involved in domestic violence to benefit from mediation. They claimed that online mediation improves safety protection and allows parties to express themselves in a secure setting, considering the parties are separated during the session. Malaysian civil family courts may also issue a protective restraining order by authority of the Domestic Violence Act 1994.<sup>467</sup> This matter has yet to be researched further for Malaysian Shariah courts.

#### 4.3.4 Finding 4: A conducive environment for the parties is essential

Various studies have reported that a conducive infrastructure for mediation sessions is essential for a mediation to be successful. Aside from R9, the respondents were asked to share how they create a conducive environment when conducting *sulh* or mediation sessions. Based on their responses, factors such as the environment and setting of the session, equipment necessary for assistance, and the mediator's interpersonal skills have

##### **Figure 4.1. Elements that create a conducive environment**

significant importance in creating a conducive environment for mediation to take place, as shown in Figure 4.1

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<sup>463</sup> Norman Zakiyy Chow Jen-T'chiang, "Court-Annexed Mediation in Resolving Disputes Relating to Family in Malaysia: What We Need To Know Before We Go Forward", *Malaysian Journal of Shariah and Law* 2(2010), 145. R3 also mentioned this point in his interview.

<sup>464</sup> Susan Landrum, "The Ongoing Debate about Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness", *Cardozo J. Conflict Resolution* 12 (2010), 425.

<sup>465</sup> Nur Farahiyah Md Nasir et al., "Prospect and Challenges of Using Online Mediation in Domestic Violence in Muslim Family Disputes", 873-880.

<sup>466</sup> Fernanda S. Rossi et al., "Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse", *Family Law Review* 55(3) (2017), 390- 403.

<sup>467</sup> See Section 4 (Interim protection order) and Section 5 (Protection Order) of Domestic Violence Act 1994.

#### 4.3.4.1 The environment setting

In their practice, R1, R4, and R5 shared that a mediation session does not necessarily have to take place in a formal environment, like the office. In fact, it can be adjusted to suit the disputing parties' comfort, as shown below:

**Table 4.1. Environment setting for a conducive mediation session**

Respondent	Interview Details
R1	<i>“Tak semestinya bila kita nak bincang tu, kita tak semestinya perlu bincang dalam office. Kadang-kadang kita jumpa di tempat yang klien comfortable. Kadang mungkin di pejabat dia. Kadang mungkin di hotel. Di restaurant. Mana-mana yang sesuai.”</i>
R3	<i>“If we go to private mediation, the mediation session could be in the office, could be in somewhere else which are comfortable by both parties. But in the shariah court, we have a specific room they need to enter, they need to discuss. That is basically that, either the <i>Sulh</i> room, <i>Sulh</i> office, or the officer's office itself. So they cannot choose the venue for the mediation session... Some parties, they do not feel comfortable go to the court. They feel comfortable discuss outside the court room, outside the government building. Perhaps they prefer to just discuss at their home, bring mediator there, or go anywhere else. We cannot deny that some of the parties they are not very keen to go to the court. They prefer if they have dispute, they want to settle it privately. So with their own time.”</i>
R4	<i>“Realitinya, kadang-kadang mereka.. client ni,. ada yang buat kat office diorang, ada yang buat macam saya cakap tadi, tiba-tiba dia nak buat dekat apa, homestay. Bukan 2 pihak je ni. Ni contoh melibatkan sampai 6,7 pihak. Ha saya pernah ada tu 6,7 pihak ni sampai diorang sewakan homestay.. sebab kena pergi satu tempat yang bukan kampung ke rumah ke. Yang memang satu tempat tu dia dah jadi family reunion.”</i>
R5	<i>“Kita sebenarnya kena faham konsep mediasi ni kena tempat yang tenang. Contohnya, bilik tu kena tenang...kita tak boleh duduk kat tempat yang boleh nampak macam biased. Contohnya, klien saya dia lantik saya dan dia duduk dekat Serdang. And yang sorang lagi tu dia duduk dekat Ampang. Takkanlah saya nak pilih Serdang. Nampak macam biased la kan klien saya kan, betul tak? So kita kena pilih yang tengah-tengah.</i>
R7	<i>“Saya takkan buat dalam dewan lah, sebab dalam dewan bicara tu kedudukan dia sangat formal, hakim di atas bench. Sangat jauh jarak dia dengan pihak-pihak tu. Jadi dia akan kaku di situ, maknanya, kalau kita nak buat sesi tu dia akan terbatas lah. Ha, jadi kita akan buat di chamber. Patutnya chamber lah. Bilik yang, hmm, jadi lebih dekat, makna pihak-pihak tu lebih dekat dengan kita dan kita akan kendalikan sesi tu dengan lebih santai lah.”</i>

“R8            *“Dekat mahkamah ni, pegawai sulh memang akan ada satu bilik khas untuk dia kan? Macam saya ni, bilik saya lah. Dekat situ (while pointing), kita macam ada satu pembahagi. Depan saya ni ada satu bilik pegawai sulh .”*

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From these responses, a conducive environment for mediation is an environment that is comfortable and non-biased for the parties. R1, R3, R4, R5, R7, and R8 highlighted that the environment setting for mediation must be comfortable and non-biased, and for private mediators, can be conducted in a more flexible setting aside from offices, such as hotels, homestays, and restaurants. R3 added that parties might also prefer private mediation because of its logistical flexibility, as they may not be keen on the idea of going to court. Nevertheless, the location to conduct a mediation session with a privately-appointed mediator must be a place that portrays the mediator's neutrality towards both parties, as proposed by R4 and R5.

For government mediators, R7 prefers to conduct judge-led mediation in her chambers rather than the courtroom to encourage a sense of closeness with the parties. For *sulh* officer, R8, her office has a compartment that separates it from another room for *sulh* sessions. R8's response indicated that the place must also be private enough to maintain confidentiality. Nadia Murshida and Alias Azhar strengthened R8's point of separating a *sulh* officer's office from another compartment to conduct mediation, where a dull and narrow space with scattered case files may disrupt the parties' emotions and willingness to cooperate in the session.<sup>468</sup>

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<sup>468</sup> Nadia Murshida Abd Azzis and Alias Azhar, “Pendekatan Mediasi dalam Tuntutan Hadanah: Kajian di Mahkamah Syariah Pulau Pinang”, *International Journal of Law, Government and Communication* 3(9) (2018), 43.



#### 4.3.4.2 Providing the necessary tools to aid the mediation session

Another element that makes up a conducive environment is mediation equipment and tools during the session, as explained in Table 4.14:

**Table 4.14. Mediation equipment is essential to create a conducive environment**

Respondent	Interview Details
R4	<i>“Tiba-tiba dia nak buat dekat apa, homestay... pada masa tu, kita dah bawa siap-siap lah. Bawa siap-siap manila card putih tu dan marker pen dan sebagainya, untuk membantu pihak-pihak dia nanti, senanglah kita nak lakar, dan diorang sendiri, sebab diorang sendiri la nanti nak kena bulatkan the issues.”</i>
R5	<i>“Then, kita kena ada alat2 yang membantu, ... macamnya kalau kita meeting pun, meja tak boleh empat segi. Dia kena bulat. Bulat dia rasa welcomed. Kalau empat segi, kita duduk meja panjang. Dua-dua duduk sana, kita duduk depan dia, seolah-olah dia tu menyerah diri dekat kita. Faham tak? Apabila bulat, dia rasa macam okay ‘I feel heard. Dia nak dengar saya cakap.” Haa, macam tu...Lepas tu, macam, kita kena ada chart. Kena ada white board. So bila ada whiteboard tu, kita kena fokuskan pada pihak-pihak, “This is the issue! Isu ni je yang kita ni akan focus.” Apa benda yang nak di settle kan. Apa masalah dia apa semua.</i>
R8	<i>“Dekat situ kita memang ada meja. Meja bulat...memang dekat mahkamah ni pegawai sulh memang akan ada satu bilik khas untuk dia, kan.. Dalam bilik saya pun memang ada white board. Ada satu kes saya tu macam saya tak ada lah guna white board tu tapi pihak-pihak tu guna sekali, ada. Tapi jarang la pihak-pihak tu gunakan white board tu. Cuma ada satu kes tu dia macam, mungkin macam susah kut pihak-pihak nak faham tu, so kena lah catit sikit-sikit berkaitan dengan apa point dia tu. Ada lah juga kegunaan dia saya nampak bila white board tu diletakkan di situ.”</i>

For R4, R5, and R8, a conducive environment requires appropriate mediation tools. Attending a mediation session outside offices, R4 came prepared with tools such as markers and manila cards for disputing parties to use. R5 and R8 justified the idea that a whiteboard and a roundtable are vital. Compared to a long, square table that insinuates parties are submitting to the third party, R5 conveyed that a roundtable gives off a more neutral and friendly vibe. All three respondents also expressed that these writing tools allow parties to identify and highlight relevant issues or facts with precision. This point

is vital, as this action may help the parties identify and realise the key issues themselves, aside from reminding mediators that their role is only to facilitate and not conquer. This ‘visual documentation’ is crucial, as some parties have difficulty focusing on the relevant issues at hand and instead divert to other less important matters.<sup>469</sup> Both facilities are provided for *sulh* officers in court in their rooms, as shared by R8.

Various studies supported the above findings. For instance, Mcguire confirmed the need for the mediator and parties to sit in a literal roundtable setting. This approach is ideal to avoid any impression of taking sides or assuming power positions.<sup>470</sup> When asked how the physical arrangement changes with many participants, Mason answered:

“The recent Central American mediation provides a good example. There were eleven participants. The mediation facility had only the usual long rectangular tables aligned in the typical “U” pattern, really more suitable for arbitration than mediation. So, we rented a smaller round table to fit only the decision-makers on each side and myself as mediator.”<sup>471</sup>

Using the round table also helps the mediator from being ‘bogged down’ in a multi-dimensional mediation setting,<sup>472</sup> as mentioned by R4.

#### 4.3.4.3 The mediator’s interpersonal skills

For R2, R6, and R10, a mediator’s interpersonal skills make up part of the conducive mediation setting, as quoted below:

**Table 4.15. Mastery of mediation skills in a mediator**

Respondent	Interview Details
R2	“ <i>Dia banyak kepada kita punya interpersonal skills juga for the mediation.</i> ”

<sup>469</sup> Interview with R4 through GoogleMeet on 03.09.2021

<sup>470</sup> James E. Mcguire, “Expert Roundtable in Mediation” *Dispute Resolution Magazine* 11(3)(2005), 21-24.

<sup>471</sup> Paul E. Mason, “Multi-Dimensional Mediation” in *Contemporary Tendencies in Mediation*, ed. Humberto Dalla Bernardina de Pinho and Juliana Loss de Andrade, (n.p, Editorial Dykinson, 2015), 197. Multi-dimensional mediation involves mediating beyond the normal two-party scenario where many other factors come into play. See pages 192-203 in this reference for more information.

<sup>472</sup> *Ibid*, 202.

- R6 *“Bila dia datang, jangan sampai dia ni menganggap kita menyebelahi satu pihak. Bila dia datang kat office kita ni, even untuk panggil saya panggil dia sendiri tau. Saya tak suruh staff panggil ke suruh orang lain panggil. Saya takkan biarkan dorang tunggu lama kat kaunter... Tapi first2, ...kita nak bina rapport ni dlu, supaya dia respect kita sebagai seorang ketiga... supaya dia tak rasa yang kita ni orang asing... sebab the other party is our client tau, kita taknak dia rasa yang kita ni menyebelahi satu pihak je..”*
- R10 “Mastery of mediation skills are important, for example, how to break impasse or deadlock, body language, take a rest or acknowledging their problems.”

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For private mediators, R2 and R10, they stressed that a conducive environment relies much on the mediators’ mastery of mediation skills, including their interpersonal skills in dealing with the parties. R6 gave a more expressive reply and mentioned that a mediator needs to create an atmosphere where neither party feels like the other side is favoured, considering LAD mediators often ‘represent’ the plaintiff. She hinted that creating such a setting begins even before the mediation sessions start by building rapport, and a caring and friendly atmosphere with both clients.

The above findings agree with Ashgar Ali Ali Mohamed and Asma Hakimah et al.,<sup>473</sup> who stressed that mediators must be equipped with the required qualities and necessary skills to perform as mediators and achieve a joint mutual agreement between disputing parties. Nevey Varida supported this point by stating that it is the mediator’s responsibility to create a conducive environmental setting for parties to compromise readily.<sup>474</sup> Additionally, Rachmat highlighted the significance of mediators having the

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<sup>473</sup>Asma Hakimah et al., “Mediation in Islamic Family Law Disputes: An Overview of Experience of the UKM Legal Aid and Mediation Centre”, *Current Legal Issues* 2(2020), 14-20. See also “Mediation A Compliment to Litigation”, *The Star Online*, 24<sup>th</sup> April 2018.

<sup>474</sup>Nevey Varida Ariani, “Non-Litigation Alternatives Business Dispute Resolution”, *RectsVinding Journal* 1(2)(2012), 283.

right skills, as he finds that, aside from the parties, the success or failure of a mediation outcome relies heavily on the mediator.<sup>475</sup>

Similarly, Sarah Saphira explained that it is a prerequisite for a mediator to have interpersonal skills. She proceeded to divide them into internal and external aspects. The internal aspect relates to the mediator's interpersonal capabilities to bridge and regulate the session to facilitate parties in reaching a settlement, whilst the external aspect consists of the formal procedures and conditions the mediator adopts in practice.<sup>476</sup>

For legal practitioners in family matters, Timothy Hadeen and Peter Salem listed interpersonal skills as listening, negotiation, and attending to clients in emotional crisis. They have also included a keen understanding of financial issues in family law, the impact of divorce and separation on children, and the ethical dimensions of family law practice.<sup>477</sup> Additionally, Wan Azimin and Hidayat Buang supported the significance of *sulh* officers mastering the mediator's skills. In their research, they stated that the enhancement of *sulh* implementation in Shariah courts greatly relies on the commitment and skills of trained and knowledgeable *sulh* officers.<sup>478</sup>

Overall, this research identified three factors that must exist concurrently to create the ideal conducive environment; a comfortable and non-biased environmental setting with adequate facilities such as markers, a whiteboard, or any writing materials, and a

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<sup>475</sup> Rachmat Rizki Aulawi, "Efektifitas Mediasi Dalam Perkara Perceraian Di Pengadilan Agama Dompu", 82.

<sup>476</sup> Sarah Saphira Lubis "Penggunaan Metode Kaukus Oleh Mediator Dalam Memaksimalkan Hasil Mediasi di Pengadilan Agama Sei Rampah" (Thesis Dissertation, Muhammadiyah Sumatera Utara University, 2022), 49- 50.

<sup>477</sup> Timothy Hedeem and Peter Salem, "What Should Family Lawyers Know? Results of A Survey of Practitioners and Students", *Family Court Review* 44(4), 601 – 611.

<sup>478</sup> Wan Azimin Wan Adnan and Ahmad Hidayat Buang, "Enhancing *Sulh* Application in Real Estate Property Claims in Malaysian Shariah Courts", 146 – 148.

round table; as well as the mediator’s interpersonal and professional mediation skills. Together, these elements strengthen the chance for a successful mediation.

#### 4.3.5 Finding 5: The practices and procedures of private mediators in resolving family conflicts under the Shariah jurisdiction

From a mediator’s perspective, SLMAs are inquired to share how they practise mediating family cases under Shariah jurisdiction. The findings are themed below:

- i. Informal mediation
- ii. Formal mediation
- iii. Endorsement as a court order by Shariah judges in court

##### 4.3.5.1 Informal mediation

Findings indicate that SLMAs utilise their mediation skills as part of their legal practice while being approached by clients as lawyers, as presented below:

**Table 4.16. SLMAs practice informal mediation under Shariah jurisdiction**

Respondent	Interview Details
R1	<i>“Selepas saya dapat sijil mediator pun, jadi pengantara, saya tak jalankan tugas mediator tu per se. Maksudnya, indirectly. Saya mewakili anak guam. Cuma saya menggunakan skills sebagai mediator tu untuk cuba selesaikan... Kita praktis skill mediator ni, bersama-sama dengan kapasiti kita sebagai peguam, cuma kita ambil skills. Kita nak improve kita punya tugas sebagai peguam Syarie, dan pada yang sama kita nak jugak selesai secara baik. Masa tu lah kita apply skills yang sebagai mediator.”</i>
R2	<i>“Tak banyak kes yang saya dapat sebenarnya .. kebanyakan benda tu berlaku secara dipanggil informal punya mediation punya keadaan... Banyak yang datang mungkin sebab kita advice klien daripada awal kot... kita advise dia...”</i>
R4	<i>“Bila kita tahu, yang pihak lawan kita ni memang dia nak, kalau boleh dia nak, selesaikan masalah. Jadi sebelum nak selesaikan masalah tu kita kena bagitaulah, kita kena jelaskan dengan betul bahwa kita adalah peguam pihak, contohlah, pihak A. Dia pihak B... kita akan berbincanglah secara baik apakah terms-terms yang boleh... Di hadapan mahkamah nanti kita peguam pihak A. Tapi sebenarnya umpama macam kita mewakili kedua-dua pihak.”</i>

R5 *“Kita masih gunakan skill tu macam “Ah.. tak boleh nak settle ke benda ni..? Macam boleh nak settle” apa benda semua ni kan. At the end, alhamdulillah, boleh saya kata yang half of my cases dekat firm ni memang kita guna settlement lah. Ha.. yang ni yang kalau kes dah nak start, maksudnya, terus secara bicara kan. Tapi kita dah boleh manage sebelum nak capai bicara tu, kita try to settle kan benda ni. Tapi, ada jugak kes yang, maksud saya, kita consult dulu sebelum kita failkan dekat court. Maksudnya, kalau boleh settle awal-awal, kita boleh terus rekodkan dekat mahkamah lah.”*

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Just as government mediators practise informal mediation in part 4.3.1, Syarie lawyers too practise mediation skills informally. R1, R2, R4, and R5 attested to practising informal mediation in their legal practice. R1 justified that implementing mediation skills within a lawyer’s capacity is a step to improve her litigation approaches and promote a ‘win-win’ situation, skills that R2 added can be useful when advising clients. This means that Syarie lawyers would practise mediation skills, but within the capacity of a lawyer. R4 explained that there is room to achieve such a situation when it is known that both sides are willing to negotiate. In this case, the lawyer would introduce himself as the plaintiff’s party and act as a third party, but indirectly represent both parties when endorsing the settlement in court. Supporting R1 and R4, R5 shared that more than half of her legal cases as a Syarie lawyer were settled using informal mediation in litigation.

Here, the SLMA will act as a representative for one party and contact the other party on behalf of the first, especially when the other party has not appointed any lawyers. This provides room for disputing parties to discuss without meeting face-to-face. If the facilitated negotiation is successful, the SLMA will draft a settlement agreement based on the agreed terms, and only then will register the case in court to be endorsed, as R1 explained: *“That one kita memang discuss dulu, dah ada perjanjian persetujuan baru kita pergi ke court.”* The procedures are the same as common legal procedures, such as filing, preparing the pleading, and preparing the documentation to be filed in court. Fortunately,

the case can be settled right away at the first court hearing.<sup>479</sup> For polygamy cases, the court reserves the right to determine whether the husband is eligible or not to remarry, despite the first's wife agreement and cooperation.<sup>480</sup>

Lawrence acknowledged this by providing that it is a lawyer's responsibility to manage disputes and achieve the best outcomes for the client in the shortest amount of time and at the lowest expense, and that one way to accomplish this is through mediation. The litigator must learn a new set of mediation skills as trial advocacy's commonly practised approaches and litigated way of thinking do not guarantee a win-win success.<sup>481</sup> SLMAs with both the skills and preferences to resolve things amicably help save time and speed up the overall litigation process. As Lawrence said, "Mediation is, after all, assisted negotiation."

However, practising informal mediation as a lawyer has a setback when the other party, for instance, the defendant, has appointed their own lawyer. It becomes challenging when the other lawyer has no intent to resolve the case amicably and instead, advises his client to settle it litigiously.<sup>482</sup> R1 explained that as her client's lawyer, she could only communicate with the defendant's lawyer and not with the defendant directly. This constraint is stipulated in Part 37 of Practice Direction Number 4 Year 2002,<sup>483</sup> where a Syarie lawyer may not communicate with any party represented by another Syarie lawyer. This point shows that even when practising informal mediation, SLMAs are still Syarie lawyers and are bound by the rules and regulations of one.

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<sup>479</sup> Interview with R1, R2 and R5 through GoogleMeet on their respective dates.

<sup>480</sup> Interview with R1 and R4 through GoogleMeet on their respective dates.

<sup>481</sup> James K. L. Lawrence, "Mediation Advocacy: Partnering with the Mediator", *Dispute Resolution* (2000), 15, 425.

<sup>482</sup> Interview with R1 through GoogleMeet on 06.08.2021.

<sup>483</sup> Ethics of Syarie Lawyers, Practice Direction Number 4 Year 2002.

Another tricky part of informal mediation is dealing with the other party's distrust of the SLMA. Because the SLMA acts as one side's lawyer representative, the other side may reject and resist the lawyer's approach, as he believes that the SLMA has already taken sides with the opposing party.<sup>484</sup> Understandably, getting disputing parties to agree on all matters would be very challenging. For cases where not all arising issues have been resolved by a consensus between the parties, the case would then proceed with its usual protocol of going to court for adjudication. Nonetheless, the issues that the parties have reached a mutual understanding on will be recorded in the affidavit, which therefore cuts down on the time it takes to settle the litigation process.

#### 4.3.5.2 Formal mediation

The outcome denotes that although scarce, SLMAs have had opportunities to officially mediate family cases formally under Shariah jurisdiction, as recorded below:

**Table 4.17. SLMAs conduct formal mediation sessions**

Respondent	Interview Details
R2	<i>“Normally, ada beberapa kes yang saya dapat daripada orang lain .. daripada lawyer-lawyer, di mana lawyer-lawyer ni pun sebenarnya diorang ni pun mediator .. yang memang nak kalau boleh pihak-pihak neh settle dengan cara baik lah. Either satu pihak bergaduh dengan satu pihak yang lain... Kalau saya ada kes yang tak boleh selesai, saya mintak kawan saya mediate. Kalau ada kes yang kawan saya tak boleh selesai, kawan saya minta saya mediate. Dia macam tu.”</i>
R4	<i>“Jadi gunanya mediator ni lah mediasi ni lah, kita gunakan praktis untuk perkara tersebut. Saya, pada waktu ketika itu, saya akan pakai topi mediator... Dengan package kita ada 3 sesi.. Selalunya macam saya dengan ada beberapa kawan-kawan yang lain selalu</i>
R5	<i>“Tapi kadang-kadang... kita akan suggest, why not kita pergi pada mediasi yang lain punya session, dengan peguam lain lah, supaya kita boleh nak try nak expedite benda ni, sebab benda ni boleh nampak nak settle.”</i>
R10	<i>“It is like any other mediation.”</i>

<sup>484</sup> Interview with R4 through GoogleMeet on 03.09.2021.



Compared to other SLMA respondents, R2, R4, and R10 shared that there are cases where they have formally mediated family disputes under the Shariah jurisdiction as mediators. For R2 and R4, they receive mediation cases when other SLMA peers cannot resolve their legal matters at any stage of litigation. They encourage their clients to attempt mediation instead, thus passing the clients to other SLMAs. The reason is that a Syarie lawyer who has represented either party cannot formally become a mediator for both sides to avoid bias or conflict of interest.<sup>485</sup> Disputing parties may also approach an SLMA to be their mediator out of their own free will without initially being involved in litigation. R5 has never mediated family cases formally, yet she too confirmed this practice. For R4, the mediation session comes in a package with three mediation sessions.

R2 and R4's points are similar to when mediation skills are incorporated into the lawyer's playing-out-conflict process, a method Nathanson defined as mediation advocacy.<sup>486</sup> Unlike informal mediation, where SLMAs include mediation skills in their legal practice, mediation advocacy happens when a lawyer works with a mediator to achieve the best results for the disputes, passes the case to a mediator, or when a lawyer needs to step down as an advocate and think like a mediator to assist the mediator.<sup>487</sup> The mediation conducted by SLMAs, however, does not necessarily have to be mediation advocacy, as the parties can straightaway appoint the SLMA as a mediator even before any litigation process begins.

The procedure begins when disputing parties approach an SLMA to be their mediator. The SLMA will prepare a pre-mediation agreement where the parties formally appoint the SLMA and determine the necessary details, including who will pay for the

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<sup>485</sup> Interview with R4 through GoogleMeet on 03.09.2021.

<sup>486</sup> Stephen Nathanson, "What Lawyers Do", 140-142.

<sup>487</sup> James K.L Lawrence, "Mediation Advocacy: Partnering with the Mediator", 425.

mediation fees, the allocated time, place, and number of mediation sessions to be conducted. Often, the mediation fee is split in half between both disputing parties. Once the pre-mediation agreement is drafted, the mediation sessions will only commence once the mediator and disputing parties have signed it.<sup>488</sup> Regarding how SLMAs conduct the mediation session, R10 simplified that the process is similar to any other mediation. This means that the mediation process encompasses an identical flow to *sulh* in Shariah courts or common civil mediation.

As elaborated by various studies such as Mohd. Fuad,<sup>489</sup> Akmal Wafi,<sup>490</sup> Hammad Mohamad Dahalan, and M. Azhan Yahya,<sup>491</sup> the process will have an introduction, followed by joint sessions where each side of the party has the opportunity to talk, caucus sessions when necessary, identify issues where the mediator facilitates parties to determine relevant issues, present and discuss possible solutions and finally, the mediation outcome. Private mediation sessions can also be extended or repeated as many times as the clients wish, though this comes with additional charges per session. Private mediation sessions, however, do not require parties to receive a *sulh* notice, as is the case with *sulh* in court.<sup>492</sup> The process would include an introduction session, joint sessions with the mediator facilitating the parties to identify the issues and guide towards possible solutions, and if needed, caucus or private sessions.

Once the parties have reached an agreement, the SLMA will recheck the agreed terms and draft the settlement agreement to be signed by the parties. The end process is

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<sup>488</sup> Interview with R2, R4 and R5 through Google Meet on their respective dates.

<sup>489</sup> Mohd Fuad Mohd Salleh, "*Proses Penyelesaian Konflik Melalui Perundingan Sulh*" (PhD Thesis, Putra Malaysia University, 2006), 123-124.

<sup>490</sup> Akmal Wafi Khairul Zaman, "*Efektifitas Mediasi Sebelum Memutuskan Perceraian*" (Masters Thesis, State Islamic University of North Sumatra, 2018), 47-55.

<sup>491</sup> Hammad Mohamad Dahalan and Mohamad Azhan Yahya, "*Perjanjian Sulh di Antara Pihak-Pihak Bertikai di Mahkamah Shariah Sebagai Pilihan atau Persetujuan Yang Perlu Dipatuhi?*", 257-258.

<sup>492</sup> See rule no. 3 of the Civil Procedure (*Sulh*) (Federal Territories) 2004.

similar to informal mediation, where the settlement needs to be endorsed in court. If the mediation fails, the dispute will be brought to court for adjudication. The Head of *Sulh* unit of JKSM, R9, said that there is not much difference between the common mediation practice and the *sulh* conducted at Shariah courts. Unlike common mediation, *sulh* celebrates Islamic values and mannerisms, such as beginning the session with *Bismillah* and surah al-Fatihah recitation.

The practice of Syarie lawyers conducting formal mediation for Shariah cases conforms to Zainul Rijal's study, which showed that this practice has long existed since 2011. At that time, there were approximately 35 Syarie who practised *sulh* (in this case, private mediation services) for Shariah cases for free.<sup>493</sup> Despite the availability of private mediation services, findings indicated that until now, SLMAs scarcely, if not rarely, carried out these formal sessions. For instance, R1 had only mediated one session, while R2 experienced mediating two to three formal mediation sessions for family conflicts under Shariah jurisdiction throughout her whole career as an SLMA. R3 and R5 had not conducted formal mediation as an SLMA, as they believed that the role of *sulh* officers is sufficient at the Shariah courts.

For R10 and R4, both respondents had experienced mediating more Muslim family cases, courtesy of business or broad exposure, and experience in the mediation field. Although, R4 too commented that practising formal mediation is uncommon among them: "*Kita punya permintaan rendah. Mediasi ni permintaannya rendah.*" Nevertheless, Wan Azimin and Ahmad Hidayat acknowledged such practices. They viewed the practice of settlement agreements by Syarie lawyers acting as mediators as a recent development

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<sup>493</sup> Zainul Rijal Abu Bakar, "Sulh in the Malaysian Shariah Courts", 8 – 9.

and encourage it to be applied more widely in Shariah courts aside from the current *sulh* proceedings.<sup>494</sup>

As evidence that private Muslim mediators practise mediation beyond the family scope under the Shariah jurisdiction, this research presented an unreported property case of an LGBT Muslim couple mediated by one respondent. In this case, both parties were Muslim males. They sought mediation services to discuss their separation and ‘matrimonial property’ issues. Indubitably, such a relationship is frowned upon in Islam and Malaysia. This research did not support such an act, but merely pointed out that the couple appointed the SLMA as a mediator because, in the absence of laws regarding LGBT couples rights in Malaysia in both civil and Shariah jurisdiction, the SLMA was able to facilitate their negotiation with proper Islamic knowledge in property matters. The respondent who mediated this case also managed to share the Islamic beliefs about LGBT with both males before the mediation session was conducted.

Other formal family mediation cases handled by the SLMA respondents under Shariah jurisdiction include inheritance property between seven siblings, a divorce case between a husband and wife with no ill feelings towards each other, and a child custody case between a wife and her in-laws over her child. Also, most SLMAs reported that marital disputes, mainly child custody and divorce, and property disputes are the most common family disputes they have mediated formally or informally for Shariah cases.<sup>495</sup> This is only a limited study based solely on the research findings, and how common it is for

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<sup>494</sup> Wan Azimin Wan Adnan and Ahmad Hidayat Buang, “The Implementation of *Ṣulḥ* Involving Real Estate Claims of Muslims in Shariah Court in Malaysia: A Survey of Previous Studies”, *Journal of Shariah Law Research*, 4(1) (2019), 39.

<sup>495</sup> R1, R4 and R10 responded that divorce child custody is the most common case brought up in their mediation practice. R10 added property-related matters are also common.

SLMAs practise formal mediation for family conflicts under the Shariah courts' jurisdiction has yet to be properly determined.

#### 4.3.5.3 Endorsement as a court order by Shariah judges in court

As agreed by many respondents, it is paramount to ensure that, like *sulh*, any settlement agreement resulting from any private mediation session related to family conflicts under the Shariah courts' jurisdiction needs to be endorsed at the Shariah courts, as emphasised below:

**Table 4.18. All settlement agreements must be endorsed at the Shariah courts.**

Respondent	Interview Details
R1	<i>“Sebab kalau ada perjanjian sahaja, perjanjian tu tak binding so any breach of the contract, maknanya pihak2 tu takleh execute lah. Macam benda tu sia-sialah... So the moment ada perjanjian, memang kita akan advise untuk pergi ke court untuk rekod. Sebab kalau perintah, kalau ada any breach of the contract tu, any breach of the perintah tu, dia contempt of court.”</i>
R2	<i>“Tapi masih lagi kena endorse laa kat court la.”</i>
R3	<i>“Go to the Shariah court and then make a proper agreement, and then it can be recorded as a court order... I would strongly suggest to go back to the court and make a new agreement. I mean, because in shariah court, if let's say the existing agreement is no longer working between parties, and then they can apply to vary the court order.”</i>
R4	<i>“.... Dan boleh endorse kat depan mahkamah... Kalau kita sorang kita kena engage la kalau kawan-kawan kita ke, kenalan kita ke yang kita percaya boleh bawa kes ni... Tanpa mengubah... Dalam kes ni maksudnya dia tiada peguam pihak lawan takde apa, dia ada satu peguam je sebagai pemudahcara je, untuk settlekan kes tu... So, topi yang..berbeza. Settlement, masa settlement is settlement, tapi bila ketika di hadapan mahkamah tu kena ada peguam lain yang bawa kes tu, untuk bawa kes. Sepertimana yang telah dipersetujui oleh hasil perbincanganlah”</i>
R5	<i>“Kena faham ya, konsep settle di luar court ni still kena record dekat court. Walaupun settle luar court. Yang Shariah ni. Sebab orang selalu ingat macam, kalau kita nak settle luar court apa ni, maksudnya kita tak payah nak bawa kes ni pergi court apa semua tu lah. Tak. Kita settle luar court, tapi kita menjimatkan masa nak bicara dekat court apa semua. That comes as a proposal of settlement.”</i>
R8	<i>“Sebenarnya kalau ada persetujuan bersama..oh andaikata b awah JBG ke..under peguam ke..memang kalau kata ada pihak-pihak tu nak tak nak memang dia kena endors depan hakim untuk dijadikan satu</i>

*perintah. Sebab apa, endors tu untuk mahkamah Syariah keluarkan perintah mahkamah. Kalau kata perjanjian sahaja, sebenarnya tak diiktiraf oleh undang-undang...”*

R9 *“Tapi yang Syar’ie ni, macammanapun ending dia adalah nak jadi perintah ataupun persetujuan tu, mesti diendorskan di mahkamah untuk dikeluarkan sebagai perintah.”*

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To ensure the mediation outcome is binding, SLMA respondents agreed that the settlement agreement signed by the parties needs to be endorsed in court by the Syarie judge, similar to *sulh*. As R1 and R3 explained, endorsing the settlement helps ensure parties adhere to the agreed terms because they will be more disciplined to execute the order or may be accused of contempt of court, as written in section 147 of the Shariah Court Civil Procedure (Selangor) Enactment 2003.<sup>496</sup> Furthermore, when the settlement becomes a court order, parties may have the court vary the order based on their recent and changing daily needs and lifestyle, as specified in section 83 of the same enactment.<sup>497</sup>

In addition, government Shariah officers, R8 and R9, also stressed the importance of endorsing private mediation sessions in the court, with R8 highlighting that the laws do not recognise unendorsed agreements. In fact, Wan Azimin and Ahmad Hidayat Buang pointed out that any property-related order that is not made by the court authority may be subjected to the risk of having it reviewed by authorities such as the state land and mines office. Parties will also have to bear the consequences of the order at their own risk.<sup>498</sup>

Based on Zainul Rijal’s study, Shariah judges would accept these settlements after reconfirming that the settlements are Shariah-compliant and that all parties wholly agree

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<sup>496</sup> Section 147. Duty to Comply, Shariah Court Civil Procedure (Selangor) Enactment 2003. [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_enactment\\_Ori\\_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/94d189311054869748256f1c0010476c?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_enactment_Ori_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/94d189311054869748256f1c0010476c?OpenDocument)

<sup>497</sup> Section 83. Mode of amendment, Shariah Court Civil Procedure (Selangor) Enactment 2003. [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_enactment\\_Ori\\_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/80141b215976942048256f1900272569?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_enactment_Ori_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/80141b215976942048256f1900272569?OpenDocument)

<sup>498</sup> Wan Azimin Wan Adnan and Ahmad Hidayat Buang, “Enhancing *Sulh* Application in Real Estate Property Claims in Malaysian Shariah Courts” *Kanun: Malaysian Law Journal* 33(1) (2021), 153.

with the terms without force. Otherwise, these judges would refuse to endorse the settlement.<sup>499</sup> Yet, some judges insisted on disputing parties to reattend mediation through *sulh* in court,<sup>500</sup> and this coincides with R8, who answered that *sulh* officers would need to recheck settlement terms made outside of court brought by the parties, ensure their full agreement and participation with the terms, and, if needed, redraft the settlement according to the court's format before presenting it to the judge.<sup>501</sup> To save time, Practice Direction Number 2 Year 2012 stipulated that any settlement agreement prepared by Syarie lawyers or the parties does not need to be referred to the *sulh* proceeding at the time of registration. This practice direction must be read together with Practice Direction Number 1 Year 2010.

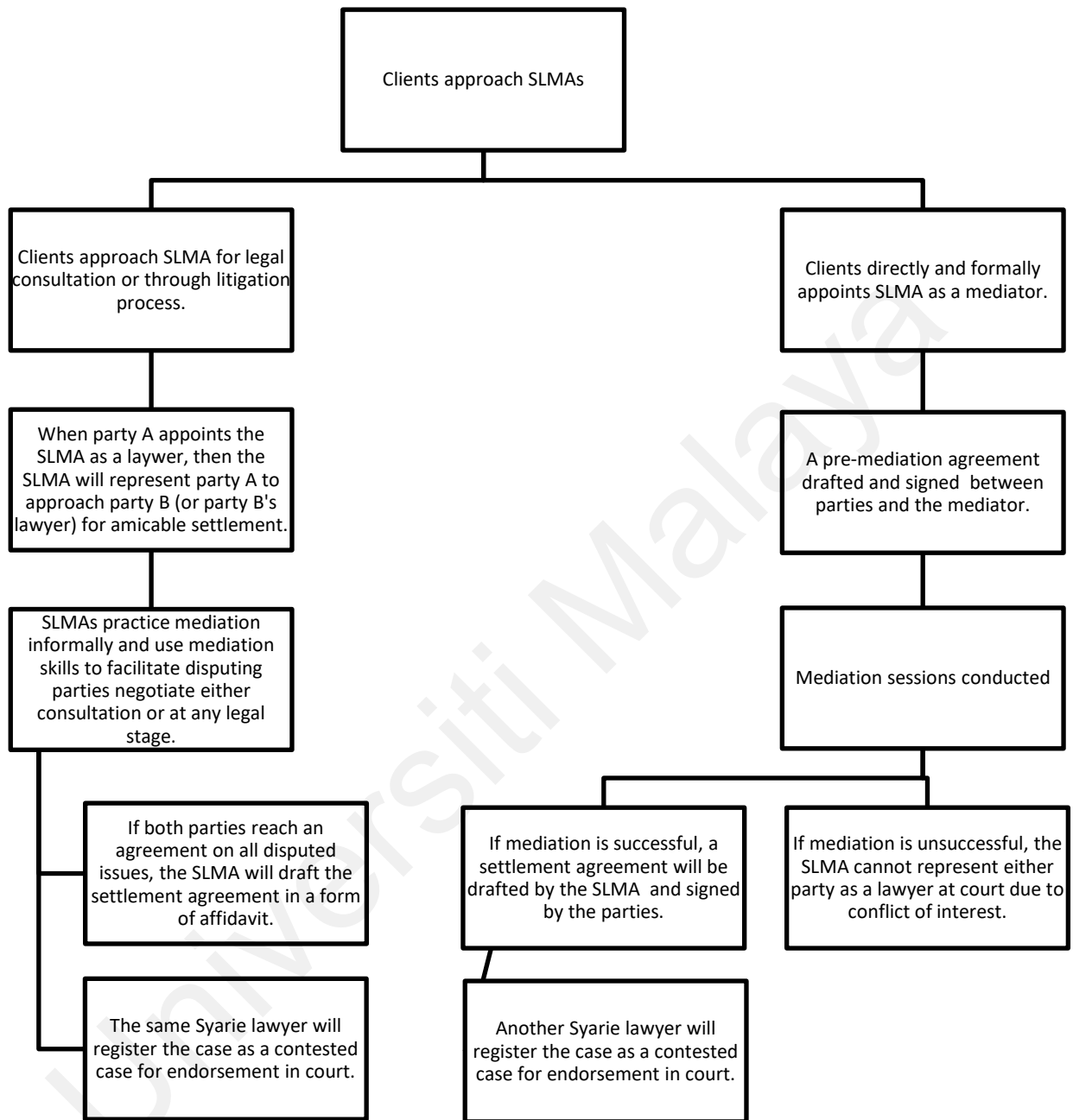
To summarise the practice of mediators, the responses revealed that SLMAs conduct formal and informal mediation practices similar to *sulh* officers and civil mediators, though formal mediation is rarely practised by them. Their mediation processes are identical to *sulh* in Shariah courts and are accepted by the Shariah courts to be endorsed. For better understanding, a diagram is provided to show the flow of formal and informal mediation processes conducted by SLMAs:

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<sup>499</sup> Zainul Rijal Abu Bakar, "Sulh in the Malaysian Shariah Courts", 8 – 9.

<sup>500</sup> *Ibid.*

<sup>501</sup> Interview with R8 through GoogleMeet on 27.04.2021.



**Figure 4.2. Practice of Formal and Informal Mediation by Syariah Lawyers with Mediation Accreditation (SLMAs) for family cases under the Shariah jurisdiction**



#### 4.3.6 Finding 6: Private mediation fees for Shariah family cases are similar to civil mediation fees or legal consultation fees

This research explored the mediation fees charged by SLMAs as private mediators for family cases under Shariah jurisdiction. The findings are categorised as follows:

- i. Mediation fees for formal and informal mediation.
- ii. Possible additional fees for endorsement in court.

##### 4.3.6.1 Mediation fees for formal and informal mediations

R1 – R5 generously shared their experiences, as depicted below:

**Table 4.19. Mediation Fees Charged by SLMAs in Informal Mediations**

Respondent	Interview Details
R1	<i>“Macam saya, lebih kurang macam consultation fee lah... katakan, kalau fees time jumpa memang dah confirm nak lantik saya, nak buka file, nk daftar kes. Kita akan terus buka file. Tapi ada jugak pasangan datang untuk consultation, lepas tu dia kata lagi dia tak confirm lagi nak teruskan ke tak. So dia just nak consult je. Haa, masa tu yang kita buat macam mediation jugak la kan... Maknanya, consultation fee dalam 1 hour ni dalam, RM350.. RM330–500 la per session... Maknanya, sesi mediasi, eh, kita punya negotiation yang awal-awal tu, kita masukkan sekali dengan legal fees sekali. Kita tak asingkan lah.”</i>
R2	<i>“Satu sesi tu biasa kita caj dia RM500... satu sesi tu dalam satu jam lebih lah. so dalam satu jam setengah macam tu la... Sebab apa yang saya ikut ni, sebab saya ikut dari Bar Council dulu punya .. Bar Council, dia ada dia punya sendiri kan .. Sebab sekarang ni kita bawah PPMM, kita cuba nak buat modul untuk pusat mediasi Islam sebenarnya. Modul dah ada. Kita tengah buat. Cuma kita tengok yang yang Bar Council sebenar buat sebelum pada ni daripada walk-in paper diorang. Kita ambil on that part lah.”</i>
R3	<i>“But when you are talking about cost, yes, it’s true because there are no governing rules. In that particular issue, so it’s up for mediator and also parties to negotiate, I mean the mediator themselves, they can put whatever amount, and if parties agree, then they can proceed with the mediation session... But I think, perhaps, RM100.. Per mediation session. Oh, if you make it per hour, okay. I think that is fair. Make by hour, means that if the session runs in many sessions we just compute it using hour, perhaps one-hour professional RM300 to RM500 I think for one hour.”</i>

- R4        “Haah, maksudnya, dia ambil RM1500 tu open file, dengan package kita ada 3 sesi, kalau tak kiralah, 3 sesi tu 1 sesi 2 sesi dia dah gagal, dia still kena bayar 3 sesi tu. Ha so, itu RM1500 ...”
- R5        “Hari tu, dalam RM500 lah. Sejam.. Itu kes nafkah anak .”
- 

From the comments above, it appears that mediation fees differ in two situations. For informal mediation with R1, if clients come for consultation but do not open a case file, and R1 applies mediation skills informally, they would be charged around RM350 – RM500 for approximately one hour of service as the consultation fee. On the other hand, clients who decide to appoint R1 as a lawyer only have to pay the overall legal fee when the case is registered in court to be endorsed, should the mediation succeed. The informal mediation is already part of the legal services, as R1 said: “Bila dorang dah agree untuk buka file, nak proceed. memang kita tak charge consultation la. Kita terus masuk kepada open file terus.” Here, parties are simply paying for the legal fees, where the costs can vary depending on how long and complicated it takes for the issues to resolve.

For formal private mediation sessions, it can be deduced that the general fee charged for family mediation services under the Shariah jurisdiction is RM500 for an hour and an hour and a half, as shared by R1, R2, R4, and R5. R2 shared that the amount is determined following the civil mediation fee since the Islamic mediation module prepared by PPMM is still in progress. For R4, the mediation package is set at RM1500 for three mediation sessions, and parties will have to pay the total amount for the package regardless of how many sessions they attend out of the three sessions. Datuk Kutubul Zaman explained that the mediation cost at the Malaysian Mediation Centre (MMC) is determined by the

amount of the claim involved. A mediation fee of RM500 is charged for cases with claims of up to RM100,000, including family disputes<sup>502</sup>.

In contrast, R3 determined that, considering there are no set rules specified for private mediation under Shariah jurisdiction, the mediator and disputing parties still have room to negotiate the price. He suggested that, as a professional profession, it is fair to charge an hour of mediation for approximately RM300-RM500.<sup>503</sup> Other factors may also influence the mediation fees, including the mediator's seniority and experience, the client's financial situation and character, meeting points outside offices, and other miscellaneous expenses.<sup>504</sup>

#### **4.3.6.2 Additional fees for endorsement in court**

Because the settlement agreement must be endorsed in court, disputing parties may need to incur more costs to cover additional litigation fees. Based on the findings, the researcher understands that once the settlement agreement has been checked and signed by both parties, the next step would be to appoint a Syarie lawyer to help the clients register and endorse the settlement at court.

Basically, parties may have to cover the standard litigation fees (i.e., the legal fees and disbursement fees) for the endorsement process, as R4 said: "*Dia akan jadi cas seperti cas guaman, untuk kes-kes tertentu.*" To avoid a conflict of interest, the SLMA assigned to bring the case to court is not the same person who mediated the dispute but can be from

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<sup>502</sup> N.a, "Not Many Going for MMC", *The Stars Online*, 14<sup>th</sup> September 2008. Accessed on 26.08.2022 through <https://www.thestar.com.my/news/nation/2008/09/14/not-many-going-for-mediation-says-mmc>.

<sup>503</sup> Interview with R3 through GoogleMeet on 07.04.2021.

<sup>504</sup> Interview with R1, R2, R3, R4 and R5 through GoogleMeet on their respective dates.

the same legal firm.<sup>505</sup> As R4 established: “*Masa settlement is settlement, tapi bila ketika di hadapan mahkamah tu kena ada peguam lain untuk bawa kes tu.*”

R1 and R4 mentioned that these fees differ based on the number and type of issues contained within the mediation agreement. They also depend on at which level of court the case will be registered.<sup>506</sup> A case example is one that covers divorce, wife’s maintenance, child custody, child maintenance, and marital alimony. Aside from other issues under the Lower Shariah Court’s jurisdiction for a hearing, child custody and marital alimony lie under the Shariah High Court’s jurisdiction. Rather than having these issues heard in two separate courts and at two separate times, the SLMA would request to have all the issues brought up to the high court and have all these matters endorsed together in one setting.<sup>507</sup> In line with the case’s complexity, the litigation fees vary too.

For example, R1 explained that family cases at the Shariah lower court in Selangor may cost a minimum of RM5000 per case, RM10,000 at the Shariah higher court, and RM15,000 at the Shariah appeal court, and again, depending on the case’s complexity.<sup>508</sup> Considering these issues can be filed and heard in court together in one setting, the lawyer would then charge the overall payment as a package, and this is more cost-effective compared to arguing the issues for an unknown number of court hearings. What’s more, R1 added that parties also do not necessarily have to pay them in a lump sum.

Meanwhile, R3 reckoned that instead of hiring a lawyer after the mediation sessions to register the case, parties may opt to register the case themselves after the mediation

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<sup>505</sup> Interview with R1 and R4 through GoogleMeet on their respective dates.

<sup>506</sup> Interview with R1, R2 and R4 through GoogleMeet on their respective dates.

<sup>507</sup> Interview with R4 through GoogleMeet on 03.09.2021

<sup>508</sup> R1 shared that these values are for cases in Selangor.

sessions and hire a typist to type the necessary documents to reduce endorsement costs.

He said:

“In Shariah courts, usually they have a typist. They can hire a typist to prepare the documents. They pay their services and then they can just file straight away to the court and then if they are called to *sulh* session, and the *sulh* session success, then that’s it. So, there is a huge difference between parties who are represented by a lawyer or not represented by a lawyer.”

Unfortunately, the typing service is not available in all Malaysian Shariah courts. According to this study, parties only need to bring their signed settlement agreement from the mediation session and go through the standard registration and *sulh* process in court. Once the *sulh* officer has reaffirmed the agreed terms, the *sulh* officer will draft the settlement agreement conforming to the court’s standard before presenting it to the judge for endorsement. R8 said:

*“Cuma kalau kata ada kes yang masuk sulh tu nak tak nak kami terpaksa lah go through balik lah perjanjian tu... kita kena sahkan balik apa yang dorang setuju. Dalam masa yang kita nak olah ayat tu. Sebab berbeza kan. Sebab perjanjian kita guna pihak pertama dan kedua kan? Tapi dekat mahkamah kita guna plaintif dan defendan. Itu pun kita nak kena pastikan lah ayat tu berdasarkan format mahkamah.”*

Nonetheless, parties should consider carefully if they want to appoint a Syarie lawyer or go *pro se* (i.e., self-represented litigants that deal with court procedures themselves) with the endorsement process. Based on their study, McMullen and Oswald proclaimed that *pro se* litigation is common, particularly in divorce cases, and parties are good at determining whether they require a lawyer or not.<sup>509</sup> In contrast, Carter stated that those

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<sup>509</sup> Judith G. McMullen and Debra Oswald, “Why Do We Need A Lawyer: An Empirical Study of Divorce Cases” 12(1) (2010), 82 – 83.

who are unfamiliar with court procedures often find themselves encountering a bewildering and strict set of court rules and procedures. He added that appointing a lawyer is advantageous because there may be a situation at any point during the process that calls for the lawyer's expertise, experience, and judgment<sup>510</sup>

From these findings, one may wonder whether mediation services are as cost-effective as previous studies indicated. Monetarily, there is no doubt that any mediation process is more cost-effective than litigation. It is also common knowledge that private services come at a higher price than government services. Compared to private mediation, parties would only need to pay the registration fees at court, and the *sulh* proceedings are free.<sup>511</sup> Even so, it is advisable for parties to consider factors like one's financial capabilities, the case's urgency, mental health, and well-being. As such, private mediation services are more timesaving but less cost-effective than *sulh* offered by courts. At any point, current private mediation and legal fees remain negotiable upon discretion and discussion between the SLMA and disputing parties on separate accounts, as each SLMA has its own *modus operandi*.<sup>512</sup>

#### **4.3.7 Finding 7: Approaches towards Achieving a Successful Mediation**

Though this research understands that ultimately it is the parties' agreement that makes a mediation successful, it wishes to identify what approaches government and private mediators take to achieve successful mediation in family conflicts. The responses were categorised as follows:

- i. Acknowledging family ties

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<sup>510</sup> Terry Carter, "Self-Help Speeds Up", *ABA Journal*, 87(7) (2001), 34-38.

<sup>511</sup> Rule 9, Civil Procedure (*Sulh*) Act (Federal Territories) 2004.

<sup>512</sup> Interview with R1 and R4 through GoogleMeet on their respective dates.

- ii. Knowing the mediator's niche area
- iii. Identifying and understanding the main and underlying issues
- iv. Possess knowledge of civil law
- v. Communication between parties
- vi. Possess the necessary mediation skills

#### 4.3.7.1 Acknowledging family ties

As R6 and R7 indicated, it is important to acknowledge the existence of family ties in a family conflict.

**Table 4.20. Acknowledging family ties**

Respondent	Interview Details
R6	<i>"Dalam rumahtangga, lidah kan lagi tergigit, inikan lagi manusia kan."</i>
R7	<i>"Saya melihat dari aspek lain, hubungan kekeluargaan itu sendiri."</i>

The purpose of stressing this point is because mediators need to understand that family conflicts differ from other conflicts. Nurul Hudani et al. said that family conflicts are much serious compared to other disputes as they involve emotions and blood ties. When conflict arises, what was once a positive atmosphere with a loving, codependent, and committed familial relationship becomes negative with distrust, disappointment, and hatred, and these emotions can lead to more complicated issues such as divorce, extramarital affairs, and child abuse.

All these consequences would significantly affect one's life. Nurul Hudani et al. further added that family conflicts can also last for a long time, and the effects can be long lasting and detrimental to family members.<sup>513</sup> Acknowledging the existence of family ties in

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<sup>513</sup> Nurul Hudani et. al, "The Factors of Family Situation and Their Relation with Self-Esteem Among Problematic Students", *Borneo International Journal of Education* 1(2019), 41-42.

family mediation helps mediators remember that family conflicts need to be addressed more delicately than others.

#### 4.3.7.2 Knowing the mediator’s niche area

Mediating conflicts related to the mediator’s niche area is also a big advantage, as said by R5.

**Table 4.21. Knowing the mediator's niche area**

Respondent	Interview Details
R4	“Actually, I can be any, anything mediator. <i>Cuma bagi saya,... my forte is dalam bidang kekeluargaan, okay. Tapi kalau dalam bidang keluarga, okay kita pergi bidang bisnes, korporat. Contoh, saya bukannya peguam korporat, saya peguam Syariah. Dan saya belajar,... Tapi masalahnya kita tak practice... Jadi kalau hal kekeluargaan ni memang kita on the fingertips lah. Memang kita dah buat hari-hari. 10 tahun, 11 tahun.</i> ”
R5	“Niche, niche area dia... <i>sebab tu kalau kita tengok mediator ni, dia banyak pekerjaan dia. Contohnya, ... finance dispute. The banker will know better right. Sama jugak kalau Syariah. Family matters dispute. Kita kena ada family matters punya knowledge lah. So, let’s say.. at least la kena ada background la, atau knowledge on that. Kalau tak macam mana kita nak mediate benda tu.</i> ”

R5 shared that knowing and practicing in the mediator’s niche area increases the mediation success rate. For instance, relevant and adequate knowledge on family matters should help a family mediator mediate the conflict more productively. R4 attested to R5’s comment and shared that even though he could mediate a variety of disputes, he preferred to focus on the family field, as dealing with family matters is a daily occurrence throughout his profession as a Syarie lawyer for years.

To elaborate this point, Rappaport defined ‘niche’ as a specialised practice area, type of client, geography, or some combination of these. She claimed that a niche needs to be “sufficiently narrow” for the mediator to “win” in that area, allowing the mediator to build





In his interview, R4 said that it is important to identify the main issues causing the dispute and separate it from unrelated ones. Mohd Sofian contended with this point and affirmed that during the mediation phase, the mediator must clarify the main issues in order to determine the best potential solutions for settlement.<sup>516</sup> Government mediators, like *sulh* officers, judges, and LAD mediators, can begin by reading the facts presented in the case file before the mediation session begins. For SLMAs, they need to be more alert and focused during the initial joint sessions, where the parties would then tell their side of the story. To keep track, it is suggested that the mediator properly note the statements given by the parties.

#### 4.3.7.4 Possess knowledge of civil law

R6 highlighted that a family mediator needs to possess knowledge on civil law matters.

**Table 4.23. It is highly encouraged for the mediator to have civil law knowledge**

Respondent	Interview Details
R6	<i>“Mut’ah, iddah, hak penjagaan anak, nafkah anak? Betul, ikut hukum syarak. Tapi harta sepencarian, memanglah dia ada hukum syarak, tapi enforcement adalah sivil... Kena belajar jugak undang-undang sivil. Especially berkaitan dengan harta. Bukan senang-senang nak cerita tentang nafkah anak, hak jagaan dan lawatan anak je.”</i>

Based on the statement above, having knowledge on civil matters contributes to a successful mediation. R6 said that while it is true that matters such as child custody and maintenance, and matrimonial property lie under Shariah jurisdiction, their enforcement is interconnected with civil law. In fact, matrimonial law was initially under civil jurisdiction before it was put under Shariah jurisdiction in the 1980s.<sup>517</sup> For instance, Marina Abu Bakar et al. discuss the issue of intellectual property as part of matrimonial

<sup>516</sup> Mohd Sofian Makhtar, “Soft Skills of Mediators” (Masters Thesis, Faculty of Built Environment, Universiti Teknologi MARA, 2011), 26.

<sup>517</sup> Marina Abu Bakar et al., “The Claim Issue of Intellectual Property as a Jointly Acquired Property: A Critical Analysis from Shariah and Law Perspective”, *Journal of Fatwa Management and Research* 24(2) (2021), 65.

property, where the law of intellectual property comes from common law and lies under civil jurisdiction, such as the Malaysian Intellectual Property Corporation Act 2001, Copyright Act 1987, and the Patent Act 1983.<sup>518</sup>

#### 4.3.7.5 Communication between parties

R2 answered that ensuring the parties get to communicate their concerns is the real goal of mediation.

**Table 4.24. Communication between parties**

Respondent	Interview Details
R2	<i>“Sebab aim kita to make sure dua pihak tu communicate. Dapat berhubung dengan baik... Tu maknanya masing-masing dah communicate lah tu situ sebenarnya. Sebab tu tujuan mediation neh sebenarnya untuk kita guide pihak pihak sahaja selesaikan masalah dan bagi pihak berkomunikasi.”</i>

Supporting this approach, Nuraini and Siti Marziah emphasized the importance of effective communication between couples or family members. Such communication would contribute to agreements in discussions, the formation of ideas and opinions, and subsequently reaching understanding. Moreover, communication is considered the key medium not only to convey information, but also to impact the emotional development of family members.<sup>519</sup>

The mediator’s role is even more crucial in situations where one party is not articulate enough to deliver the necessary information. The mediator can guide the struggling parties by asking informational questions. With good listening skills, the mediator can help identify relevant issues and rephrase the information for both parties using direct statements in sentences that both parties will accept. Silbey and Merry defined this

<sup>518</sup> *Ibid*, 76-77.

<sup>519</sup> Nuraini Nuri and Siti Marziah Zakaria, “Marital Conflict and Coping Strategies of Individuals Who Lose Their Jobs During the Covid-19 Pandemic: Impact Towards Marital Quality” *Journal of Wacana Sarjana* 5(2) (2021), 1 – 14.

approach as ‘rephrasing’. They explained that the rephrasing process represents a formulation that disputing parties and other people might accept, while simultaneously satisfying the third party’s interest.<sup>520</sup> This research also suggests caucuses as another approach for the mediator to obtain information. As the caucus is a private session between the mediator and one party, the mediator can focus on the party’s delivery. The party may also improve in delivering relevant information as they may become more comfortable and confident to speak out in privacy.

#### **4.3.7.6 Possess the necessary mediation skills**

Just as a mediator’s skills are important to create a conducive environment, they are equally significant to achieve a successful mediation. R10 summarised this point by stating: “Mastery of mediation skills is of the utmost importance. A mediator will fail if he or she doesn’t master the skills.” Novi and Ineu agreed with his statement, confirming that the mediator’s ability greatly influences the mediation’s success or failure.<sup>521</sup> From the respondents’ responses, these skills include listening, reframing sentences, probing, empathy, and knowing when to use caucus.

#### **4.3.8 Finding 9: Differentiating the roles of a Syarie lawyer and a mediator**

Lawyers are understood to have a different and more conflicting nature to their profession compared to mediators. Except for R3, who happens to be a government officer and has yet to conduct any private mediation sessions, SLMA respondents were asked how they differentiate their roles between a Syarie lawyer and a mediator. Their responses are themed as follows:

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<sup>520</sup> Susan S. Silbey and Sally E. Merry, “Mediation Settlement Strategies. In *Mediation* (Routledge, 2018), 183 – 208.

<sup>521</sup> Novi Hidayati Afsari and Ineu Yuni Andini, “Proses Mediasi Dalam Mencegah Terjadinya Perceraian di Pengadilan Agama” *IKTISYAF*, 1(1) (2019), 62.

- i. Declaration of role
- ii. Knowing one's function
- iii. Adhering to the role's code of conduct
- iv. Practice increases experience

#### 4.3.8.1 Declaration of role

To ensure they do not mix up their roles or use approaches that contradict the roles' nature, R2 and R4 shared it is vital to first introduce and announce their position to both parties before any mediation or advocacy step can commence:

**Table 4.25. SLMAs must declare their roles to avoid confusion**

Respondent	Interview Details
R2	<i>"Sebab masa kita punya statement tu pun kita kena introduce kita, siapa kita, berapa lama kita punya experience apa semua supaya kita nak.. kita punya, panggil apa, rapport!"</i>
R4	<i>"Kita kena declare betul-betul kepada anak guam, ataupun mana-mana pihak. Itu sebab saya kata, saya takkan syorkan mana satu yang dia nak, ataupun yang saya nak lah. Kita nak, pelanggan kita yang dia datang dengan kita ni dia nak kita sebagai apa. Supaya mudah bagi kita, untuk kita praktikkan mana satu, topi mana kita nak pakai."</i>

As described above, R2 explained that the initial process requires the mediator to introduce their position, background, and experience not only to ensure their clients are aware of their role, but also to build rapport, a point with which Indah strongly agreed.<sup>522</sup> R2's approach also matched Chapter Three of the Sulh Work Manual,<sup>523</sup> where the *sulh* officer will begin the session by declaring their role during self-introduction. Jinping

<sup>522</sup> Indah Salya Pusputa, "Paket Pelatihan Konseling Pranikah Dalam Melestarikan Keluarga Sakinah di Kua Karang, Pilang Surabaya" (Master's Thesis, Sunan Ampel State Islamic University, Indonesia, 2018), 76.

<sup>523</sup> Chapter 3, Preliminary Statement (*al-Ta'aruf*) Of Sulh Officers, the Sulh Work Manual. Accessed on 28.08.2022 through <http://www.eShariah.gov.my/portal/page/portal/BI%20Sulh/Sulh%20Work%20Manual%20for%20Shariah%20Court>

Wang et al. clarified that self-introduction helps establish a quick rapport and interpersonal closeness.<sup>524</sup> For R4, the clients themselves need to determine what role they appoint him as. He will confirm his role through a declaration before the process begins when clients approach him for his services.

The researcher contended that R4's situation is easier as he has established himself as a mediator under another company. Declaring the role also helps parties determine how to interact with the appointed role, consequently helping the parties determine the next move.

#### 4.3.8.2 Knowing one's function

R10 advised that to differentiate between these two roles, one has to know how to function at a time.

**Table 4.26. Understanding the role's function helps differentiate the role**

Respondent	Interview Details
R10	"One has to know one function at a time, when I act as mediator I never think like a lawyer and vice versa. Actually, shariah law do encourage amicable settlement, thus it is not really matter whether I am a lawyer or a mediator. In both occasion I prefer amicable settlement."

From R10's reply, the SLMAs must not view themselves as lawyers when being mediators, and vice versa. The Cambridge dictionary defined 'function' as a person's duty or ability to work or operate.<sup>525</sup> SLMAs need to understand that a mediator's role is not the same as a lawyer's and that these two professions have their respective mechanisms, despite sharing certain common grounds. The researcher interprets this point as the need

<sup>524</sup> Jinping Wang et al., "Alexa as Coach: Leveraging Smart Speakers to Build Social Agents that Reduce Public Speaking Anxiety" (Article, Proceedings of the 2020 CHI Conference on Human Factors in Computing System, Honolulu, 25<sup>th</sup> – 30<sup>th</sup> April 2020), 3- 10.

<sup>525</sup> Meaning of Function, *Online Cambridge Dictionary*. Accessed on 29.08.2022 through <https://dictionary.cambridge.org/dictionary/english/function>.

for SLMAs to focus their minds on the role given to them, and this can be achieved by having a solid foundation on how lawyers and mediators operate.

SLMAs would find it more accommodating to ‘control and switch’ how they deal with clients’ family issues if they had sufficient knowledge and understanding of how to function, especially when both professions have the same aim: to uphold Shariah law. For instance, a mediator must be impartial towards both parties, while a lawyer would prioritise their client first despite becoming the facilitator for both parties.

Edwards attested to this and highlighted the importance and obligation for aspiring lawyers to understand their duties as “officers of the courts” by learning the theoretical frameworks, philosophical concepts, and legal doctrines. By doing so, they will have the ‘capacity to think beyond the mundane’ in evaluating the works of legal professions.<sup>526</sup> In any case, R10’s response showed that amicable settlements are attainable in both litigation and mediation.

#### 4.3.8.3 Adhering to the role’s code of conduct

Next, R1 and R5 replied that upon appointment, one needs to ensure to adhere to the role’s common rules.

**Table 4.27. SLMAs must adhere to the appointed role's code of conduct**

Respondent	Interview Details
R1	<i>“Saya akan pastikan kita akan ikut rules dia lah. Kalau katakan kita dah jadi mediator, per se, maknanya memang kita bertindak sebagai mediator, we are binding kepada rules dalam mediator. Maknanya, kita tak boleh mewakili pihak-pihak dalam kes lah... Dia topi lain-lain. So maknanya, kita tak boleh nak gabungkan topi tu. Dia kena pakai dan buka satu-satu.”</i>
R5	<i>“It’s a matter of how. So benda ni bila client datang dekat kita, kita as a lawyer, kalau kita pakai style lawyer, “Kalau nak macam tu, kita</i>

<sup>526</sup> Harry T. Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession”, *Michigan Law Review*, 91 (1) (1992), 39.

*macam tu lah”. Kan, tapi kita tak boleh buat macam tu, lagi-lagi kita peguam Syarie. Kita kena advice keseluruhanlah. Maksudnya, “Kalau puan nak macam ni, ah your ex-husband pun ada hak jugak. So tak boleh nak nafikan kan. Especially untuk anak.” So benda tu yang kita akan cakap dekat klien.*

*So bila kita as a mediator, kalau kita ada mediation punya skills ni, kita kadang-kadang boleh go through dorang ni, macam, kita create doubt dekat dorang, kita probe dorang.. betul tak apa yang dorang fikir kan. Saya pernah buat dekat klien saya... saya probe dia. Saya cakap dekat dia, “Tak boleh bagi chance ke? Pernah bagi tak?” Ha.. kalau lawyer dia takkan cakap macam tu. Haa, sebab dia (lawyer) kata, “Ohhh okay kita ikut je la apa yang puan nak kan.” Tapi kalau kita as a mediator, ataupun kalau kita guna skills mediator tu, “Ohh puan taknak cuba ke? Bagi la test sekejap~”. Kan. Haa, maksudnya untuk kita bagi dia berfikir.”*

To summarise R2 and R5’s points, the SLMA must follow the appointed role’s code of conduct. A code of conduct refers to a set of rules that members of an organization or people with a particular job or position must follow.<sup>527</sup> Following the previous point, this means that upon understanding how the role should function, the person must conform to the rules and code of ethics of said appointed role, i.e., the rules and ethics of mediation and mediators. R5 gave an example of differentiation by stating that, unlike a lawyer who advises clients, a mediator uses probing to have clients reconsider their wishes. Gilman claims that rules and ethical codes are developed to guide and regulate behaviour among working people. They direct people to act morally, and such behaviour should be ingrained in them over time.<sup>528</sup>

#### **4.3.8.4 Practice increases experience**

Finally, all previous conditions would not be as effective if one does not practice their skills.

#### **Table 4.8: Practicing both as a mediator and lawyer help differentiate the roles**

<sup>527</sup> Meaning of Code of Conduct, *Online Cambridge Dictionary*. Accessed on 28.08.2022 through <https://dictionary.cambridge.org/dictionary/english/code-of-conduct>.

<sup>528</sup> Stuart C. Gilman, “Ethics Codes And Codes Of Conduct As Tools For Promoting An Ethical And Professional Public Service: Comparative Successes and Lessons” (PhD Thesis, PREM, Washington, 2005), 6 -8.



Respondent	Interview Details
R2	<i>“Sebenarnya kita kena more practice lah. Kita kena praktis sebabnya benda tu, sebenarnya kita kena praktis, kena selalu bear in mind lah. Sebab kalau you get used dengan you punya skill, InshaAllah you, you boleh. Takde masalah. Takkan tercampur lah. Sebab cara kita communicate ni... Kena praktis la cara communicate....”</i>
R5	<i>“Kadang-kadang kita boleh tukar topi kan. Entahlah. Selalunya kalau kita tukar topi tu, in shaa Allah takde apa-apalah. “Cuma, dia jadi court challenging bila kita lawyer, tapi we try to guna skills mediasi. Mediator tu. Sebab kita tak declare benda tu as mediation. Tapi kita guna skills mediator tu jugak dekat kita punya clients..So, dia jadi kadang-kadang at one time, dia boleh jadi macam, kita ni nak fight ke, kita ni nak settle? Kadang-kadang klien kita ni, “Eh kita ni bayar awak nak suruh fight” untuk dia tapi kenapa dia ni beriya nak settle. Tapi benda tu kadang, I always keep that in my mind lah. Kan... Just kena put that in my mind masa saya handle client sendiri. Kadang-kadang kita pun risau jugak.””</i>

R2 and R5 stressed that the key to differentiating between two different third-party roles is to continuously practise the profession. R2 explained that one would not easily become confused after gaining sufficient experience when performing the roles. R5 shared the same sentiment and believed that practising as both a lawyer and mediator to be possible and easy as long as there is enough experience and practice, and being alert throughout the process. In his study, Edwards argued that those who merely understand theories but do not practice them will struggle to conduct themselves professionally. He even went as far as to suggest aspiring lawyers do *pro bono* work for the sake of experience and practice.<sup>529</sup>

Despite the above replies, one cannot deny that it is challenging for a lawyer to simply change their way of working, as admitted by R1 and R5.

Respondent	Interview Details
R1	<i>Sebab dia lain sangat. Kalau you pakai topi peguam, dia nak practice kan skills mediator ni 100%, tak boleh. Dia memang contradict! Lawyer memang tugas dia advice, suggest... mediator dia tak boleh.</i>

<sup>529</sup> Harry T. Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession”, 38.

*That's why untuk seorang lawyer, nak ubah, nak tukar jadi topi mediator tu, sangat susah... Masa training, kita boleh nampaklah, memang akan terkeluar jugak, "Saya cadangkan..", "Saya rasa..", "Saya nasihatkann."*

R5 *"Cuma, dia jadi court challenging bila kita lawyer, tapi we try to guna skills mediasi. Mediator tu. Sebab kita tak declare benda tu as mediation. Tapi kita guna skills mediator tu jugak dekat kita punya clients..So, dia jadi kadang-kadang at one time, dia boleh jadi macam, kita ni nak fight ke, kita ni nak settle? Kadang-kadang klien kita ni, "Eh kita ni bayar awak nak suruh fight" untuk dia tapi kenapa dia ni beriya nak settle. Tapi benda tu kadang, I always keep that in my mind lah. Kan... Just kena put that in my mind masa saya handle client sendiri. Kadang-kadang kita pun risau jugak."*

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Being experienced in legal practice and mediation, LAD mediator, R6, testified that juggling roles between the Syarie lawyer and mediator professions would be near impossible due to their opposite nature. R6 said that it is for this reason that LAD separates its officers, where any LAD lawyer does not practise simultaneously as a mediator. At the same time, R6 believed that having experience as a family lawyer significantly contributes to adding in-depth knowledge and wisdom when mediating family conflicts.<sup>530</sup>

In this matter, Greenberg enlightened that the current focus of legal practice is on settlements rather than litigation. Though not many lawyers may be interested in mediation, lawyers need to adapt their typical conceptual framework to this development to remain effective practitioners.<sup>531</sup> The researcher contended that such a challenge should not discourage SLMAs from attempting mediation, as practising both professions can be rewarding as long as they fit the client's situation and the SLMA's nature of preferring

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<sup>530</sup> Interview with R6 through Google Meet on 27.03.21.

<sup>531</sup> Elayne E. Greenberg, "Ethical Compass: Settlement Fever: Lawyers, Have You Updated Your Philosophical Map?", 6.

amicable settlements. Compared to SLMAs, *sulh* officers and LAD mediators do not encounter such problems as their role is already fixed as mediators.

#### 4.3.9 Finding 10: Absence of proper governing rules and regulations for private Muslim mediators under the Shariah jurisdiction

As private mediators, the SLMAs were asked what rules and regulations govern their mediation practice for Shariah cases, and below are their responses:

**Table 4.28. Absence of proper governing rules and regulations for SLMAs**

<b>Respondent</b>	<b>Interview Details</b>
<b>R1</b>	<i>“So basically, kita akan secara tak rasmi lah, kita ikut rules dan regulations sebagai pengantara tu. Kita just ambil skills je... kita tak tertakluk kepada rules dan regulations mediator yang, betul-betul mediator punya rules dan regulations lah. Kalau katakan kursus kita buat di bawah Accord Group Australia... So semua dia punya materials, module, semua tu daripada the Accord Group. So dalam tu dah ada rules and regulations sebagai mediator. Itulah yang kita pakai setakat ni. Dia takde yang dibukukanlah. Macam takdelah macam Kaedah-Kaedah Peguam Syarie, takde.”</i>
<b>R2</b>	<i>“Kat Malaysia kita ada Mediation Act... Akta mediasi, dia umum sahaja. So cuma yang kita ada, kita terikat bawah akta mediasi jela. Itu je yang kita ada... Cumanya kalau kita ni, kita terikat dengan akta mediasi la sebagai mediator. Tu saja. Dia boleh guna akta mediasi. Bawah akta mediasi.... Tapi boleh je saman under undang-undang kontrak.”</i>
<b>R3</b>	<i>“This is some of the issues that need to be researched further... We do not have a proper or a formal rule regarding practice of private mediation.”</i>
<b>R4</b>	<i>“Dia ikat dari sudut bagaimana kita SOP tu. SOP mediasi... Persetujuan mediasi tu kan dia tidaklah sepertimana arbitrator ataupun court order. Dia hanya terikat sepertimana dalam akta mediator tadi, profession dan sebagainya. Cuma dia tidak ada contoh macam, satu badan, macam persatuan ke apa ke yang ada buat rules and regulation, you kena buat macamni, you kena buat macamni. Takde. Yang kita nampak, yang kita follow adalah betul-betul apa yang ada sekadar dalam SOP macamana kita belajar dalam mediasi, dan juga kalau contoh, apa yang terikat dengan Mediator Act tadi saja lah.”</i>
<b>R5</b>	<i>“Kita takde specific (undang2). Sebabnya, kita tak terikat dengan mana-mana lah... Ah, tapi generally kita just abide by the rules lah. Yang biasa. Maksudnya tak boleh bias, kena ada muqaddimah, kena ada isu, kena ada general statement, kena ada isu-isu dia, kena ada kaukus, maksudnya kena ada</i>

*perjumpaan dengan satu pihak, and then ada perjumpaan dengan satu pihak lagi. Ada perjumpaan dengan semua orang. So benda tu kena follow the procedures la... Saya refer yang Australian Accord Group punya.... Sebab kita takde satu badan yang khusus untuk control kemasukan mediator apa semua lah. Mungkin ada, tapi maksudnya untuk Muslim dan Syarie lawyers yang nak jadi mediator tu takde lagi.”*

**R10** “There are no specific rules for mediation and as to shariah we must act in accordance with shariah law.”

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Except for R2, the other five respondents reported that there are neither proper nor formal rules or legal bodies governing their mediation practice for cases under Shariah jurisdiction. R1 explained that Syarie lawyers are bound to the Syarie Lawyers’ Disciplinary Procedures (*Kaedah-Kaedah dan Tata tertib Peguam Syarie*), but there are no such rules for mediators mediating Shariah cases. Their practice and work ethics are based on the general standard operating procedure (SOP) for mediation taught during the Accord Group’s mediation training, including the ethical code like neutrality, impartiality, and confidentiality, and the SOP, such as introduction, addressing the issues, caucus, and joint sessions. R3 also confirmed the absence of proper rulings for private Shariah mediators. Zainul Rijal’s study attested to this, where the previous 35 SLMAs who provided free mediation services had no clear legislation to guide them.<sup>532</sup>

On the other hand, R2 and R4 opined that the Mediation Act 2012 binds their status and practice as mediators. The Mediation Act 2012 was passed in Malaysia to promote and encourage mediation by providing for the mediation process, thereby assisting disputing parties to settle fairly, quickly, and affordably.<sup>533</sup> Granted, SLMAs

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<sup>532</sup> Zainul Rijal Abu Bakar, “Sulh in the Malaysian Shariah Courts”, 8.

<sup>533</sup> Hasniyati Hamzah and Siti Aminah Abdullah, “Dispute Resolution of Stratified Residential Properties: The Strata Management Tribunal of Malaysia” (Article, Pacific Rim Regional Meeting of the International Academic Association on Planning, Law and Property Rights, Taiwan, 16 – 17<sup>th</sup> April 2018), 9.

registered under the Malaysian Bar Council and practising civil mediators are bound by the Act.<sup>534</sup> Yet, Article 1 of the Mediation Act 2012 clearly stated that the rules of the Act are formulated for civil and commercial disputes. As not all Muslim mediators are registered automatically with MMC,<sup>535</sup> and not all Syarie lawyers are civil practitioners, it raises the question of whether or not the Act applies to these SLMAs in mediating family cases under the Shariah jurisdiction. This research agreed with R3 and opined that a *lacunae* exists where SLMAs or other family mediators who are not registered with the MMC may be exempted from legal action should misconduct or unethical mediation occur.

Nevertheless, R1 reminded that any advocate solicitor remains subject to the Legal Profession Act and therefore remains bound to the Act even when he acts as a mediator. As such, the person cannot advertise himself as a mediator.<sup>536</sup> Similarly, when a SLMA becomes a mediator for Shariah cases, he is still bound to all legislation related to a Syarie lawyer. Alternatively, R2 suggested contract law as an alternative law to prevent misconduct, considering the parties and mediator need to sign a pre-mediation agreement.

Unlike these private mediators, government mediators already have their designated rules and regulations, as provided in Chapter 3. For *sulh* in Shariah courts, Faizah asserts that the existing legislations are sufficient to make *sulh* the best alternative in Shariah courts. The rules and regulations act as guidelines and ensure *sulh* officers operate orderly. Interestingly, her study reported that *sulh* officers do not necessarily

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<sup>534</sup> Interview with R1 through GoogleMeet on 06.08.2021.

<sup>535</sup> Interview with R5 through Google on 19.05.2021.

<sup>536</sup> Interview with R1 and R2 through GoogleMeet on their respective dates.

follow the *Sulh* Manual. The manual acts as a guide for *sulh* officers and *sulh* officers have the flexibility to approach the case as they deem fit.<sup>537</sup>

#### **4.4 The Advantages and Disadvantages of Mediators Handling Family Disputes under the Shariah Jurisdiction**

##### **4.4.1 Advantages and Benefits**

Throughout this research, SLMAs are used to represent private mediators while Shariah officers from Shariah courts and LAD represent government mediators. From their experiences, the advantages and benefits as a mediator are summarized below:

(a) ***Possess knowledge and experience dealing with court trials***

Because SLMAs also possess experience as Syariah lawyers, they possess the necessary knowledge to conduct family mediation. SLMAs are familiar with court procedures, are knowledgeable with Islamic family law, and understand the norms and customs of Muslim Malay community in Malaysia. These criteria can greatly enhance their performance as mediators. The same could be said for government mediators. R6 revealed that she first practiced litigation at LAD before becoming a mediator. Her experience as a lawyer helps to provide the parties with relevant information during mediation sessions and determine her mediation strategies. Because of the rotation system of Shariah officers for posts, *sulh* officers eventually get to encounter and fully grasp court proceedings, which broadens their experience, knowledge, and perspective in dealing with family conflicts. R7 opined that *sulh* officers are also more experienced because they deal with many cases daily.

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<sup>537</sup> Norfaizah Ramli, “*Penyelesaian Konflik Melayu Kaedah Sulh Dalam Kes Tuntutan Pembahagian Harta Sepencarian: Kajian di Mahkamah Tinggi Shariah Selangor*” (PhD Thesis, University of Malaya, Kuala Lumpur, 72.

**(b) *Mediation skills enhance SLMAs' legal practice***

For SLMAs, R1, R5, and R2 mentioned that having mediation skills and mediation accreditation improves their legal practice more effectively. R1 identified that there is a greater success rate for her legal cases to settle through *sulh* since she has attained her mediation skills. As for R2, she found mediation skills to be very useful when dealing with stubborn clients. In addition to that, both R2 and R5 believed that having a mediation accreditation adds value to their legal practice and indirectly attracts society by having two credentials.

**(c) *Flexibility of time and location for mediation sessions***

According to R1, R4, and R10, private mediators are more flexible in terms of days and office hours. Unlike *sulh* proceedings, private mediators have more flexibility for mediation sessions with clients at odd hours or even on non-working day,<sup>538</sup> which is convenient for working parties. R10 shared that normally private mediators fix one session per day whereas *sulh* officers deal with approximately ten cases per day. With fewer cases, private mediators can focus on the clients and have closer postponement dates compared to *sulh* officers who have a list of cases waiting.

As discussed in part 4.3.4, parties and private mediators can also choose venues for mediation sessions. Mediation sessions can be conducted outside offices or any place that is convenient. On the contrary, going for *sulh* in court is also beneficial. Because the sessions are conducted in court, *sulh* officers can quickly draft and have the judge endorse the settlement on the same day considering both processes are done in the same

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<sup>538</sup> Zainul Rijal Abu Bakar, "Sulh in the Malaysian Shariah Courts", 9.

location.<sup>539</sup> Furthermore, dealing with many cases in one day pushes *sulh* officers to gain more experience conducting *sulh*.

(d) *Positive impact on the mediator's personal character*

Remarkably, practicing mediation has a positive influence on the mediator's character development. R2, R5, R6, R7, and R8 shared that mediation skills are not simply a mediator's approach to facilitating disputing parties but also help developing the mediator's character. In R2's words: "*Mediation ni pun dia bagus untuk kehidupan kita, Bila you praktis jadi mediator, benda tu terbawak bagi kesan pada diri you. You tak semestinya guna mediation ni untuk you punya kerja sebagai mediator je, tak.*"

Benefits attributed to their mediator profession include being humble,<sup>540</sup> appreciating and acknowledging people,<sup>541</sup> avoiding being judgmental,<sup>542</sup> apologizing when making mistakes,<sup>543</sup> increased in self-esteem, and patience.<sup>544</sup> They also acquire skills to analyze the best way to communicate with people with different personalities.<sup>545</sup> For R3, practicing mediation skills led him to develop a preference for amicable settlements. When encountering disputes, getting parties to communicate and achieve an amicable resolution would be R3's first thought. For R6 and R8, both relish the satisfaction of being able to help parties and their family members have a better future through amicable settlements. Malizia and Jameson substantiate these characteristics and reported that those who practice mediation and receive mediation training gain "personal

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<sup>539</sup> Interview with R8 through GoogleMeet on 27.04.2021.

<sup>540</sup> Interview with R2 through GoogleMeet on 16.08.2021.

<sup>541</sup> *Ibid.*

<sup>542</sup> Interview with R2 and R8 through GoogleMeet on respective dates.

<sup>543</sup> Interview with R2 and R6 through GoogleMeet on respective dates.

<sup>544</sup> Interview with R6 through GoogleMeet on 27.03.2021.

<sup>545</sup> Interview with R1, R2, R5 and R9 through GoogleMeet on respective dates.



benefits,” cultivating and building social-emotional behaviors and communication abilities that help prevent stress and other mental health issues.<sup>546</sup>

(e) *Speedy settlement and endorsement*

R1, R2, R5 and R4 shared that it is faster to register and endorse uncontested cases in court. Uncontested cases refer to cases with resolved issues while contested cases mean the issues are being litigated.<sup>547</sup> Successful mediation sessions with settlement agreements are considered uncontested cases. R5 said:

*“Walaupun mahkamah buka dan sebagainya, fokus mereka adalah, kepada kes yang ada jalan penyelesaian, ataupun kes yang mudah dipersetujui oleh kedua-dua belah pihak. Contohnya, dua-dua ada fakta tak bercanggah dalam fakta kes pengesahan cerai, ataupun permohonan wali hakim, apa lagi perceraian secara baik. Ha.. jadi benda-benda yang takde contested la. Mana-mana kes contested sekarang ni semua jammed. Memang tak, contohnya dalam PKP ni dia takde dipanggil lah.”*

In 2020, JKSM introduced Practice Direction Number 6 Year 2020. It dictates that any uncontested cases gone through *sulh* proceedings will be given priority for endorsement.<sup>548</sup> Just as mediation is timesaving and cost-effective for disputing parties, it also saves time for mediators to endorse the case.

Through formal or informal mediation, SLMAs would be able to settle the case at court faster if the case is uncontested. R5 added, that mediation can also be another source of income that takes lesser time to finish. She pointed that this can be advantageous as

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<sup>546</sup> Deborah A. Malizia and Jessica Katz Jameson, “Hidden in Plain View: The Impact of Mediation on the Mediator and Implications for Conflict Resolution Education”, *Conflict Resolution Quarterly*, 35(3) (2018), 301-318.

<sup>547</sup> Rosalyn Charles, “What is the difference between an uncontested case versus a contested case in terms of how it moves forwards?”. Accessed on 31.08.2022 through <https://www.divorcemag.com/articles/difference-between-uncontested-case-versus-contested-case-in-terms-of-how-it-moves-forward#:~:text=All%20cases%20are%20contested%20from,issues%2C%20the%20case%20is%20contested>.

<sup>548</sup> See Practice Direction Number 6 Year 2020 “Keutamaan Pengendorsan Melalui Laluan Pantas Perjanjian Persetujuan Yang Berjaya Diselesaikan Melalui Majlis Sulh”, JKSM.

the more cases settle fast, the more new cases she can accept. R2 agrees with R5 by stating, “*Kita boleh settle-kan kes kita ni cepat. Without any lambat kan kes la.*” The same point is also applicable to *sulh* officers and LAD mediators.

(f) ***Unlimited mediation sessions***

As long as parties are willing to resolve their matters through mediation, additional sessions can be added and charged accordingly for private sessions, as commented by R4: “*Kalau timbul masalah lain, masalah lain tu pulak yang masuk dalam benda yang kena diselesaikan. Ha jadi, kita tambah la sesi.*”

At the LAD, R6 shared that once both parties have signed the Second Form, parties can attend as many sessions as they need to as long as they are done within thirty days. Within the thirty days time, the case must be settled by then. R6 said: “*Borang jadual kedua tu permintaan untuk pernyataan. Bila telah ditandatangani, mesti kes tu selesai dalam masa 30 hari. Berapa banyak tak kisah tapi mesti dalam masa 30 hari diselesaikan. Berapa banyak tak kisah tapi mesti diselesaikan dalam masa 30 hari.*”

While all mediation sessions can be postponed, Farah reminds that if dragged too long, postponement of any ongoing sessions can interrupt the smooth process of justice and at times, the parties involved too.<sup>549</sup>

(g) ***Clients are free to choose their mediator***

For government mediators, parties cannot choose their *sulh* officer or LAD mediator, but instead are subjected to availability of slots and *sulh* officers available. For private mediators, parties have the freedom to choose their mediator. To quote R3:

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<sup>549</sup> Farah Safura Muhammad, “The Fast Track Project: The First Step Towards Improving Divorce Cases in Shariah Courts, Malaysia”, *E-Academia Journal*, 9(1) (2020), 64.

“As private mediators, parties can choose who will be their mediators. They can hunt, they can browse, they can choose which one is appropriate to hear, to manage their dispute as compared to Shariah court officer, parties.. because this is the shariah court mediators, ahh.. mediation itself a court-mandated or court-directed mediation. So parties cannot say that, “ I want this officer, I do not want that officer” but in private practice, yes. They can choose who will be their mediators.”<sup>550</sup>

#### 4.4.2 The Disadvantages and Challenges

Apart from the benefits listed above, the disadvantages and challenges faced by the mediators are as follow:

##### (a) *Lack of awareness and knowledge about mediation*

Despite the existence of mediation in the Malaysian history, and its formal implementation as *sulh* in Shariah courts since 2002, time and time again, the lack of awareness and knowledge about mediation becomes a challenge in the Malaysian mediation industry. This issue was raised by R1, R2, R3, R4, R5, R6, R9 and R10, some with frustration, indicating how this phenomenon impacts not only the mediation profession but the opportunity to expand mediation as a functional alternative to litigation.

For instance, R4 commented that the public are not aware of the mediators' existence and tend to confuse mediators with counsellors as they are more familiar with the latter. Often, only those who work in professional fields or high-profiled cases may know of mediation.<sup>551</sup> R4's concern is shared with Hammad Mohamad Dahalan (2014), who said that many amongst the society confuses the function of *sulh* and view the *sulh* sessions similar to counselling sessions.<sup>552</sup> This belief is misguided and goes against the authorities of *Majlis sulh* and the *Sulh Manual* issued by the Chief Judge of Selangor's Shariah

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<sup>550</sup> *Ibid.*

<sup>551</sup> Interview with R4 through GoogleMeet on 03.09.2021.

<sup>552</sup> Hammad Mohamad Dahalan, “Pengurusan *Sulh*: Peranan, Pelaksanaan dan Keberkesanannya oleh Pegawai *Sulh*” (International Research Management and Innovation Conference 2014, Kuala Lumpur, 17-18 November 2014), 655.

court's Circular 1/2002.<sup>553</sup> The situation shows that this issue has yet to be addressed properly amongst the society. R10 shared his opinion:

“Shariah Courts are limited to certain jurisdictions only. Performance of shariah courts are also questioned by many. Thus products of shariah courts may not be well accepted by the mass. In fact lack of promotion on mediation by the shariah courts contributed to this too.”

**(b) *Lesser income compared to the profession as a Syarie lawyer***

As a professional profession, lawyers are generally paid handsomely as legal fees and litigation services tend to be very expensive. Understandably, R1, R2 and R4 expressed their preference to be appointed as a Syarie lawyer over a mediator as legal services generate more income for them. As for R5, she said that because private mediation is expensive compared to government mediation services, parties may prefer to go to *sulh* or LAD for mediation.

At the same time, R5 also believed that practicing informal mediation helps settle litigation cases faster. Hence, SLMAs will have more opportunities to accept other cases and this too contributes to an increased income. Either way, both reasons would cause lesser income for SLMAs as mediators compared to being appointed as Syarie lawyers, proving that economic factor influences SLMAs' preferences to practice mediation. Unlike SLMAs, *sulh* officers and LAD mediators are not affected by this factor.

**(c) *Potential for SLMAs to lose clients as lawyers***

Similar to the point above, SLMAs tend to be discouraged and reluctant to fully practice as mediators as there's potential for SLMAs to lose clients as lawyers. Since it is ethically wrong to represent the clients as lawyers if the mediation fails, SLMAs would not be able to represent either party to avoid conflict of interest. This approach is in line with the

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<sup>553</sup> *Ibid.*

LAD's mediation approach where R6 commented that at the LAD, officers who are appointed as mediators do not go to court to present trials.

Even if the mediation is successful, the mediation sessions would only generate further income if the firm has more than one Syarie lawyer. If not, SLMAs may recommend parties to trustworthy lawyers to endorse the settlement. Parties can choose to go with the suggestion, find another lawyer or endorse the settlement with the help of *sulh* officers in court. As conveyed by R1, she therefore found it much preferable to simply apply mediation skills instead of being appointed formally as a mediator as there is a risk for the SLMAs to lose bigger income as they are refrained from taking up the failed mediation case to court.

**(d) *No list of Muslim Mediators is provided to mediate Shariah cases***

As stated before, not all Muslim Mediators accredited by the Accord Group are automatically registered under the Malaysian Mediation Centre (MMC). While civil mediators are trained and listed by the MMC,<sup>554</sup> there is no particular list of SLMAs or Muslim mediators that can mediate family conflicts under the Shariah jurisdiction provided by any organization.<sup>555</sup> This research contends that providing this list may be another step toward promoting mediation amongst Muslim society and encourage legal practitioners to open up to mediation. According to Zainul Rijal, an attempt was made to provide such list and have the list displayed at the Shariah courts for parties' convenience but unfortunately was not accepted.<sup>556</sup> This attempt shows that such list already exists,

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<sup>554</sup> See list of civil mediators provided by the Malaysian Mediation Centre: <https://www.malaysianmediationcentre.org/list-of-accredited-mediators/>.

<sup>555</sup> Interview with R3 and R5 through GoogleMeet on respective dates.

<sup>556</sup> Zainul Rijal Abu Bakar, "Sulh in the Malaysian Shariah Courts", 9.

but only needs to be presented as alternatives for parties who have difficulties to attend *sulh* in courts or mediation at LAD.

(e) ***Clients are not confident with court officers***

R7 shared that throughout her experience as a Shariah court officer, she came across several clients who were not confident with the skills of *sulh* officers: “... *Kita dapat yang sebelum-sebelum inilah, client tak berapa yakin dengan orang yang ada di hadapannya.*” Wan Puspa affirms this challenge by reporting that, out of all the challenges faced by mediators, the society’s lack of trust, acceptance and support towards the mediators make up the highest percentage by 29.5%.<sup>557</sup> To remedy this issue, some courts decided to openly share and hang all qualification certificates in the *sulh*’s waiting area. R7 said:

*“Kita memang memaparkan pensijilan-pensijilan pengiktirafan, pensijilan Accord Group ataupun daripada NLP yang mendapat akreditasi yang diiktirafni, dipaparkan di ruangan menunggu client sebab, err.. Jadi ini salah satu usaha yang dibuat oleh Negeri Sembilan, kita memang paparkan di dalam frame sijil-sijil yang telah dihadiri oleh pegawai sulh di ruangan menunggu client sulh tu.”*

(f) ***Violence at work***

R9 revealed that there were instances where *sulh* officers were exposed to violence in *sulh* proceedings. In one case, a *sulh* officer was slightly harmed when trying to prevent physical violence between a married couple. Fadzlina attests to this by stating that mediators facing violence and claims of violence were common among divorcing couples. Yet, due to mediation’s confidentiality nature, there has been no further record on this matter.

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<sup>557</sup> Wan Puspa Melati, “Community Mediators in Malaysia: Profile and Analyses on their Roles and Challenges”, *International Journal of Innovation, Creativity and Change*, 10 (10) (2020), 633.

## 4.5 Discussions from the Research Findings

### 4.5.1 Expansion of Mediators at Shariah Courts under Section 99 Shariah Court Civil Procedure 1998

Section 99 of the Shariah Court Civil Procedure dictates the following:

*“The parties to any proceedings may, at any stage of the proceedings, hold sulh to settle their dispute in accordance with such rules as may be prescribed or, in the absence of such rules, in accordance with Islamic Law.”*

This research reasons that *sulh* officers are not the only mediator available who practices mediation under the Shariah jurisdiction, as suggested in part 4.4.1. Indisputably, *sulh* officers play the appointed central role of mediators at all Malaysian Shariah courts. Nevertheless, aside from the LAD mediators, other Shariah officers such as the Shariah judges and the court registrars also indirectly practice *sulh*. This point was elaborated in subtopic 4.3.1 where government mediators conduct mediation formally and informally under the Shariah jurisdiction.

In fact, Mohd Na'im and Mohd Amir established that FSD officers at the consultation and legal advice unit too use mediation to investigate complaints on non-compliant maintenance orders and persuade parties to reach another agreement. Otherwise, the case will be forwarded to the Enforcement and Execution Unit.<sup>558</sup> However, all these different levels of Shariah officers need to ensure that any attempt to mediate disputing parties throughout any court procedures must not affect their main job scopes.

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<sup>558</sup> Mohd Naim Hj Mokhtar and Muhammad Amir Firdaus Sidin, “The Role of Family Support Division of Shariah Court of Selangor in Protecting the Rights of Women and Children to Maintenance” (Article, 1<sup>st</sup> International Conference on Women and Children Legal and Social Issues, Subang, 17<sup>th</sup> -18<sup>th</sup> October 2016), 13-14.

Meanwhile, private mediators such as SLMAs are available to strengthen the family mediation practice under the Shariah jurisdiction, before or after the dispute has been registered in court. To elaborate on how Syarie lawyers can be adapted in *sulh* at the Shariah courts, R7 shared that as a judge who practices judge-led mediation, her approaches include allowing the appointed lawyer to act as the mediator for the disputing *parties*:

*“For those who appoint lawyers, I use the same approach.. other judges’ approaches might be different though.. Before the trial begins, as in, even in process of completing the pleading, that’s where I would suggest or make room to the lawyers to try their best to find a solution and reach a settlement agreement, and later present to me on another date. If there’s no settlement, no problem, I’m prepared to lead the case by trial. It means that, kita memberi peluang seluas-luasnya kepada peguam to manage their client’s case.. I begin (the trial) first by (suggesting) to settle through a settlement agreement.... and I see that, alhamdulillah, so far, there are a lot of cases that are successfully settled through settlement agreements...”*

R9 supported the judge’s above statement by stating:

*“Apabila adanya perkenalkan Mediasi, Pengantara, Sulh apa semua ni, untuk peguam-peguam Syar’ie, dia mesti membuat mediasi berdasarkan permintaan daripada klien. Contoh, seorang pemohon mohon fasakh. Kemudian, dia pun buat permohonan di mahkamah. Jadi, di masa yang sama, apabila masa kes sebutan di mahkamah, suami dia datang. Suami dia datang, mahkamah benarkan mintak supaya stand down supaya pihak peguam boleh Sulh kepada pihak-pihak yang hadir dalam permohonan pada hari ini. Maknanya Peguam Syar’ie bertindak sebagai Pegawai Mediasi ketika itu. Dia pegawai peguam.”*

The above statements coincide with Wan Muhammad Asyraf Wan Mohd Fadzli (2019), who said that Shariah courts are equipped to perform *Sulh* proceedings via judges, lawyers, and *sulh* officers.<sup>559</sup>

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<sup>559</sup> Wan Muhammad Asyraf Bin Wan Mohd Fadzli, “Mediation in the Shariah Courts: An Empowerment Alternative for Amicable Resolution in Shariah Disputes”, *UM Law Review* Website, accessed on 22 September 2019, <https://www.umlareview.com/lex-in-breve/mediation-in-the-Shariah-courts-an-empowering-alternative-for-amicable-resolution-in-Shariah-disputes>



Here, it is clear that Section 99 embraces the spirit of Islamic disputes, which is to achieve and promote amicable settlements. Courtesy of this section, *sulh* is empowered as an alternative to settle disputes. Because there is no restriction mentioned in Section 99 as to whom can conduct the mediation session, this fact allows a variation of mediators under the Shariah Jurisdiction to mediate formally and informally inside and outside of court trials.

#### 4.5.2 Different terms are used to describe the mediation practitioners in Malaysia

Findings show that different terms are used to identify mediation practitioners for family conflicts in Malaysia. For legal authorities and law practitioners, the term ‘mediator’ refers to the mediators appointed by the Bar Council under civil jurisdiction. These civil mediators often operate under the Malaysian Mediation Centre (MMC). On the other hand, they generally specified the scope of mediators under the Shariah jurisdiction, particularly at the Shariah courts, as *sulh* officers and associated the word ‘*sulh*’ for mediation under the Shariah jurisdiction. For mediation at the LAD, the term used to define the third-neutral parties in mediation sessions is similar to the civil jurisdiction, which is also ‘mediators’.

However, unlike the civil mediators, who are equally known as ‘mediator’ in the Malay language, mediators under the LAD are referred to as ‘*pengantara*’, which means ‘third neutral party’, or ‘*pegawai pengantara*’.<sup>560</sup> This point coincides with R6’s statement, who said: “*We’re simply mediators at the LAD*”. The different use of terms was thoroughly highlighted by two government respondents below:

**Table 4.29. Terms to determine mediation practitioners in Malaysia**

Respondent	Interview Details
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<sup>560</sup> Interview with R7 through Google Meet on 02.06.2021.

- R7** “Sebab skop yang kita di mahkamah Syariah ni saya lebih cenderung kita mengguna pakai *sulh* lah supaya kita tidak keliru dengan pelaksanaan sebab bila kita sebut mediator dia tidak timbul sama sekali di mahkamah Syariah walaupun methodnya sama... kalau di mahkamah Syariah ini kita memang sepenuhnya menggunakan istilah *sulh* berbanding dengan pelaksanaan di sivil contohnya menggunakan mediasi, manakala di Jabatan Bantuan Guaman menggunakan istilah pegawai perantara, kalau tak silap saya lah. Jadi istilah-istilah itu sangat penting difahami supaya pemakaian itu bila digunapakai ataupun diajukan kepada pihak industri dia tidak menimbulkan kekeliruan.”
- R9** “Sebenarnya dalam dekat Malaysia ni *Sulh*, *Mediasi*, *Pengantaraan*, nampak perkataan ini wording yang kita guna ni berbeza tetapi prosesnya similar lah bersama dengan antara satu sama lain. Tetapi istimewanya *Sulh* ini yang diamalkan di Mahkamah Syariah, ... jadi makna kata *Sulh* adalah sebahagian daripada prosiding di mahkamah. Berbeza dengan *Mediasi* dan *Pengantaraan* yang lain. *Pengantaraan* diamalkan di Jabatan Bantuan Guaman (JBG). *Mediasi* diamalkan oleh Peguam Syar’ie melalui Bar Council, melalui certificate yang diiktirafkan oleh Malaysia Mediation Centre (MMC) ya. Itu yang perbezaan antara tiga ni. Tetapi proses semasa penggunaan sama ada *Sulh*, *Mediasi*, *Pengantaraan*, itu adalah sama sahaja, tetapi nama kedudukan tu berbeza. Kena faham konsep tu dulu ya. *Pengantaraan* adalah di bawah Akta Bantuan Guaman 1971.”

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Here, R7 and R9 highlighted the importance of understanding and differentiating the terms used to identify the mediators to determine their jurisdictions. For instance, *sulh* officers are shariah officers appointed explicitly by the Shariah jurisdiction to mediate family cases at the Shariah courts. They have no power to mediate civil cases or cases not specified under the Shariah state laws. As mentioned above, R7 also expressed her concern that referring *sulh* officers, LAD mediators, and the mediators under the civil jurisdiction using the term ‘mediators’ altogether can lead to confusion in the industrial market.<sup>561</sup> With that said, there should be a fine line that differentiates civil and Shariah law practitioners.

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<sup>561</sup> Interview with R2 through Google Meet on 16.08.2021.

### 4.5.3 Rotation of Shariah Officers Indirectly Affects Competency and Effectiveness of *Sulh* Officers

In such a short amount of time, mediators need to build trust and rapport with the clients for the clients to feel comfortable and confident with their skills and competency. Under JKSM, Shariah officers undergo a 'rotation' beginning with the lowest post, L41, and often spends around a year or two as a *sulh* officer before being appointed to another post.<sup>562</sup>

While these skills can be enhanced over time, this research identified that *sulh* officers are often appointed from Shariah officers who are generally relatively new to *sulh*. Some *sulh* officers are also appointed without having enough experience and knowledge in dealing with *sulh* cases in Shariah courts. This situation becomes concerning as the role and responsibilities of a *sulh* officer is equally as important as the judge. R3 shared:

*““There are another advantage of having private mediator. Some of the private mediators, they are very senior mediator. Senior Sharie officer. Sharie officer, peguam sharie. They are well-versed in law system, Islamic law system in Malaysia, they are much more, they are having so much experiences as compared to sulh officer. Because if you study later, you might see that in Shariah court, sulh officer, mostly we are from grade 41 to 44 which is the lowest rank of officer, made appointed as a mediator and most of us, we are not very senior. We still young.”*<sup>563</sup>

*Sulh* officers are generally Shariah officers who have just been appointed for work, and Shariah officers have post rotations to increase their knowledge and exposure at the Shariah courts. The Shariah officer may be appointed as a *sulh* officer, a judge, court registrar or a research officer and allow Shariah officers to gain deep insights on resolving family conflicts from multiple angles. However, because *sulh* officers are the central for mediation in Shariah courts, it becomes concerning if the rotation period is too short. R7

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<sup>562</sup> Interview with R9 through GoogleMeet on 12.102.2021.

<sup>563</sup> Interview with R3 through GoogleMeet on 07.04.2021.

said that if Shariah officers were to change posts too frequently, they would not have the opportunity to expand their soft skills properly.<sup>564</sup>

As Head of Sulh, R9 attested to this:

*“...Cuma cabaran di peringkat Pegawai Sulh dan Pengantara ni, mereka tidak permanent di situ. Sebab Pegawai Sulh adalah Pegawai Shariah. Pegawai Pengantara juga adalah Pegawai Shariah. Jadi Pegawai Shariah ini adalah dia rotation. Dia pergi biro mungkin boleh jadi peguam, mungkin boleh jadi pengantara, dan kalau dia pergi mahkamah, mungkin dia boleh jadi hakim, mungkin dia boleh jadi pegawai Sulh . Ha nampak tak... Dia post. Posting lah. Maknanya rotation... Jadi post je berbeza. Kerja lebih kurang sama. Tetapi menjadi satu cabaran sekiranya pihak-pihak Pegawai Shariah ini terlampau cepat sangat pertukaran dia, dia tak sempat catch up kan, ha. Baru je nak belajar pasal Taaruf, pasal Repo, pasal apa, dia pindah pulak dekat tempat lain sebagai jadi hakim, katakan... Mari pula orang baru kat sini. Ajar pula macam mana nak buat kan. Ha itu yang jadi cabaran kalau jadi Pegawai Sulh ataupun Pengantara kerajaan.”<sup>565</sup>*

Based on her study, Faizah reported that *sulh* officers have different experiences based on how long they have worked. Consequently, each *sulh* officer develops their own style, skills and approaches. Faizah contends that this does not affect the *sulh* officers’ performances significantly.<sup>566</sup>

#### **4.5.4 Why SLMAs make the best mediators for Muslim family conflicts in Malaysia**

Going back to history where family members became mediators for disputing parties, one may contemplate whether a mediator should be a close family member or a neutral outsider who has no connection whatsoever with either party. Almost all respondents believe that it should be the latter. While private family mediators for Shariah cases are not necessarily limited to SLMAs, this research strongly views SLMAs as a great asset

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<sup>564</sup> Interview with R7 through GoogleMeet on 02.06.2021.

<sup>565</sup> Interview with R9 through GoogleMeet on 12.10.2021.

<sup>566</sup> NorFaizah, “Penyelesaian Konflik Melalui Kaedah Sulh Dalam Kes Tuntutan Pembahagian Harta Sepencarian: Kajian di Mahkamah Tinggi Shariah Selangor”, 148.

in providing private mediation services for Muslim family cases under the Shariah jurisdiction

Appointing them as family mediators is highly advantageous considering an SLMA has the right combination of qualifications, expertise, and experience necessary to be a competent family mediator for Muslim family conflicts. SLMAs have similar backgrounds consisting of an Islamic or Shariah diploma or degree, which makes them understand Islamic laws and values more than common people. They are also well-accustomed to the processes and procedures in court, such as presenting sound and Shariah-compliant reasonings, dealing with court officers and judges, and estimating reasonable timelines for the court procedures to complete. These skills and knowledge would greatly assist them to formulate reliable suggestions and comprehend the consequences of decisions made in court better. As Hoffman explains, seasoned lawyers may be preferred because of their language of the law, a common understanding of certain legal principles, and familiarity with the courtroom and the possible outcomes of the courtroom.<sup>567</sup>

Moreover, SLMAs who practice under civil jurisdiction possess added and a wider range of legal knowledge thus can facilitate more critical and technical family issues, such as inheritance and matrimonial property. Adjudication and mediation also have similar aims which are to resolve conflicts and avoid further disputes. Simultaneously, SLMAs must also be professional in separating their roles between a lawyer and a mediator and bear good and honest intentions to help disputing parties communicate and reach an amicable settlement.

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<sup>567</sup> David A. Hoffman, "Is There a Niche for Lawyers in the Field of Mediation", *Negotiation Journal* 15(2) (1999), 109.

What's more, this research identifies the British's past intervention in the Malayan legal system and the lack of current societal knowledge as the causes that lead the present Islamic mediation to focus on post-divorce family disputes. This mediation practice, although proving to be highly beneficial and functional, limits the extent of Islamic mediation based on the definition provided by scholars, where *sulh* simply means a private agreement between disputing parties to settle a dispute amicably<sup>568</sup> without having to resort to litigation. As Nora Abdul Hak et al. mentioned, *sulh* is vast enough for mediators to mediate every mode of amicable settlement.

With the existence of SLMAs as family mediators, family and social issues that do not fit the criteria for mediation through LAD mediators and *sulh* at Shariah courts could still enjoy the benefits of mediation. Moreover, parties have the opportunity of choosing their mediator and can address family matters beyond the scope of Shariah courts. Certainly, family conflicts are not the only area SLMAs can mediate. Many respondents quote that a mediator is flexible to mediate many different cases, issues or conflicts as long as the mediator has skills and sufficient knowledge to assist disputing parties.

#### **4.6 Conclusion**

To conclude, this research confirms the existence of private and government mediators in Malaysia to resolve family conflicts under the Shariah jurisdiction. At the Shariah courts, government mediators consist of formally appointed *sulh* officers, with Shariah judges or court registrars applying mediation skills informally. LAD mediators also provide mediation services and assist in reducing *sulh* cases in court, as parties attending mediation sessions at the LAD are not required to attend *sulh* sessions in court.

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<sup>568</sup> Nora Abdul Hak, Sa'odah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 19.

Parties may appoint SLMAs to mediate their family conflicts under the Shariah jurisdiction and beyond. The practice and approach of SLMA as mediators are similar to *sulh* officers in Shariah courts and the civil mediators. Regrettably, this service remains inconspicuous due to lack of promotion and society's lack of awareness.

Government and private mediators under the Shariah jurisdiction are similar in the sense that they abide by the general rules of mediation and Islamic rulings. What differentiates them is the practice, where the procedures and regulations are not the same. Under the Shariah jurisdiction, private mediators have more flexibility because they are not as restricted compared to government mediators in terms of regulations, type of case and the need to achieve the key performance indicator (KPI) set by the government.

We can also conclude that contrary to one's beliefs, while the current Islamic mediation practice in Malaysia is indeed less time-consuming and more cost-effective, the latter still involves payments of thousands when hiring private Shariah mediators. The reason is that the settlement agreement formulated by the private Shariah mediators would still require endorsement from the court. Consequently, disputing parties still need to pay the mediator's fees depending on which level of Shariah court the settlement agreement is endorsed. If the mediation session fails, the case would therefore be presented to the court by another lawyer who is not involved in the prior mediation process.

## CHAPTER 5: CONCLUSION

### 5.1 Introduction

This chapter concludes the findings based on the research objectives presented in Chapter One. It also discusses the overall conclusions and provides suggestions for further research in the future.

### 5.2 Conclusion of the Research

This chapter offers answers for the following questions:

#### 5.2.1 Findings for Research Objective One

The first research objective is to determine the types of alternative dispute resolutions in Islam used to resolve family conflicts. In summary, Islamic Dispute Resolutions (IDRs) has eight processes in total. However, only six processes are deemed suitable: *al-Qadā* (Adjudication), *Ṣūlh* (Mediation), *Tahkim* (Arbitration), *Naṣīḥah* (Counseling), *Fatwā al-Muftī* (Fatwas by Muftis), and Mediation-Arbitration (Med-Arb).

The general rule of all these processes is mentioned in the Quran, where verse 18 in surah al-Luqman denotes that any settlement that goes against the teachings of Islam will automatically be void. These processes have unique similarities and differences. For instance, *al-Qadā*, *Tahkīm*, and *Ṣulh* are binding, while *Naṣīḥah* is non-binding. It is opined that *Sulh* (mediation) is generally the best way to resolve family disputes because of its impartiality toward third parties, binding nature, and voluntary nature.

#### 5.2.2 Findings for Research Objective Two

The second research objective is to identify the practice of mediators under Shariah jurisdiction in resolving family conflicts in Malaysia. In this research, the term mediators is divided into government mediators and private mediators. Government mediators refer



to *sulh* officers, judges, LAD mediators, and court registrars, while the study focused on Syarie lawyers with mediation accreditations (SLMAs) for private mediators.

Focusing on private mediators, SLMAs practice family mediation under Shariah jurisdiction in two settings. One is when they apply the skills informally during their appointment as Syarie lawyers. Another is when they formally conduct mediation upon appointment as mediators, either through mediation advocacy or the parties directly approach the SLMA. When accepting mediation cases, the mediators under Shariah jurisdiction would consider the parties' openness and willingness to participate, the parties' objectives, their emotional conditions, the cause of conflict, accessibility to attend mediation, and their chances of winning the case litigiously. More importantly, any case of domestic violence will not be considered.

Their approaches to aiming for successful family mediation include acknowledging family ties, mediating in their niche areas, and mastering their mediation skills. As SLMAs provide both legal and mediation services, they must ensure that these roles do not get mixed up. The SLMA must declare their role upon appointment before work can commence, have a good command of relevant knowledge and rules related to both legal and mediation, abide by these rules, and continuously practise upon appointment to ensure they're able to differentiate when to function as a lawyer or as a mediator, how the role functions, and what approaches can be used to achieve their goals.

In practice, SLMAs' mediation fees also differ from government mediation fees under Shariah jurisdiction. For SLMAs, mediation fees may either be viewed as consultation fees if the case does not proceed or charged as part of the litigation fees for informal mediation. For formal mediation, this research records that SLMAs' mediation fees can be charged approximately RM500 per session. Even so, there are no set rules for private mediation under Shariah jurisdiction. The fees can vary depending on the mediator's

discretion and agreement with the parties. Factors such as the SLMA's seniority and experience may affect mediation fees as well. Compared to this, *sulh* in Shariah courts and Shariah mediation at the LAD are free and have no cost aside from registration fees.

### **5.2.3 Findings For Research Objective Three**

The third research objective is to identify the benefits gained and the challenges faced by government and private Shariah mediators in Malaysia in the mediation profession. It is found that possessing knowledge and experience in the legal profession and other government posts helps enhance the mediators' performance. For SLMAs, their mediation skills greatly increase the success rate for uncontested cases and when dealing with clients. SLMAs have more flexibility in terms of location and time, while government mediators have faster and easier access to endorse the settlement at court.

As for the challenges, several are reported, such as the unavailability of a list or directory for Muslim mediators, the reluctance of SLMAs to practise private mediation as it provides a lesser income compared to lawyers, and the probability for SLMAs to lose clients. Most importantly, it was identified that the lack of awareness is the greatest challenge that not only hinders the progression of the mediator's profession, but also causes families to lose opportunities for amicable settlements.

## **5.3 Suggestions**

Based on the discussions presented in this study, the researcher proposes the following suggestions:

### **(a) *To promote and spread awareness on private mediation services alongside sulh***

The mandated court-annexed mediation (*sulh*) in Shariah courts has continuously proven to reduce the backlogs of cases effectively. Unfortunately, the issue of backlog of cases continues to haunt the courts and legal administration. To remedy this issue, private

family mediation is believed to be able to assist the courts, disputing parties, and mediation practitioners significantly. Yet regrettably, a large portion of the public is unaware of this alternative.

Promoting and spreading awareness about *sulh* and mediation services for Shariah cases amongst communities would help ease the CAM's burden. Such actions would support *sulh* officers in performing their responsibilities to promote amicable settlements faster and more efficiently. As private mediation can be conducted even before the case is registered at court, it is much more timesaving as it cuts the waiting period to attend *sulh*, and the time for clients or their legal representatives to register the case files.

For family disputes, especially marital disputes that entail divorce, the issues need to be addressed quickly as they involve human emotions, rights, and the well-being of family members. SLMAs make one of the best mediators, as they possess Islamic or Shariah backgrounds related to family matters and also understand court procedures.

With that being said, the authorities and public need to work together to not only promote and spread awareness about mediation's existence, but also where and how parties may acquire its services. One way to expose mediation in society is to offer free mediation services. For example, Singapore offers free mediation services to encourage amicable settlements, and litigation is used as a last resort should all attempts at a peaceful settlement fail.<sup>569</sup> A certain amount of budget can be accommodated by the government to pay private mediators to conduct free mediation services for the society. The society will have a chance to build trust in mediation through certified mediators. Private

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<sup>569</sup> Nora Abdul Hak, "Family Mediation in Asia: a Special Reference to the Law and Practice in Malaysia", *IJUM Law Journal*, 15(1) (2007), 121-148.

mediators are also encouraged to practice their mediation skills pro-bono while simultaneously promoting the mediator profession.

(b) ***Defined Rules and Regulations for mediators dealing with cases under the Shariah jurisdiction***

To avoid an unethical code of conduct by mediators and mistreatment towards their clients, it is of utmost importance to prepare a set of rules and regulations for private mediators under Shariah jurisdiction. Establishing such rules would not only highlight the existence of private mediators for Shariah family cases, but also help SLMAs differentiate their roles between a lawyer and a mediator. Moreover, clients will also be able to trust the mediators more readily, as these laws will help supervise and maintain the mediators' code of conduct.

As for the Mediation Act 2012, this Act only applies to civil mediators, and it remains a question as to whether the Act binds any private mediators who are not registered under the civil bar counsel and dealing with family conflicts under Shariah jurisdiction. The researcher strongly supports the establishment of mediation rules for private mediators under Shariah jurisdiction, as this can help avoid non-uniformity of mediation laws in Malaysia for Shariah cases in the future.

As creating these laws may take some time to be implemented, private mediators are strongly encouraged to refer to existing laws related to mediation, such as the Mediation Act 2012 and the *Sulh* Code of Conduct.

(c) ***The establishment of Islamic Mediation Center***

During these times, several parties, including the Malaysian Muslim Lawyers Association (PPMM), are doing their best to establish an Islamic Mediation Institution

(IMC).<sup>570</sup> This research believes and fully supports the notion that the establishment of this centre would be highly beneficial to resolving Muslim family conflicts in Malaysia.<sup>571</sup>

During the COVID-19 pandemic phase, PPMM had successfully set up a mediation center under the Prime Minister's Department of Malaysia known as *Pusat Mediasi COVID-19* to assist Malaysian society with its disputes caused by the pandemic.<sup>572</sup> The cost was covered by the Malaysian government, although it focuses on disputes other than family disputes. With the establishment of IMC, not only does the scope of mediation can be expanded to family disputes and other areas., it would also increase the credibility and experience of Muslim mediators in Malaysia, making them more than competent to assist the Shariah courts in reducing the backlog of cases caused by the pandemic and further on in the future. Muslim mediators, not limited to dealing with Shariah cases, will have a proper administration. The IMC could also be developed as a training centre for professional Islamic mediators throughout Malaysia and other countries.

**(d) *Early exposure to mediation for university students***

Education is the key to awareness. Students, particularly law students, must be aware of various ADR processes, including mediation and the potential to become a mediator. By expanding their knowledge and understanding of ADR, more graduates can be encouraged to become mediators and contribute to society's awareness and inclination to choose mediation over litigation. Nurah reported that there are existing law schools outside Malaysia that have moved forward by offering ADR or mediation courses.<sup>573</sup> This

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<sup>570</sup> Zainul Rijal Abu Bakar and Nurhidayah Muhammad Hashim, *Selesai Kes Secara Mediasi in Keistimewaan Islam dan Undang-Undang Shariah di Malaysia*, 83.

<sup>571</sup> Zainul Rijal Abu Bakar and Nurhidayah Muhammad Hashim, *Selesai Kes Secara Mediasi in Keistimewaan Islam dan Undang-Undang Shariah di Malaysia*, 81.

<sup>572</sup> See <http://www.pmc19.gov.my/> for more information on *Pusat Mediasi Covid-19*.

<sup>573</sup> Nurah Sabahiah (2013), "Mediation in the New Dispute Resolution Landscape; A Case for the Enhancement of Its Application in Malaysia", 43.

exposure is even more significant for those who could support Muslim family institutions and the system of Shariah jurisdiction.

To illustrate this point, Siti Zubaidah and Muhammad Zahiri listed potential job employment for graduates of the Bachelor of Shariah and Law, University of Malaya. The list includes Shariah officers (*sulh* officer, registrar, Shariah judge, research officer, and support division officer) and senior counsel in the Attorney General's chambers. Other listed professions include Syarie prosecutor, family law counsellor, Islamic legal research officer, and Syarie lawyer.<sup>574</sup> This research thus adds another potential career as a family or property mediator for cases under Shariah jurisdiction, or for any Muslim family conflict.

#### **5.4 Future Research**

For future research, the following recommendations are suggested:

- i) A further in-depth study on various Syarie lawyers with mediation accreditation all over Malaysia. This will provide a bigger perspective on how far Shariah mediation has progressed in the current time. Also, such a study may help identify how the practice of mediating Shariah cases varies from one state to another.
- ii) A comparison between the main factors that contribute to the success of a mediation session is also recommended, with the variables consisting of the mediators, disputing parties, and administrative management.

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<sup>574</sup> Siti Zubaidah Ismail and Muhammad Zahiri Awang Mat, "Kerelevenan Program Pengajian Undang-undang Islam Dalam Mendepani Cabaran Semasa: Pengalaman Universiti Malaya" (Article, International Conference on Research In Islamic and Arabic Language Education 2012, Mecca, Saudi Arabia, 1-2 June 2012, 453-461.)

iii) As this research only covered the procedures and approaches of limited mediators, a more in-depth study is suggested, i.e., one that preferably uses a mixed-mode approach to ascertain whether government and private mediators genuinely abide by the guidelines and policies provided by the Islamic theoretical and conceptual approaches on mediation. This can be done by getting the respondents to tick off the steps or strategies they use when mediating a case, such as ensuring the disputing parties are well-informed and asking general questions rather than indulging the parties in the mediator's wants. The interviewees could consist of the same type of mediators used in this research, but at a larger scale, including Shariah judges, *sulh* officers, Shariah mediators at LAD, private Shariah lawyers with mediator accreditation, and other practicing mediators who deal with family Muslim-related cases.

## 5.5 Conclusion

To conclude, this research confirmed the existence of private mediators in Malaysia to resolve family conflicts under Shariah jurisdiction. At the Shariah courts, government mediators consist of formally appointed *sulh* officers, with Shariah judges or court registrars applying the mediation skills informally. LAD mediators also provide mediation services and assist in reducing *sulh* cases in court, as parties attending mediation sessions at the LAD are not required to attend *sulh* sessions in court.

Parties may appoint SLMAs to mediate their family conflicts under the Shariah's jurisdiction and beyond. The practice and approach of the SLMA as mediators are similar to that of *sulh* officers in Shariah courts and civil mediators. Regrettably, this service remains inconspicuous due to society's lack of awareness. Shariah mediators are similar in the sense that they abide by the general rules of mediation and Islamic rulings. What differentiates them is the practice, where the procedures and regulations are not the same. Under Shariah jurisdiction, private mediators have more flexibility because they are not as restricted compared to government mediators in terms of regulations, type of case, and the need to achieve the key performance indicator (KPI) set by the government.

While the current Islamic mediation practice in Malaysia is indeed less time-consuming and more cost-effective, the latter still involves payments of thousands when hiring private Shariah mediators. The reason is that the settlement agreement formulated by the private Shariah mediators would still require endorsement from the court. Consequently, disputing parties still need to pay the mediator's fees, depending on which level of Shariah court the settlement agreement should be endorsed.

If the mediation session fails, the case would therefore be presented to the court by another lawyer who was not involved in the prior mediation process. Still, the researcher believes that it is imperative to promote not only *sulh* in courts, but the existence of private



mediators providing mediation services for family Shariah cases, as it has been countlessly proven that mediation is indeed cost-effective and less time-consuming. Resolving disputes using a faster approach can hopefully build a more prosperous and peaceful society in one's country.

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