



Legal Framework and Implementation Of Mediation In Child Custody Disputes At The Syariah Court Of Malaysia

Malezya Şeriat Mahkemelerinde Çocuk Velayeti (Hidanesi) Anlaşmazlıklarında Arabuluculuğun Hukuki Çerçevesi ve Uygulaması

Ahmad Mukhlis Mansor

Abstract

The goal of resolving disagreements amicably has been emphasized in numerous Islamic legal texts. Since 2001, the Malaysian Shariah Court has offered mediation, or *sulh*, as a form of alternative conflict resolution. *Sulh* aspires to end the ongoing hostilities and restore peace between the parties. The COVID-19 pandemic has affected the marital system among the Muslim community in Malaysia, leading to the practice of online *sulh* besides the normal face-to-face *sulh*, particularly in child custody dispute situations. The study employs a combination of library-based, qualitative research approaches and interviews with the *sulh* officers. This article explores the legislative framework and the implementation of *sulh* or mediation in the Syariah Court, with a particular emphasis on cases involving child custody issues. The study revealed that mediation is a suitable means of resolving family disputes, particularly the *hadhanah* or child custody disputes. Apart from that organized legislation, rules, and regulations make the implementation of mediation neat and orderly.

Keywords: Sulh, Child Custody Dispute (Hadhanah), Syariah Court, Mediation, ADR

Öz

Uyuşmazlıkların dostane bir şekilde çözülmesi amacı birçok klasik fıkıh metninde vurgulanır. 2001 yılından bu yana, Malezya Şeriat Mahkemesi, alternatif bir uyuşmazlık çözüm yöntemi olarak arabuluculuk (uygulamadaki ismiyle sulh) hizmeti sunmaktadır. Sulh, taraflar arasındaki devam eden uyuşmazlıklara son vermeyi ve barışçıl anlaşmayı tesis etmeyi amaçlamaktadır. COVID-19 pandemisi, Malezya'daki Müslüman toplum içerisinde evlilik sistemini etkilemiş; bu durum, özellikle çocuk velayeti (hidane) anlaşmazlıklarında yüz yüze sulhun yanı sıra çevrimiçi sulh uygulamalarına da yol açmıştır. Bu çalışma, kütüphane temelli nitel araştırma yöntemleri ile sulh memurlarıyla yapılan görüşmeler bir arada kullanılarak Şeriat Mahkemesi'ndeki sulh ya da arabuluculuk uygulamalarının yasal çerçevesini ve özellikle çocuk velayeti (hidane) anlaşmazlıklarına odaklanarak bu uygulamaların nasıl hayata geçirildiğini incelemektedir. Makale, arabuluculuğun, özellikle hidane ya da çocuk velayeti anlaşmazlıklarında, aile içi uyuşmazlıkların çözümü için uygun bir yöntem olduğunu ortaya koymuştur. Ayrıca sistematik bir mevzuat içerisinde kurallar ve yönetmeliklerin varlığının, arabuluculuk uygulamalarını düzenli ve sistemli bir şekilde gerçekleştirmeye olanak tanıdığı tespit edilmiştir.

Anahtar Kelimeler: Sulh, Çocuğun Velayeti (Hidane), Şeriat Mahkemesi, Arabuluculuk, Alternatif Uyuşmazlık Çözümü (ADR)

* **Corresponding Author:** Ahmad Mukhlis Mansor, Syariah Court of Federal Territories, Malaysia. E-mail: mukhlismansor@esyariah.gov.my
ORCID: 0009-0007-3880-3916

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INTRODUCTION

Malaysia is a unique country with a distinct legal structure based on English common law, known as the Common Law of Malaysia.¹ As a multiracial country, the legislation comprises various laws such as the Federal Constitution, States Constitution, and Islamic law. Under Article 121(1A) of the Malaysian Federal Constitution, the reassertion of the Malaysian Syariah Courts (MSC) jurisdiction as state courts by this regulation permits the courts to exercise exclusive jurisdiction over matters relating to Muslims and particular areas of Islamic Law.² The MSC is an institution created by state legislation.³ Islamic law and Islamic matters, including the establishment of Syariah Courts, come under the jurisdiction of the State, according to Article 74 of the Federal Constitution read together with the State List. Since its inception during the British colonial period, the MSC has experienced several administrative, management, and structural changes.⁴ Among the challenges faced by the MSC are the backlog of cases,⁵ limited jurisdiction, and inconsistency between Malaysian Syariah states' legislation.⁶ Other challenges include the failure of parties to comply with the court rulings,⁷ the issue of discrimination against women,⁸ and jurisdictional issues between the civil court and the Syariah court.⁹

In 1998, the Malaysian government established a centralized federal organization

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- 1 Defrim Shabanaj, "Common Law of Malaysia: A Practical Approach," *E-Journal of Law* 2, no. 2 (2017): 42–68.
 - 2 See Article 74 of the Malaysian Federal Constitution, read together with Article 121 (1A) of the same Act.
 - 3 R. Dahlan and F. Sabila Faudzi, "The Syariah Court: Its Position Under The Malaysian Legal System," *Shariah Reports* 1 (2015): cci–ccxvi.
 - 4 Ainan Husnaa Muhammad Saifullah and Raihanah Abdullah, "A Brief Overview On The Inquisitorial Method In Malaysian Shariah Courts", *Journal of Shariah Law Research*, vol. 6, no. 1 (2021): 67–88.
 - 5 R. Abdullah, "Penangguhan Kes Di Mahkamah Syariah : Penyelesaian Dan Cabaran," *Jurnal Syariah* 17, no. 1 (2009): 1–30.
 - 6 H. Che Pa, N. H. Nor Muhammad, and S. Mustar, "Bidang Kuasa Eksklusif Mahkamah Syariah Selepas Pindaan Perkara 121 (1A) Perlembagaan Persekutuan: Satu Penilaian," *Malaysian Journal of Syariah and Law*, 2016.
 - 7 Zaini Nasohah, "Cabaran Penguatkuasaan Dan Pelaksanaan Perintah Nafkah Di Mahkamah Syariah Negeri Selangor Dari Perspektif Peguam Syar'ie," *Jurnal Undang-Undang Dan Masyarakat* 13 (2009): 115–28.
 - 8 F. S. Muhammad and A. Ruskam, "A Review of Discrimination Against Women in Shariah Courts," *Sains Humanika* 5, no. 3 (2015).
 - 9 Ramizah Wan Muhammad, "The Administration of Islamic Justice: Position and Jurisdictions of Syariah Court in Malaysia," *International Journal of Liberal Arts and Social Science* 8, no. 4 (2020): 43–64.

known as the Department of Syariah Judiciary Malaysia (JKSM) to standardize the administration and management of all MSCs.¹⁰ The mission of the JKSM is to improve efficiency and uniformity in the Syariah judicial administration system throughout Malaysia.¹¹ The MSC is responsible for providing legal aid and support to address family problems, including *hadhanah* or child custody disputes for divorced couples.¹² The delay in resolving the *hadhanah* issue by the Syariah Court impacts not only the divorced spouses but also the children who have witnessed their parents' separations.¹³

This paper studies the legal framework and implementation of *sulh* practice in the Malaysian Syariah Courts, emphasizing child custody disputes (*hadhanah*). The methodology used in this study is the interview with the *sulh* officers and the library-based methodology. The content-based analysis method was used to examine the data. The data were analyzed using content-based analysis. The study will contribute to the literature on the practice of *sulh* involving child custody disputes in the Syariah Courts.

CHILD CUSTODY ARRANGEMENT

Protecting the needs of the children after the parents' breakup is a must as children require complete attention after their parents' divorce. A study by Weaver and Schofield discovered that children from divorced families have more significant behavioral difficulties than children from intact families.¹⁴ Families with a less supportive and stimulating post-divorce home environment, mothers who were less sensitive and depressed, as well as a lower household income, were shown to be more likely to have children who had behaviour problems following divorce.¹⁵ The separation of parents led to insecurity in the lives of the children and their

10 Muhammad.

11 "Jabatan Kehakiman Syariah Malaysia - Visi, Misi, Objektif," accessed August 17, 2021, <http://www.jksm.gov.my/index.php/ms/profil-jabatan/pengenalannya/visi-misi-objektif>.

12 Ramizah Wan Muhammad, "The Administration of Syariah Courts in Malaysia, 1957–2009," *Journal of Islamic Law and Culture* 13, no. 2–3 (2011): 242–52.

13 R. Ramli, D. Imam Supaat, and H. Hashim, "Kebiasaan Baharu (New Normal) Dalam Pelaksanaan Sulh Kes Hadhanah Dan Nafkah Anak: Isu Dan Cabaran: The New Normal of Sulh Implementation in Child Custody (Hadhanah) and Child Support (Nafkah): Issues and Challenges," *INSLA E-Proceedings* 3, no. 1 (2020): 414–37.

14 J. M. Weaver and T. J. Schofield, "Mediation and Moderation of Divorce Effects on Children's Behaviour Problems.," *Journal of Family Psychology* 29, no. 1 (2015): 39.

15 J. M. Weaver and T. J. Schofield, "Mediation and Moderation of Divorce Effects on Children's Behaviour Problems.," *Journal of Family Psychology* 29, no. 1 (2015): 39.

educational achievement.¹⁶ Maximizing interaction with children allows children to recognize that their parents have played a significant role in their development even though they are both separated. If parents can set aside their conflicts and only focus on the upbringing of their children as best as possible, this could achieve a joint custody arrangement.¹⁷ Joint custody or cooperative parenting arrangements such as the duty to determine issues relating to children (“legal custody”) and also the responsibility of taking care of children (“physical custody”) might be a possible answer in a child custody arrangement.¹⁸ Nowadays, joint physical custody has become a trend as it provides a child more access to both parents and; hence, a better outcome.¹⁹ In addition, children’s best interests are served when both parents are involved in the child’s upbringing and development.²⁰

In Islam, legal custody is also known as guardianship or *wilayah*. Guardianship is an authority that allows a person to enter contracts and other legal actions, carry them out, and endure the consequences.²¹ Guardianship refers to the implementation of a decision that impacts a third party, regardless of whether the desires of that person are considered or not.²² This form of guardianship can be categorized into two distinct types: guardianship of a person and guardianship of property.²³ Being a guardian of a person means having the power and responsibility to handle their personal matters, like marriage, schooling, discipline, medical care, job possibilities, and so on.²⁴ Conversely, when someone is appointed as the guardian of property, they are granted the authority to manage, execute, and enter into contracts, among

16 Jennie E. Brand et al., “Why Does Parental Divorce Lower Children’s Educational Attainment? A Causal Mediation Analysis,” *Sociological Science* 6 (2019): 264–92, <https://doi.org/10.15195/v6.a11>.

17 Beck v. Beck, 86 N.J. 480, 497-500 (1981).

18 Beck v. Beck, 86 N.J. 480, 498 (1981).

19 Karmely, M., “Presumption Law in Action: Why States Should Not Be Seduced into Adopting a Joint Custody Presumption,” *Notre Dame JL Ethics & Pub. Pol’y* 30 (2016): 321.

20 Karmely, M., “Presumption Law in Action: Why States Should Not Be Seduced into Adopting a Joint Custody Presumption,” *Notre Dame JL Ethics & Pub. Pol’y* 30 (2016): 321.

21 Wahbah Al-Zuhayli. *Al-Fiqh Al Islami Wa Adillatuhu*. Vol. 4. Damascus: Dar Al-Fikr, 1989, 139; Al-Siba’i, Mustafa and Al-Sobouni, ‘Abd al-Rahman. *Al-Ahwal Al Sakhsyiyah Fi Al-Ahliyya Wal- Wassiyah wal-Tarakat*. 5th edn. Damascus: Al-Mattba’ah Al-Jadidah, 1978, 40.

22 Al-Siba’i, Mustafa and Al-Sobouni, ‘Abd al-Rahman. *Al-Ahwal Al Sakhsyiyah Fi Al-Ahliyya Wal- Wassiyah wal-Tarakat*. 5th edn. Damascus: Al-Mattba’ah Al-Jadidah, 1978, 40-41

23 Al-Siba’i, Mustafa and Al-Sobouni, ‘Abd al-Rahman. *Al-Ahwal Al Sakhsyiyah Fi Al-Ahliyya Wal- Wassiyah wal-Tarakat*. 5th edn. Damascus: Al-Mattba’ah Al-Jadidah, 1978, 40.

24 Wahbah Al-Zuhayli. *Al-Fiqh Al Islami Wa Adillatuhu*. Vol. 4. Damascus: Dar Al-Fikr, 1989, 140-141.

other legal actions, concerning the child's assets. All jurists agree that the father is the natural guardian of his minor children's person and property.²⁵

Having the right of physical custody or *hadhanah* refers to the protection provided to individuals who are unable to care for themselves, such as children or mentally ill individuals. This includes ensuring that their basic needs are met, such as providing food and drinks, with the aim of promoting their well-being.²⁶ The practice of *hadhanah* requires physical presence with the child, while the exercise of *wilayah* can be carried out remotely, regardless of whether the guardian is living with the child or not. The connection between guardianship (*wilayah*) and *hadhanah* can be viewed as a complicated framework of rights and responsibilities divided among the entitled individuals.²⁷ The primary difference between the two ideas is that *wilayah* is primarily concerned with decisions that have an impact on the child's welfare both now and in the future, whereas *hadhanah* is more emotionally focused on caring for and nursing the infant.²⁸

In America, the American Law Institute (ALI) offers a comprehensive parenting plan method. According to the ALI, a parenting plan is a set of provisions for allocating custodial and decision-making responsibilities for a child and resolving future disagreements between the parents.²⁹ The purpose is to help parents plan for their children's future. The ALI proposal on parenting plan also anticipates future conduct like parental planning on the child's custodial arrangements and upbringing, meaningful contact between the child and every parent, and security from exposure to conflict and violence.³⁰

The minimal custodial schedule that must be filed to the Court for approval should include a description of the child's living conditions at each parent's residence and a timetable/formula for when the child will remain at each place.³¹ The parenting

25 Al-Siba'i, Mustafa and Al-Sobouni, 'Abd al-Rahman. *Al-Ahwal Al Sakhsiyyah Fi Al-Ahliyya Wal- Wassiyyah wal-Tarakat*. 5th ed. Damascus: Al-Mattba'ah Al-Jadidah, 1978, 41.

26 Al-Nawawi, Muhyee Al-Din Abu Zakariyya Yahya ibn Sharaf. *Minhaj al-Talibeen*, Engl. Trans., E.C Howard, Law Publishing Company, Lahore, Pakistan, n.d, 391

27 Zahraa, M., and Normi A. Malek. "The concept of custody in Islamic law." *Arab Law Quarterly* (1998): 157.

28 Zahraa, M., and Normi A. Malek. «The Concept of Custody in Islamic Law.» *Arab Law Quarterly* (1998): 157.

29 American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Lexis Nexis Matthew Bender, 2002).

30 American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Lexis Nexis Matthew Bender, 2002).

31 Raymond C O'Brien, "Child Support and Joint Physical Custody," *Cath. UL Rev.* 70 (2021): 229.

plan must also provide a method for making major childcare decisions, resolving disputes, and enforcing the plan's terms.³² Additionally, the mechanism for future modification of any court-approved plan may be detailed in the drafted agreement.³³

Child custody (*hadhanah*) and child maintenance disputes that emerge following parental divorce, according to Asmidah, must be resolved quickly and amicably to avoid further detrimental consequences for the child's development.³⁴ If family law litigation is not based on the nature of tolerance, it can become an endless source of hostility between disagreeing couples. Separating a child or adolescent from their parents might cause psychosocial problems, communication issues, delinquent behaviours, drug misuse or withdrawal from the school system.³⁵ Children of various ages had different demands. In children's growth, parent-child relationships played a significant role since it was vital to nurture, educate, and teach the religion and social norms of the children.³⁶

The issue of *hadhanah* or child custody rights should be handled quickly and effectively to benefit both the children and society. Inefficiency in dealing with child issues will cause tension in divorced couples and children, causing psychological trauma, creating social problems among them, particularly among youngsters, and ultimately affecting their healthy development.³⁷

MEDIATION (*SULH*) IN CHILD CUSTODY DISPUTES

Numerous countries, including the United States, Singapore, New Zealand, and Australia, require parents to participate in an alternative dispute resolution procedure

32 Raymond C O'Brien, "Child Support and Joint Physical Custody," *Cath. UL Rev.* 70 (2021): 229.

33 Raymond C O'Brien, "Child Support and Joint Physical Custody," *Cath. UL Rev.* 70 (2021): 229.

34 Asmidah Ahmad et al., "Hak Penyertaan Kanak-Kanak Dalam Prosiding Sulh (Mediasi) Di Mahkamah Syariah," *Journal of Advanced Research Design* 15, no. 1 (2015): 1-14.

35 P. E. del Pozo Franco et al., "Method for Recommending Custody to Minors Based on Parental Responsibility Using a Neutrosophic Cognitive Map," *Neutrosophic Sets and Systems* 44 (2021): 324-32.

36 Eyüp Ensar Dal, "The Social Construction of Childhood in the Ottoman Society: A Socio-Legal Analysis of Childcare in Early Eighteenth-Century Üsküdar" (Middle East Technical University, 2021).

37 Ramli, Supaat, and Hashim, "Kebiasaan Baharu (New Normal) Dalam Pelaksanaan Sulh Kes Hadhanah Dan Nafkah Anak: Isu Dan Cabaran: The New Normal of Sulh Implementation in Child Custody (Hadhanah) and Child Support (Nafkah): Issues and Challenges." *Insla E-Proceedings* 3, no. 1 (2020): 417.

before initiating the lawsuit process.³⁸ A similar approach is followed in the MSC. The court will appoint a date for both parents to attend the mediation process or *sulh* council, administered by the *sulh* officer when accepting *hadhanah* and child support cases.³⁹

Suitability of Mediation in Family Disputes

Mediation is a desirable procedure for resolving family disputes because it addresses non-legal emotional and relationship issues.⁴⁰ Due to the unique character of family disagreements, which can trigger feelings of grief, anxiety, rage, bitterness, hostility, and an overwhelming sense of loss, mediation is a more helpful medium for resolving disputes, as it focuses on problem-solving and private ordering.⁴¹

Mediation Involving Domestic Violence and Child Abuse

It is essential to note that not all family law situations are appropriate for mediation. For example, in cases involving domestic violence or child abuse, mediation is not a suitable solution. The *sulh* in the Syariah court, according to Nor Fadzlina, has no legal provisions for power imbalance or exclusions for concerns of violence.⁴²

Dafna argued that in most divorce cases involving violence, the batterers' dominant power or power imbalance usually succeeds in the disputed case.⁴³ When the batterer is granted custody of the children in a child custody case, the children are more vulnerable to violence. Even though the disagreement may be resolved more quickly

38 S. Ahmad and N. Abdul Hak, "Family Mediation and Sulh: An Alternative Dispute Resolution in Malaysia," *International Journal of Social Policy and Society* 7, no. January (2010): 66–79, https://www.researchgate.net/profile/Saodah_Ahmad/publication/299336872_FAMILY_MEDIATION_AND_SULH_AN_ALTERNATIVE_DISPUTE_RESOLUTION_IN_MALAYSIA/links/56f0fa5308aecedbe3ce45797.pdf.

39 S. Ahmad, "User Satisfaction With Sulh (Mediation) in the Selangor Syariah Judicial Department," *Malaysian Journal of Consumer* 19, no. December (2012): 125–41, https://s3.amazonaws.com/academia.edu.documents/44936808/Saodah_A_-_User_Satisfaction_with_Sulh_Mediation_in_the_Department_of_Syariah_Judiciary_Selangor.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1503204740&Signature=sRo7qZ7Dmm94fioSXQVLoqSSYpQ%25.

40 M. Kamenecka-Usova, "Mediation for Resolving Family Disputes," in *SHS Web of Conferences*, vol. 30 (EDP Sciences, 2016), 18.

41 N. Abdul Hak, "Islamic Arbitration (Tahkim) and Mediation in Resolving Family Disputes: A Comparative Study under Malaysian and English Law" (Glasgow Caledonian University, 2002).

42 N. F. Naw, "Mandating Mediation in Family Law Conflict in Malaysia: Exploring Judges and Lawyers' Perspectives," in *IACM 24th Annual Conference Paper*, 2011.

43 D. Lavi, "Til Death Do We Part: Online Mediation as an Answer to Divorce Cases Involving Violence," *NCJL & Tech.* 16, no. 2 (2015): 253.

than through litigation, it may cause injustice to the victim, usually the mother.⁴⁴ Mediation should not be used when there is a severe imbalance in the negotiating position or when one side is afraid of the other as a domineering person.⁴⁵

On the other hand, other studies rebut the above arguments, arguing that mediation benefits even involving parties experienced with domestic violence.⁴⁶ Jessica stated that while mediation is not always appropriate in this type of situation, it may be used to assist a victim in communicating safely with the batterer about ending the violence. It also assists the batterer and the victim in exploring treatment options and helps a family establish visitation arrangements that limit the abuser's contact with the victim.⁴⁷

Nur Farahiyah, Zinatul, and Shamsuddin observed that, in some cases where there was no physical violence, the mediator could not recognize the existence of domestic abuse on the victim.⁴⁸ They also emphasized the necessity of the mediator's role in identifying hidden violence during mediation.⁴⁹

The Practice of Sulh in the Malaysian Syariah Court and Its Recent Application

The application of *sulh* in the MSC is consistent with Islamic law. *Sulh* is prohibited when it interferes with *huququllah* (Allah's rights), such as *hudud* punishment, *zakat*, and *kafarah*.⁵⁰ Any attempt to go beyond this prescribed provision by a joint settlement is sinful and unlawful. On the other hand, compromise and reconciliation are promoted in *huquq al ibad* (human rights), provided that they are fair and equitable and do not contradict any Syariah laws.⁵¹

44 D. Lavi, "Til Death Do We Part: Online Mediation as an Answer to Divorce Cases Involving Violence," *NCJL & Tech.* 16, no. 2 (2015): 253.

45 Su'aida, Safei. "Mediation as an Alternative Mode of Resolving Family Disputes in Malaysia." PhD Dissertation, University of Malaya, 2005.

46 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 Court Review* 55, no. 3 (2017): 390–403.

47 Pearson, J., *Divorce Mediation & Domestic Violence* (Centre for Policy Research, 1997).

48 N. F. M. Nasir, Z. A. Zainol, and S. Suhor, "Mediating Family Disputes Involving Violence in Malaysia," *International Journal of Asian Social Science* 8, no. 12 (2018): 1120–29.

49 N. F. M. Nasir, Z. A. Zainol, and S. Suhor, "Mediating Family Disputes Involving Violence in Malaysia," *International Journal of Asian Social Science* 8, no. 12 (2018): 1120–29.

50 N. Ab Aziz and N. Hussin, "The Application of Mediation (Sulh) In Islamic Criminal Law," *Jurnal Syariah* 24, no. 1 (2016).

51 Nor'Adha Abdul Hamid et al., "Alternative Dispute Resolution (ADR) Via Sulh Processes," *International Journal of Law, Government and Communication* 4, no. 17 (2019): 25–33.

Sulh was implemented in the Syariah Court to lessen the backlog of cases and strengthen the Syariah Court's operation. In July 2001, *sulh* was first introduced as a pilot study in the Federal Territory of Kuala Lumpur. The *sulh* practice was legalized by section 99 of the Syariah Court Civil Procedure (Federal Territories) Act 1998. Selangor became the second State in 2002 to implement *sulh* practice in resolving disputes to reduce case backlogs.⁵²

Before the formal and structured application of *sulh*, the amicable settlement was a practice in the MSC. In the *Zailan bt Mohamad v Mohd Ariff b Ali* (unreported civil case No 12/2000, Syariah Court Petaling Jaya), the Plaintiff sought *fasakh* divorce on a variety of grounds, including the Defendant's refusal to provide maintenance to the Plaintiff and their four children.⁵³ Throughout the trial, both counsels recommended that the Plaintiff and Defendant resolve their differences amicably through *sulh*, which resulted in an amicable resolution. The Sharie lawyer's role in advising the parties to resolve their family conflicts through *sulh*, which resulted in a consent judgement, helps the parties to reach an agreement.

In the case of *Rozita binti Mohd v Tengku Rohaizak Bin Tg Rakmal*,⁵⁴ the plaintiff (wife) and defendant (husband) were divorced on June 24, 2018. The couple had two boys and a girl. The child custody claim was filed on 15 January 2019 at the Syariah Court of Terengganu. The plaintiff claimed she cared for the children's needs and education during and after the divorce. According to the plaintiff, the defendant works in Selangor, far from their residential home, and cannot properly look after the children if he is given custody rights. Neither party had legal representation, and the dispute was resolved through a mutual agreement during *sulh* session on 11 March 2019. The *sulh* agreement was recorded on the same day, 11 March 2019.

In its ruling, the court asserted that according to Hukum Syarak, *sulh* (settlement) is subject to certain requirements, namely, conditions on the individuals involved and the subject matter at hand. Thus, before officially endorsing the mutual agreement entered between parties, the Court must thoroughly examine the facts and issues of the case. To answer whether the child is subject to the *hadhanah* claim, the Court is convinced that the third child, a male, aged five, and the second child, a female, aged eight, are still underage and have not yet reached the age of *mumayyiz*. Thus,

52 S. Ahmad and N. Abdul Hak, "Sulh (Mediation) in the State of Selangor: An Analysis of Legal Provisions and Application," *IJUM Law Journal* 18, no. 2 (2010).

53 Norlia Ibrahim, Zuhairah Ariff Abd Ghadas, and Murshamsul Kamariah Musa, "' Domestic Contracts' The Effect of Family Contracts; The Malaysian Law Perspectives," *Journal of Management Research* 7, no. 2 (2015): 387.

54 [2019] (unreported). Summons No: 11300-028-0012-2019

the children still require a custodian for welfare, education, and safety. The children are still unable to handle things on their own. In accordance with Section 84 (1) of the Islamic Family Law (Terengganu) Enactment 2017, the plaintiff (the mother) is the individual who is most entitled to provide care for the children who are incapable of self-management. The trial judge stated that the court could hear and consider the children's views and let them choose their custodian if they had reached the age of *mumayyiz*. However, the Court is not obligated to agree solely with the children's decision, as the Court must also take into account the child's welfare and *maslahah*. Section 87(2) of the Islamic Family Law (Terengganu) Enactment 2017 states that the child can choose who they want to be with. However, in this case, because the parties's second and third children had not reached the age of *mumayyiz* to make a choice, the Court prioritizes the children's *maslahah* and welfare. According to the *sulh* report filed to the court, both parties were present during the *sulh* session and reached a mutual agreement. According to the court, mutual agreement is part of the concept of *sulh*. The Court ruled that the *sulh* consent agreement was irrevocable and could not be appealed, as stated in the Practice Direction of the Syariah Court No. 5 of 2006. The court also exercised caution in adopting the consent agreement, as it must continue to adhere to the governing principle of child custody, which is that the child's welfare is the most important factor. It was also decided that while deciding who gets custody of a child, the court will take the parents views into account. If the court believes that the parents' wishes would be bad for the child's welfare, then any consent agreement will be thrown out and the court will make a decision that is best for the children. In addition, the Judge evaluates whether the parties have fulfilled the conditions of *sulh* by endorsing the settlement agreement. The Judge was convinced that the conditions of *sulh* were fulfilled whenever the defendant agreed to the plaintiff's claims.

Besides *sulh* officers, judges sometimes play a role in reaching an amicable settlement of disputes among the disputing parties. Judges can use the inquisitorial technique to encourage parties to settle their issues at any time before or after a trial begins.⁵⁵ The use of inquisitorial procedures for civil court trials in the Syariah Courts is highlighted in the Syariah Court Practice Direction No.7 of 2019.⁵⁶ The practice direction guides courts in conducting an inquisitorial trial in civil disputes if the judge deems it essential. The inquisitorial technique is relevant when the judge believes "hidden" material presented by parties or some issues need to be probed.⁵⁷ Such

55 Saifullah and Abdullah, "A Brief Overview On The Inquisitorial Method In Malaysian Shariah Courts."

56 Arahan Amalan Mahkamah Syariah Seluruh Malaysia Tahun 2019 by virtue of Practice Direction No.7 entitle "Garis Panduan Perbicaraan Kes Mal Secara Inquisitorial".

57 Saifullah and Abdullah, "A Brief Overview On The Inquisitorial Method In Malaysian Shariah Courts."

practice may enhance the administration and procedural system in the Syariah courts.⁵⁸

According to Nurah, the Syariah Court's *sulh* concept applies the true essence of mediation, that the mediator's responsibility is to assist the parties in reaching an amicable settlement.⁵⁹ The mediator will not make decisions or suggest the terms of the agreement that the parties must conclude. The mediators may only advise the parties and guide them in situations where the parties agree on the terms or conditions contrary to the rules or the Islamic Law.

Apart from the normal face-to-face *sulh* at the Syariah court, online mediation has also become an option in the practice of *hadhanah* and other disputes. The implementation of the Movement Control Order (MCO) due to the COVID-19 pandemic affected the administration of the Syariah court. This involves the closure of courts requiring the judiciary to work according to new standards, such as the online execution of court processes. Online *sulh* is one of the various strategies that are suitable for the current circumstances. Online *sulh* is currently practiced in the state of Selangor⁶⁰, Malacca⁶¹, Sarawak, Pulau Pinang⁶², Federal Territories and Negeri Sembilan. It can only commence with the approval of both disputing parties.⁶³ Third-party involvement is not allowed, except with the permission of the *sulh* officer. Under rule 9(2) of the Syariah Court Civil Procedure (Sulh) (State of Pulau Pinang) Rules 2021, it stated that “*Each party shall attend the Majlis Sulh personally without any Syarie Counsel or any other parties unless with the leave of the Sulh Officer*”.

Online *sulh* save the parties' costs and time because they may not have to pay for travel or lodging if they reside far away from the mediation office.⁶⁴ Because the parties will not have to travel or wait before their session begins, they will

58 Saifullah and Abdullah, “A Brief Overview On The Inquisitorial Method In Malaysian Shariah Courts.”

59 N. Sabahiah Mohamed, “Mediation in the New Dispute Resolution Landscape; a Case for the Enhancement of Its Application in Malaysia” PhD Dissertation, University of Malaya, 2013.

60 A. M. Mansor, N. A. Hak, and R. C. Soh, “Online Mediation in The Malaysian Shariah Court: Its Benefits and Challenges,” *INSLA E-Proceedings* 3, no. 1 (2020): 279–88.

61 From the interview with Puan Norazita inti Mohd Ali, Head Sulh Officer at Syariah Court of Malacca on August 5, 2021.

62 From the online interview via Zoom with Puan Nurulhuda Bt Dzulkifli, Head Sulh Officer at Jabatan Kehakiman Syariah Pulau Pinang on August 5, 2021.

63 A. M. Mansor, N. A. Hak, and R. C. Soh, “Online Mediation in The Malaysian Shariah Court: Its Benefits and Challenges,” *INSLA E-Proceedings* 3, no. 1 (2020): 279–88.

64 A. M. Mansor, N. A. Hak, and R. C. Soh, “Online Mediation in The Malaysian Shariah Court: Its Benefits and Challenges,” *INSLA E-Proceedings* 3, no. 1 (2020): 279–88.

only have to adhere to the schedule set by the court.⁶⁵ However, to ensure the confidentiality of the *sulh* process, the online *sulh* that is practiced in the Syariah Court of Sarawak requires parties to appear physically at the nearest Syariah Court office or any government office for their *sulh* session. Parties are not allowed to stay and proceed with mediation at their convenience venue, as practiced in Selangor and other states.⁶⁶ It is observed that the Department of Syariah Judiciary of Sarawak has detailed rules and guidelines for the implementation of *sulh* online. In order to effectively manage the administration of *sulh* in the state, as there are only two *sulh* officers, also taking into account the state's geography, by implementing online *sulh*, the *sulh* officers involved no longer need to commute outside the district on a weekly basis. This can efficiently optimize the use of human resources, expenses, and administration of the *sulh* case. The State of Sarawak has introduced *Sulh* Guideline Number 1 Year 2021, which contains three (3) documents, namely:

- (i) The Conduct of the Online Sulh Council
- (ii) Procedure for Signing the Consent Agreement Document Online
- (iii) Methods for Signing and Endorsement of the Consent Agreement Document in the Digital Mode

The guideline is quite detailed, elaborating on how *sulh* online is executed in the Syariah Court of Sarawak. The Syariah Judiciary of Sarawak also issued the new Practice Direction of 2021 of online *sulh*.⁶⁷

An example of an online *sulh* conducted in the Syariah Court of Federal Territories for *hadhanah* case can be seen in the case of *Wan Suzana Binti Wan Sulaiman v. Rasil Bin Jaafar* (case no: 14101-028-0384-2022). In this case, the Plaintiff, residing in Kuala Lumpur, requested an online *sulh* session due to the ex-husband's return to his hometown in Sabah after their divorce. The defendant could not attend the face-to-face court session due to work constraints, financial difficulties, and travel distance. The defendant agreed that the session be held online. After the application was reviewed and approved, an online session was held on December 5, 2022. The Plaintiff was instructed to appear physically at the court office at the Syariah Court of the Federal Territory of Kuala Lumpur, while the Defendant was online from his

65 A. M. Mansor, N. A. Hak, and R. C. Soh, "Online Mediation in The Malaysian Shariah Court: Its Benefits and Challenges," *INSLA E-Proceedings* 3, no. 1 (2020): 279–88.

66 From the online interview via Zoom with Tuan Haji Najarudin Bin Haji Nedri, Head Sulh Officer at Jabatan Kehakiman Syariah Sarawak on August 5, 2021.

67 From the online interview via Zoom with Tuan Haji Najarudin Bin Haji Nedri, Head Sulh Officer at Jabatan Kehakiman Syariah Sarawak on August 5, 2021.

home in Sabah. The online session done using Google Meet lasted for around one hour. Following the negotiation session, the Plaintiff, the biological mother, would be granted custody of three of the parties' children. The Plaintiff and the Defendant mutually agree that the Defendant is granted the right to have access and quality time with the children, provided that the Defendant notifies the Plaintiff in advance. The case was then endorsed as a court order online by the Syariah High Court Judge.

It is observed that although the Malaysian Syariah Court uses online *sulh*, physical meetings are still the primary means of implementing *sulh*. Through face-to-face mediation, the behaviour and demeanour of the parties can be observed directly by the *sulh* officer, and it can even provide more focus to the parties when the discussion session is held. Online sessions are suitable for unavoidable situations such as the parties being far away or abroad, health constraints, or unavoidable obstacles such as a pandemic.

THE LAW GOVERNING ON SULH

The establishment of *sulh* in the Syariah Court can be seen in the Syariah Court Civil Procedure Act or Enactment. For example, under section 99 of the Syariah Court Civil Procedure (Federal Territories) Act 1998, *sulh* may commence at any stage of the proceedings.

Section 99. *Sulh*.

At any stage of the proceedings, the parties to any proceedings may hold sulh to settle their dispute following such rules as may be prescribed or, in the absence of such regulations, following Islamic Law.

The Court may record any amicable resolution or consent judgement by the disputing parties at any time as stated under section 131 of the Syariah Court Civil Procedure (Federal Territories) Act 1998. Under section 247 of the same Act, the Syariah Court Rules Committee may introduce rules related to the practice of *sulh* for better understanding and operation.

As of February 2024, all the MSCs had their own *Sulh* Rules except for Sarawak.⁶⁸ The first State with its own *Sulh* Rules was Selangor in 2001,⁶⁹ followed by the

68 The State of Sarawak has the drafted Rules named the Syariah Court Civil Procedure (*Sulh*) (Sarawak) Rules 2014 but has not been gazetted. When interviewed on 10 May 2023, the Head of the *Sulh* Unit, Syariah Judiciary Department of Sarawak Mr Haji Najaruiddin bin Haji Nedri told that they are in the process of introducing their own *Sulh* Rules soon. Although they have yet to gazette the *Sulh* Rules, the practise of *sulh* has been implemented there for quite some time.

69 Syariah Court Civil Procedure (*Sulh*) Selangor Rules 2001

Federal Territories,⁷⁰ Malacca,⁷¹ and Johor⁷² in 2004. Pahang⁷³ gazetted its own Sulh Rules in 2005, followed by Pulau Pinang in 2006 (the said rule has been repealed by introducing the new 2021 Rules).⁷⁴ The State of Kelantan⁷⁵ introduced the *Sulh* Rules in 2007 (the said rule has been repealed by introducing the new 2021 Rules). In 2014, Terengganu⁷⁶ introduced its *Sulh* Rules, followed by Negeri Sembilan⁷⁷ and Perak⁷⁸ in 2016. The State of Kedah⁷⁹ later gazetted in 2017. In 2018, Perlis⁸⁰ and Sabah⁸¹ were the last states to gazette their *Sulh* Rules. Recently, the state of Sabah has acted proactively by amending their 2018 Sulh Rules by introducing the Syariah Court Civil Procedure (Sulh) (Sabah) Rules 2023.

For the past 4 years, three States have introduced their new Sulh Rules: the State of Pulau Pinang in 2021, Kelantan in 2021, and the most recent one is Sabah in 2023. The Syariah Court Civil Procedure (*Sulh*) (State of Penang) Rules 2021 listed 19 rules for the smooth running of *sulh*. As for Kelantan, they introduced 17 rules; meanwhile, Sabah listed 16 rules altogether. The arrangement of the new regulations of these 3 states is specified in the table below:

Table 1.

The arrangement of rules under the Syariah Court Civil Procedure (Sulh) Rules of the States

Rule No.	Syariah Court Civil Procedure (<i>Sulh</i>) (State of Penang) Rules 2021	Syariah Court Civil Procedure (<i>Sulh</i>) Rules 2021*	Syariah Court Civil Procedure (<i>Sulh</i>) (Sabah) Rules 2023
1	<i>Citation and commencement</i>	<i>Citation and commencement</i>	<i>Citation and commencement</i>
2	<i>Interpretation</i>	<i>Application</i>	<i>Application and non-application</i>
3	<i>Application</i>	<i>Interpretation</i>	<i>Interpretation</i>
4	<i>Forms</i>	<i>Establishment of Majlis Sulh</i>	<i>Establishment of Majlis Sulh</i>
5	<i>Establishment of Majlis Sulh</i>	<i>Commencement of the sulh</i>	<i>Commencement of the sulh</i>

70 Syariah Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004

71 Syariah Court Civil Procedure (*Sulh*) Rules 2004 of Malacca

72 Syariah Court Civil Procedure (*Sulh*) Rules 2004 of the State of Johor

73 Syariah Court Civil Procedure (*Sulh*) Rules 2005 of Pahang

74 Syariah Court Civil Procedure (*Sulh*) (State of Penang) Rules 2021. The previous 2006 Rules were repealed by introducing the new rules gazetted on July 8, 2021.

75 Civil Procedure (*Sulh*) Rules 2007 of Kelantan

76 Syariah Court Civil Procedure (*Sulh*) (Terengganu) Rules 2014

77 Syariah Court Civil Procedure (*Sulh*) (Negeri Sembilan) Rules 2016

78 Syariah Court Civil Procedure (*Sulh*) (Perak) Rules 2016

79 Syariah Court Civil Procedure (*Sulh*) (Kedah Darul Aman) Rules 2017

80 Syariah Court Civil Procedure (*Sulh*) (Perlis) Rules 2018

81 Syariah Court Civil Procedure (*Sulh*) (Sabah) Rules 2018

6	<i>Commencement of the sulh</i>	<i>Duration of the sulh</i>	<i>Duration of the sulh</i>
7	<i>Duration of the sulh</i>	<i>Extension of time of sulh</i>	<i>Extension of time</i>
8	<i>Extension of time</i>	<i>Procedure for sulh</i>	<i>Procedure of the sulh</i>
9	<i>Procedure of the sulh</i>	<i>Implementation of Majlis Sulh</i>	<i>Conduct of Majlis Sulh</i>
10	<i>Conduct of Majlis Sulh</i>	<i>Ethics of the Sulh Officer</i>	<i>Sulh agreement</i>
11	<i>Settlement agreement</i>	<i>Termination or cessation Majlis Sulh</i>	<i>Withdrawal of a claim in dispute</i>
12	<i>Confession or consent judgement</i>	<i>Withdrawal Sulh Officer of the Majlis Sulh</i>	<i>Fail to resolve claim in dispute</i>
13	<i>Termination of Majlis Sulh</i>	<i>Judgement by confession or consent</i>	<i>Consent judgement</i>
14	<i>Report on the failure of settlement</i>	<i>Report if there is no settlement</i>	<i>Termination of Majlis Sulh</i>
15	<i>Etiquette of the Sulh Officer</i>	<i>Confidentiality</i>	<i>Disclosure of the communication</i>
16	<i>Confidentiality</i>	<i>Protection of the Sulh Officer</i>	<i>Revocation and savings</i>
17	<i>Contempt of the Sulh Officer and proceeding</i>	<i>Repeal</i>	
18	<i>Protection of the Sulh Officer</i>		
19	<i>Repeal and saving</i>		
<i>*State of Kelantan (it is not written above because that is the actual name of the said Rule)</i>			

It is observed that, although most of the new rules in these 3 states are consistent in terms of the substance with one another, some states provide an additional item to the provisions of their Rules.

In addition to the Act/Enactment and Rules, the issuance of the Practice Direction of the Syariah Court clarifies the implementation of *sulh* in Malaysia. Considering the benefits, significance, and effectiveness of implementing the *sulh* in the Syariah Court, various matters can be referred to the *Majlis Sulh*. Practice Direction No.3 the Year 2002 elaborates on the use of *sulh* where as soon as possible, not exceeding 21 days, cases suitable for *sulh* must be referred to *Majlis Sulh* by calling the parties involved for a *sulh* session for a peace settlement. For cases that fail at this stage, a trial date must be set after all pleadings have been completed. Under Practice Direction No. 1 of 2010, there are 18 types of cases to be directed to the *Majlis Sulh* at the case registration stage. The lists are as follows:

Table 2.

Cases to be directed to the sulh council at the case registration stage referring to Practise Direction No. 1 2010 of the Syariah Courts

<i>No</i>	<i>Code Case*</i>	<i>The type of Case</i>
1	009	Bethrotal Damages (<i>Tuntutan Gantirugi Pertunangan</i>)
2	016	Muta'ah Claim (<i>Mutaah</i>)
3	017	Jointly Acquired Property (<i>Tuntuan Harta Sepencarian</i>)
4	018	Maintenance of the Wife (<i>Tuntutan Nafkah Isteri</i>)
5	019	Maintenance of the Disabled Party (<i>Tuntutan Nafkah Kepada Pihak Tak Upaya</i>)
6	020	Security for Maintenance (<i>Tuntutan Cagaran Nafkah</i>)

7	021	'Iddah Maintenance (<i>Tuntutan Nafkah Eddah</i>)
8	022	Variation of the Maintenance Order (<i>Tuntutan Mengubah Perintah Nafkah</i>)
9	023	Arrears of Maintenance (<i>Tuntutan Tunggalan Nafkah</i>)
10	024	Maintenance of Children (<i>Tuntutan Nafkah Anak</i>)
11	025	Variation of the Order for the Agreement on Custody or Maintenance of Children (<i>Tuntutan Mengubah Perintah Hak Jagaan Anak/Nafkah Anak</i>)
12	026	Variation of the Order for Custody or Maintenance of Children (<i>Tuntutan Mengubah Perjanjian Hak Jagaan Anak/Nafkah Anak</i>)
13	028	Hadhanah/Child Custody Claims (<i>Tuntutan Hadhanah</i>)
14	049	Marriage Damages (<i>Tuntutan Gantirugi Perkahwinan</i>)
15	059	Right to Accommodation (<i>Tuntutan Hak Tempat Tinggal</i>)
16	060	Order for Husband to Resume Cohabitation (<i>Tuntutan Perintah Supaya Suami Tinggal Bersama Semula</i>)
17	062	Order for a Wife to Obey Husband (<i>Tuntutan Isteri Kembali Taat</i>)
18	063	Claim Mahar (<i>Tuntutan Mas Kahwin</i>)

* Starting in December 2022, the Syariah Judiciary Department (JKSM) has introduced new code cases for all cases; for example, hadhanah claim is under code case 231. This is by virtue of Practice Direction No. 12 Year 2019.

Apart from these cases, *sulh* may commence in any case instructed by a Judge, which in his opinion is necessary to be referred to *Majlis Sulh*.⁸² Some other states like Terengganu also allow *sulh* to be conducted in the divorce application.⁸³

The 2010 Practice Direction also provides an exemption for cases that have gone through the mediation process in the Legal Aid Department, and the parties have concluded an agreement. Such cases do not need to be referred to the *Majlis Sulh* during the registration stage. Straightaway after registration, the case may be brought to the Syarie Judge for endorsement of the consent agreement as a court order.

In *hadhanah* disputes, upon filing the case will be registered under code 028 or 231. If the Registrar satisfies that the case is suitable for *sulh*, a notice of *sulh* will be given to the parties. Any amicable settlement entered into by the parties during *Majlis Sulh* will be endorsed by the Court as the consent judgement order. Suppose later issues were raised in implementing the order; for instance, if there are material changes in the case, parties may apply a variation of order for *hadhanah* using code 026 or 232.

The procedure for serving *sulh* notices to parties in the *Majlis Sulh* shall follow the summons submission procedure as outlined in the Civil Procedure Law of the Syariah Courts of the States, or by a declaration of receipt of registered mail (A.R. Registered), as required by Practice Direction No. 5 2015.

82 Refer to the First Schedule of Subrule 3(1) of the Syariah Court Civil Procedure (*Sulh*) (State of Penang) Rules 2021

83 Refer to the First Schedule of Rule 3 of the Syariah Court Civil Procedure (*Sulh*) (Terengganu) Rules 2014

Practice Direction No. 11 of 2005 defines the Syariah Lower Court's authority to record any mutual agreement that falls within its jurisdiction. *Hadhanah* cases fall under the Syariah High Court's jurisdiction. Thus, a mutual agreement that succeeds for *hadhanah* disputes in *Majlis Sulh* must be endorsed by the Syariah High Court. Any consent agreement entered during *sulh* shall not be executed or enforced without first obtaining an order of the Court referring to Practice Direction No. 4 of 2006.

In addition to the issuance of the practice direction, the *Sulh Work Manual* was created by JKSM in 2002 as a guideline for the *Sulh Officers* in handling *sulh* at the Syariah Courts. It consists of 10 parts, namely:

Part 1: Introduction (*Permulaan*)

Part 2: Objective (*Objektif*)

Part 3: Preliminary Statement (Al-Taaruf) (*Kenyataan Awal (al-Taa'rif) Pegawai Sulh*)

Part 4: Preliminary Presentation of the Disputing Parties (*Pembentangan Awal Pihak Yang Bertikai*)

Part 5: Joint Discussion (*Perbincangan Bersama*)

Part 6: Separate Session /Caucus (*Pertemuan Sebelah Pihak (Kaukus)*)

Part 7: Joint Consultation (*Perundingan Bersama*)

Part 8: Concluding the Agreement (*Penghakiman Berasaskan Persetujuan*)

Part 9: Case Submitted Back (*Kes Diserahkan Kembali*)

Part 10: Confidentiality (*Kerahsiaan*)

There are also three (3) appendixes in the Manual, namely, dua (prayer) recitation during *Majlis Sulh*, settlement agreement format, and the draft format of the agreement order.

To ensure the smooth running of the *sulh* session, all *sulh* officers must adhere to the *Sulh Officer Court of Ethics 2002*. Any violation of this code of ethics may be taken action under the *Public Officers (Conduct and Discipline) Regulations 1993*. Among the general responsibilities of the *sulh* officers are allowing personal interests to conflict with official duties, using position for self-interest, being dishonest or tarnishing the name of the Syariah Court, and mingling freely with the public in a manner that may raise doubts about his ability to be fair in his duties. The *Sulh* officer cannot receive any gift related to official duties, provide an opinion on a matter being

discussed, or is likely to be an issue in any *Sulh* Council to be held, as the view made can be used by any party to support their argument later. The officers cannot participate in the activities of political parties. They shall be diligent and not delay without a reasonable excuse in resolving the *sulh* case and comply with the instructions issued by the Chief Syarie Judge. Moreover, *sulh* officers must continuously improve their knowledge and skills and implement justice as Islamic Law requires.

The code of ethics also elaborates on the specific responsibilities to be adhered to by the *sulh* officers. When conducting *sulh*, the *sulh* officer is under the duty not to proceed with *Majlis Sulh* when they are restless, angry, hungry, thirsty, sleepy, tired, and unhealthy. The officer cannot leave the session without a reasonable excuse or without obtaining the prior consent of the Chief Syarie Judge, also not conducting the *Majlis Sulh* where the disputing party involved is his enemy or friend who is likely to influence the handling of the *sulh*. The *sulh* officer must provide equal treatment to the parties, encourage the parties to resolve their disputes and reach an agreement voluntarily, and ensure that *sulh* proceedings are conducted in an orderly manner according to the *Sulh Work Manual* and encourage the parties to resolve their disputes and reach an agreement voluntarily. It is also crucial that the *sulh* officer be neutral and impartial.

***SULH* PROCESS IN *HADHANAH/CHILD* CUSTODY DISPUTES**

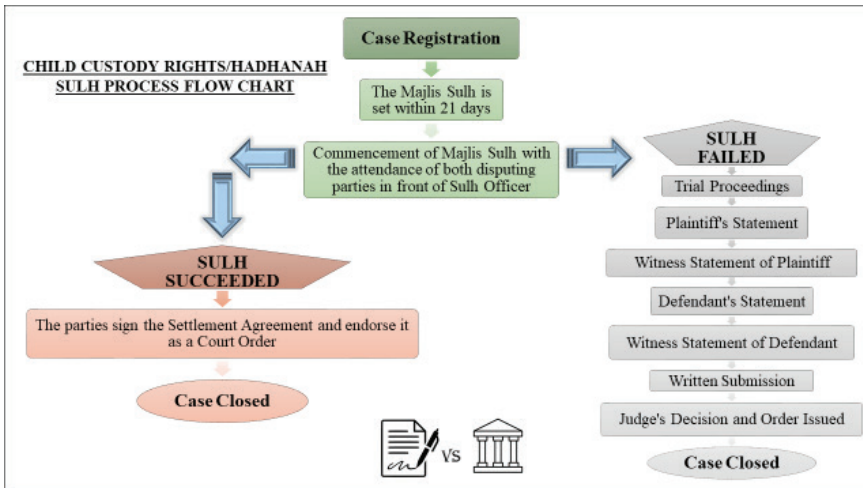
To begin with *sulh*, the parties must first identify their subject matter of dispute. Only issues concerning the rights of humankind can be settled using *sulh* methods. The MSC has its legislation on “*Hadhanah* or Custody of Children”. However, the provisions of the law on *hadhanah* in each State’s regulations are almost the same; there is no significant difference except for the arrangement of the sections only.⁸⁴ Section 81 of the Islamic Family Law (Federal Territory) Act 1984 stated the priority lists of persons entitled to custody of a child. Under subsection (1) of the same Act, the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution.

Upon receiving the case filing to the Syariah Court, the Registrar will assess and determine whether the case should go for *sulh* proceeding or continue for trial.⁸⁵ Previous studies highlighted the unsatisfactory presence of the Defendants and

84 Mahyidin Bin Hamat, Zuliza Kusrin, and Mohamad Nasran Mohamad, “Pelaksanaan Penjagaan Anak (*Hadhanah*) Di Malaysia,” *Al-HIKMAH Journal* 6, no. 12 (2016): 169–84.

85 Rule 6 of the Syariah Court Civil Procedure (*Sulh*) (State of Penang) Rules 2021 under the heading “Commencement of *sulh*”

a lack of awareness of the benefits of settlement through the *Majlis Sulh*.⁸⁶ Due to Defendant’s absence, the *sulh* session could not commence and was rendered ineffective, as the *sulh* concept itself necessitated the participation of both parties for discussion and negotiation to occur.⁸⁷ The nonattendance of either party or both for *sulh* or mediation session resulted in the case being referred to the court for trial, thus incurring more cost and time-consuming.



Flow Chart 1. Sulh Process in Child Custody Disputes/Hadhanah in the Malaysian Syariah Courts

The above flow chart outlined the process that will be undergone by disputing parties who have their child custody/*hadhanah* disputes at the MSC. Parties who can reach an amicable settlement during the *sulh* will undergo a less procedural process than the trial.

The mediator or *sulh* officer will play the primary role in the mediation session. He must be knowledgeable in the relevant subjects and have no personal or financial interest in the case’s outcome.⁸⁸ Lawyers who represent the disputing parties also

86 N. Abdul Hak and H. Khan, “The Application of Sulh in Resolving Community Disputes,” in *1st World Congress on Integration and Islamicisation of Acquired Human Knowledge (FWCII-2013), Prince Hotel & Residence, Kuala Lumpur* (Kuala Lumpur, 2013); N. Abdul Hak and U. A. Oseni, “Syariah Court-Annexed Mediation in Malaysia–Some Problems and Prospects,” *Asian Journal on Mediation* 2011 (2011): 1–10.

87 Ramli, Supaat, and Hashim, “Kebiasaan Baharu (New Normal) Dalam Pelaksanaan Sulh Kes Hadhanah Dan Nafkah Anak: Isu Dan Cabaran: The New Normal of Sulh Implementation in Child Custody (Hadhanah) and Child Support (Nafkah): Issues and Challenges.”

88 Mohammad Hafiz Bin Mohd Zaki, Mazbah Termizi, and Muhammad Ridhwan Saleh, “MEDIATION v. SULH: A COMPARATIVE STUDY,” in *ICDR 2017: Modern Trends in Effective Dispute Resolution*, 2017, 219.

play a role in advising the parties regarding the dispute's subject matter, including the possibility of resolving the issue through mediation. To ensure that *sulh* officers conduct the *Majlis Sulh* with appropriate guidelines, the JKSM has developed the *Sulh Work Manual 2002* and the *Ethical Code of Sulh Officer 2002*. These standards were established to protect the parties' rights and preserve the *Majlis Sulh*'s and *sulh* officer's credibility. When performing *sulh*, the officer must act justly and maintain confidentiality. Additionally, they must be unbiased, free of conflict of interest, trained in mediation, capable of conducting *sulh*, friendly, and responsible for ensuring parties' security during *Majlis Sulh*. *Sulh* proceedings will occur in *Majlis Sulh* in the presence of the disputing parties led by the *sulh* officer as the chairman of *Majlis Sulh*.

To ensure that all parties understand the law and its processes, the *sulh* officer should begin *Majlis Sulh* with a preliminary statement or briefing session (*ta'aruf*) where parties can ask questions on *Hukum Syarak* and Islamic family law.⁸⁹ Part 3 of the *Sulh Work Manual* specifies the sequencing of the parties' speeches. The parties are obligated to respect the other party and conduct themselves courteously throughout this session. During *the taaruf* session, the *sulh* officer will elaborate on the objectives of the *sulh* and the procedures and regulations of *the sulh*. The *Sulh* officer also emphasized the confidentiality of communication and matters discussed in the *Majlis Sulh*.

After *taaruf* session, the next step is the preliminary presentation of the disputing parties. At this stage, each party will be allowed to explain the matters in dispute, the effect, and consequences of the dispute, and list their proposal or recommendation of settlement. The *sulh* officer will first invite the Plaintiff to present their case, with any proposed or suggested resolutions. After that, the officer will hear the defendant's side of the story and any recommendations on how to resolve the dispute. Following that, the *sulh* officer will map out the issues or conflict, identifying the reasons for the disagreement, constraints to resolutions, and other options for resolving the conflict. The *sulh* officer must filter, sort, and determine all the information gathered to list the issue or the conflicts that need to be resolved, the parties' position and interest, and other possible resolutions.

During this session, the *sulh* officer is under the duty to draft the agreement listed by the parties, be it the whole or only part of the disputes. Both parties will be allowed to present their concerns or recommendations during the joint discussion.

89 Siti Noraini Bt Hj. Mohd Ali, "Perlaksanaan Sulh Dan Keberkesanan," no. September (2002): 1–17.

The private session or caucus is conducted where the *sulh* officer meets the parties separately if the joint discussion is unsuccessful or if he thinks it is necessary. Not every case required the caucus session. If parents are on good terms and can discuss amicably during joint sessions, caucus sessions may not be required. Each party will be given a chance to sit with the *sulh* officer, elaborating and brainstorming on the disputes and possible solutions. When one party is with the *sulh* officer, another party will be requested to stay outside until their turn.

After the caucus session, parties will be invited to join the session and renegotiate possible amicable solutions. This stage is also known as joint consultation. If an agreement is reached during this session, the *sulh* officer will draft the agreement to be signed by the parties before asking the parties to meet the judge to endorse the said agreement as the court order.

The majority of jurists agreed that the parties must have the legal capacity to assure the legality of *sulh*, particularly during the period of the *sulh* agreement's conclusion, and that the parties must be of sound mind and not bankrupt. The mediator in *sulh* is not authorized to make any decisions on behalf of the parties in dispute. Rather than that, he merely encourages the parties to negotiate and agree on a meeting point. Thus, in contrast to *al-qada'* or trial, which focuses on legal rights, *sulh* is based on compromise, with the goal of resolving disputes without harming the parties' relationship.

A *sulh* agreement concluded at the end of the *sulh* process is binding on the disputing parties based on the Quran in Surah Al-Maidah verse 1 where Allah says, "*O ye who believe! fulfill (all) obligations*". This is further supported by the hadith of the Holy Prophet Muhammad narrated by Abu Hurairah and compiled by Abu Dawood, "*Muslims are on (i.e. stick to) their conditions*".

CONCLUSION

Child custody or *hadhanah* is closely related to the "care and control" rights of the children. In deciding on child custody, apart from the wishes of the child and the parents, the paramount consideration is the welfare of the child. The practice of *sulh* in child custody disputes (*hadhanah*) in the Syariah Court of Malaysia is consistent with both Islamic Law and the law being enforced. Resolving child custody issues by peaceful resolution outside the court is a more effective and efficient approach, while also minimizing any negative impact on the psychological well-being of the children involved. Mediation has emerged as the most efficient method for expeditiously resolving matters due to its integration into the court process. In *sulh*, the primary focus is on the well-being of the child, rather than the desires of

the parents. Introducing *sulh* has been beneficial to many. To ensure the smooth running of *sulh*, especially for child custody conflicts, some improvements are needed, such as guidelines to handle *sulh* sessions with aggressive parties and abusive spouses.

Sulh offers a forum for disagreeing parties to resolve *hadhanah* or child custody disputes amicably while avoiding litigation. The parties can avoid the negative consequences of court litigation, such as time and cost by resolving the disagreement at this stage. However, the competence and talents of the *sulh* officers are crucial to the success of the *sulh*. To ensure the effectiveness of the *sulh* processes, this neutral third person must be unbiased, impartial, and equipped with the necessary skills and competence to handle the disagreement. As for the legal framework, it is observed that the implementation of *sulh* at the Malaysian Syariah Court is orderly considering that there are proper and standardized legal provisions, rules, and regulations that govern the smooth running of the *Majlis Sulh*.

In addition, the government initiative to introduce online *sulh* is an excellent move to meet the needs of its clients. It will enhance the existing mediation practice in this country. It is about time to fully utilize of the video mediation facilities and use their potential in resolving disagreements between parties. To guarantee that online *sulh* achieves its goal, training should be provided to the mediator and support personnel as well as to improve their skills in managing online mediation.

As for mediators, they must possess a range of essential talents, including the ability to inspire trust, adeptness in negotiating and decision-making, effective communication, proficiency in managing stress and conflict, and strong problem-solving capabilities. It is also essential to possess the ability to evaluate the personality and psychological well-being of the individuals involved during the *sulh* session.

In regards to future research, it is recommended that more studies be conducted on the relevance of engaging child counselors at the pre-mediation stage or inviting them to co-mediate with the mediator in specific circumstances. This is because the study found that the presence of collaboration between experts in family affairs and other specialized fields, as observed in countries like Singapore, Australia, and Egypt, is a significant factor in the effectiveness of family dispute resolution in those countries.

It is hoped that Malaysia will prioritize using alternative conflict resolution methods like mediation when handling child custody cases and encourage less adversarial processes in family dispute settlement. The prudent handling of minor children in court, whether in civil or Shariah proceedings, is crucial because they are valuable assets to the country and hope for the nation in the future.

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