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Resolution of Child Custody Dispute: Legislative Foundation and Contemporary Application of *Sulh* in the Shariah Court of Malaysia

Mediasi dalam Menyelesaikan Isu Penjagaan Kanak-Kanak: Asas Perundangan dan Aplikasi Sulh oleh Mahkamah Syariah di Malaysia

Nora Abdul Hak*, Ahmad Mukhlis Mansor**, & Roslina Che Soh @ Yusoff***

Abstract

Mediation or *sulh* at the Malaysian Shariah Court deals with a variety of issues relating to Islamic family law including the child custody issues. Disputes that exist between the parties can be resolved through litigation (court) and non-litigation (outside the court). *Sulh* is one of the non-litigation methods in settling disputes in peace and harmony. The Government initiative by introducing *sulh* since 2001 helps in reducing the backlog of cases, speeds up settlement of dispute and it has become a very constructive method of resolving disputes amicably. This article aims to discuss and analyse the principles of *sulh* in Islamic Law, its foundations and its implementation in Malaysia particularly in child custody disputes. The article also will look at how *sulh* interacts with the new implementation of the Special Court of *Hadanah* established in the Shariah Court of Federal Territories (MSWP). The methodology adopted, is library-based research to collect information, data and theories involved, from selected materials including journal articles, textbooks, statutes, as well as interview method. The data were analysed using the content analysis method. The study concludes that the practice of *sulh* in the child custody disputes is not only in line with the Islamic Law but also plays a vital role in protecting the children's rights as outlined by the intent of the Divine Guidance (*Maqasid Shariah*).

Keywords: *Sulh*, mediation, Shariah court, child custody dispute, ADR.

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Abstrak

Mediasi atau *Sulh* yang dilaksanakan di Mahkamah Syariah melibatkan pelbagai isu kekeluargaan termasuk kes penjagaan kanak-kanak. Pertikaian yang terjadi diantara pihak-pihak dapat diselesaikan melalui dua kaedah iaitu perbicaraan (di dalam mahkamah) dan penyelesaian tanpa perbicaraan (luar mahkamah). *Sulh* adalah salah satu kaedah penyelesaian pertikaian secara damai dan harmoni yang dilakukan tanpa perbicaraan. Inisiatif Kerajaan memperkenalkan *Sulh* mulai tahun 2001 telah membantu mengurangkan lambakan kes di mahkamah, menyelesaikan kes dalam tempoh yang singkat dan ianya menjadi kaedah yang sangat konstruktif dalam menyelesaikan pertikaian secara damai tanpa sengketa. Tujuan kertas kerja ini disediakan adalah untuk membincangkan serta menganalisa kewujudan *Sulh* di dalam Undang-Undang Islam, melihat kepada asas serta pelaksanaan *Sulh* di Malaysia terutama dalam kes melibatkan pertikaian penjagaan kanak-kanak. Artikel ini juga meneliti bagaimana pelaksanaan *Sulh* membantu ke arah pelaksanaan Mahkamah Khas Hadhanah yang baharu ditubuhkan di Mahkamah Syariah Wilayah Persekutuan (MSWP). Metodologi yang dilaksanakan di dalam kertas kerja ini melibatkan kajian perpustakaan bagi mengumpulkan maklumat, data dan teori yang terlibat daripada bahan-bahan terpilih termasuklah jurnal artikel, buku teks, statut serta kaedah temubual. Data yang diperolehi kemudiannya dianalisa menggunakan kaedah analisa kandungan. Kajian ini menyimpulkan bahawa amalan *Sulh* melibatkan pertikaian penjagaan kanak-kanak bukan sahaja selari dengan Undang-Undang Islam, namun *Sulh* juga berperanan penting dalam melindungi hak kanak-kanak seperti yang digariskan oleh *Maqasid Syariah*.

Kata Kunci: *Sulh*, mediasi, mahkamah Syariah, pertikaian penjagaan kanak-kanak, ADR.

Introduction

Islam is very concerned about the wellbeing of children since their birth. It promotes the importance of educating and raising the children well since later on they will not only benefit themselves but also other people when they grow up. The Prophet Muhammad SAW said:

“Every child is born with a true faith of Islam (i.e., to worship none but Allah Alone) and his parents convert him to Judaism or Christianity or Magianism”¹

Mohd Nai'm (2020) commented that there is a connection between *Shariah* and *fiqh* where both share the same objectives and purposes, to serve the best interests of the mankind, uphold morality and ethics towards bringing justice and harmony to the community not only in this world but also life after death. Children are the country's most valuable asset. They represent the bright future of this country and hold our

¹ *Sahih Bukhari*, Vol. 2, Book 23, Hadith 467. Kitab al Janaiz, Chapter: The (dead) children of Al-Mushrikun, <https://sunnah.com/bukhari/23/138>.

hopes to become a better Nation.² They are also one of the most vulnerable groups in the community; therefore, protecting their rights should be the main priority (Hendun Abd Rahman Shah et al, 2018).

Not every family is blessed with a happy marriage, some face hardship in maintaining peace and harmony in their relationship thus may lead to divorce or *talaq*. In Islam, *talaq* is seen as an undesirable practice. However, if a couple may feel that their marriage is not working, in this situation, divorce is allowed. Even though Islam permits *talaq* (al-Qur'an, 2:231), couples who choose divorce are not to quarrel over their rights after divorce. A desire to seek peace and tolerance is encouraged in Islam so that any disputes that arise can be resolved quickly and fairly. A peaceful settlement or *sulh*³ is strongly encouraged in Islam to end the dispute. *Sulh* is rooted based on the concept of tolerance and voluntariness that eventually lead to a mutually agreeable solution. The encouragement of peaceful settlement in every dispute is emphasised in the al-Quran. Surah Al-Nisa states "*wa al-sulhu khair*" (al-Qur'an, 4:128), which mean, "*Reconciliation is better*". In this verse, Allah clearly prescribes that *sulh* is the best conduct. Furthermore, in another verse in surah Al-Hujurat Allah SWT says:

"And if two parties of the believers quarrel, make peace between them; but if one of them acts wrongfully towards the other, fight that which acts wrongfully until it returns to Allah's command; then if it returns, make peace between them with justice and act equitably; surely Allah loves those who act equitably". (al-Qur'an, 49:9)

In a hadith narrated by al-Tirmidhi, Prophet Muhammad SAW said:

"A peaceful settlement (*sulh*) is permissible (in business) among Muslims, except in the case of prohibiting something lawful and allowing something unlawful.

In another hadith narrated in *Sahih Bukhari*, the Prophet said:

"There is a *sadaqa* (charity) to be given for every joint of the human body, and for every day on which the sun rises, there is a reward of a *sadaqa* for the one who established

² "Dasar Kanak - Kanak Negara," accessed February 21, 2020,

<http://jkm.penang.gov.my/index.php/14-dasar/36-dasar-kanak-kanak-negara-2>.

³ *Sulh* is a settlement grounded upon compromise negotiated by the disputants themselves or with the help of a third party.

sulh and justice among people” (*Sahih al-Bukhari*, Hadith 2707).

One form of peaceful settlement is through *sulh* process. Its practice has been able to achieve justice since decisions on the dispute are made by mutual agreement of the parties, neither party wins nor loses. A unanimous agreement of the Muslim jurists (*Ijma'*) is that settlement of the dispute through *sulh* is more appropriate in achieving justice, as parties are aware of their rights.

This is different from the decision made by the judge in the trial process because parties who are more talented in arguing are likely to win the case even though it is not their right to get it (Mohd Norman Shah, 2008). This issue has been emphasised in the hadith of the Prophet Muhammad SAW reported in *Sahih Muslim*:

Ummu Salama reported Allah's Messenger (may peace be upon him) as saying: You bring to me, for (judgment) your disputes, some of you are perhaps being more eloquent in their plea than others, so I give judgment on their behalf according to what I hear from them. (Bear in mind, in my judgment) if I slice off anything for him from the right of his brother, he should not accept that, for I sliced off for him a portion from the Hell (*Sahih Muslim*, Book 18, Number 4247).

From the above hadith, it can be seen that the trial process *per se* does not guarantee that justice will be achieved if the parties are not on the equal footing in presenting their cases. On the contrary, a peaceful settlement is highly recommended as not all the times the court's decision may satisfy the needs of the parties.

Definition of *Sulh*

In discussing the dispute resolution in Islam, besides *sulh* (negotiation, conciliation, mediation and compromise), other means of dispute resolutions available are *al-qada* (court adjudication) (Ahmad Ibrahim, 1986), *tahkim* (arbitration),⁴ *fatwa* of the *mufti* (expert determination), *muhtasib* (inspector), *wali al-mazalim* (ombudsman), *nasihah* (counseling) and other hybrid instruments like combination of mediation and ar-

⁴ The most remarkable verse with regard to arbitration in the Quran is Surah al-Nisa (4):35.

bitration (Hanis Wahed 2015, 71). The scope of this paper is limited to the discussion of *sulh* in the child custody disputes as has been practiced in the Shariah Courts of Malaysia.

Sulh is derived from the word “*salaha*” which means to do good deeds. *Sulh* literally means “termination of a dispute”, “to settle any dispute” or “doing good” (Syed Sabiq, 1990). Whereas according to Islamic Law, *Sulh* is defined as “an ‘*aqad* by which a dispute ends” (Nazzam & Qadri Basha, 1909, in Raihanah, 2005). The same definition is presented by Wahbah Al-Zuhaili (1999). In Islam, *sulh* is applicable in all types of disputes except in *Hudud* cases (Ramizah 2008, 35).

Under Islamic Law, *sulh* is considered as complementary to the court adjudication and is highly recommended as compared to the other dispute settlement mechanism such as litigation. Rule No. 3 of the Shariah Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004 interprets “*sulh*” as negotiation, agreement and settlement of cases between the parties in the *Sulh* Council (*Majlis Sulh*).

The practice of *Sulh* is also referred to as mediation (Nadia Murshida Abd Azzis and Alias Azhar, 2018). According to Jay Folberg and Alison Taylor (1984), “Mediation is the process by which participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.” Mediation differs from arbitration (*tahkim*) with regards to the involvement and roles of a neutral third party. Ratno (2006) emphasized that mediators only facilitate and assist parties in negotiation towards reaching an agreeable solution, not determine as to what is the appropriate solution to the disputes, whereas an arbitrator decides on a dispute based on its merits.

Based on the definition given above, it can be concluded that *sulh* leads to the outcome of a peaceful settlement reached by the disputing parties through the mediation process. *Majlis Sulh* is a guided negotiation process conducted in accordance with the rules provided by the Islamic law and law enacted by the States, before the commencement of trial (Norita, 2016). The practice of *sulh* does not only save costs and time but also encourages the settlement of disputes voluntarily rather than as a medium for revenge by the parties.

The Implementation of *Sulh* in the Malaysian Shariah Court

Traditionally, a court trial is one of the dispute resolution mechanisms existing in the Malaysian Shariah Court. However, justice in court trials only can be achieved through complex procedures and the whole process takes quite some time (Ramizah, 2008).

In the early 1990s, the Malaysian Shariah Court has often been criticized and being under pressure by the government, NGOs and society as being inefficient and manifesting delays in handling cases. The initial movement towards the implementation of *sulh* in the Shariah Court started in a workshop named Bengkel Penyelarasan Pelaksanaan Sulh di Mahkamah Syariah on the 21st until 23rd August 1996. The workshop was co-organized by the Bahagian Hal Ehwal Islam, Jabatan Perdana Menteri and the State Government of Perlis (Jabatan Kemajuan Islam Malaysia Putrajaya, 2003). There were twelve resolutions concluded in the workshop. Among other things that have been decided are that *sulh* will commence once a case has been filed in the Shariah Court, before such matter is brought for trial. The cases that will be brought for *sulh* are all property (*mal*) related (civil) cases including matrimonial matters arising within marriage and after the dissolution of marriage, properties distribution disputes including inheritance and matrimonial property claims, *waqaf*, *wasiat* and *nazar*. Besides, it was also agreed that parties may appoint a lawyer to represent them in the *Majlis Sulh* and any result (success or not) by the parties in the *sulh* process must be brought up to the judge for the endorsement as a court order, or such cases will proceed to trial.

On 13 July 2000, a meeting was conducted to overcome the issue of delays and backlogs of cases in the Shariah Court.⁵ It was decided that the Syariah Judiciary Department (JKSM) should make a formal application to the Public Service Department Malaysia (JPA) for the establishment of the *Sulh* Unit as a pilot project at the Syariah Court of Federal Territory Kuala Lumpur (MSWP) (Mohamad, 2003). Based on that decision, a special task force was formed by JKSM as an initiative to establish *Sulh* Unit in MSWP, Kuala Lumpur.⁶ Among the resolutions that were passed in the meetings was the implementation of *sulh* as a pilot

⁵ The 5th meeting of “Mesyuarat Jawatankuasa Pelaksanaan Pelan Tindakan bagi Menangani Kelewatan serta Kelemahan Perbicaraan Kes-Kes di Mahkamah Syariah”. The meeting was held at the Dewan Syura, Level 11, Pusat Islam Malaysia, Kuala Lumpur.

⁶ The task force is named as “Jawatankuasa Pelaksanaan Sulh Mahkamah Syariah Wilayah Persekutuan”.

project at the MSWP. Starting in July 2001, *sulh* has been officially established within the administration of the Syariah Court. It is undeniable that, before this formal and structured practice, *sulh* had long been adopted as a means of resolving disputes arising among the Malays. The headman and Imam in those days had already played an important role in resolving the disputes (James A W Jr & Ronda R C, 1999).

The introduction of *sulh* in the Malaysian Shariah Court aims to expedite civil case trials in the Shariah courts, resolving parties' dispute amicably and to reduce the backlog of cases (Nor Fadzlina, 2011; see also Sa'odah and Nora, 2010). Section 99 of the Shariah Court Civil Procedure (Federal Territories) Act 1998 provides that:

“...the parties to any proceedings may, at any stage of 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 Hukum Syarak.”

Section 247(1) (c) of the Shariah Civil Procedure (Federal Territories) Act 1998 clearly states that the Shariah Court Rules Committee may make rules and procedure for *sulh*. The Shariah Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004 was later gazetted and implemented within the Federal Territories. Raihanah (2006) argued that the practice of *sulh* at the Shariah Court would not succeed if the parties were not able to compromise and care for their own needs only.

After the pilot test programme at the MSWP, with the aims of unification of the Islamic law administration in Malaysia, the application of *sulh* was extended to the other States in Malaysia gradually through the Practice Directions No. 3 of 2002 from the Shariah Judiciary Department of Malaysia. Selangor was the first State that initiated the establishment of *sulh* in 2002 after a successful pilot test implementation at MSWP. The practice of *sulh* at the Shariah Court of Selangor is governed by the Shariah Court Civil Procedure (*Sulh*) Selangor Rules 2001. The encouragement to use *sulh* as a means in settling disputes can be seen in section 87 of the Selangor Shariah Civil Procedure, which provides that “the parties to an action are encouraged to hold *sulh* to settle their dispute”. It was reported that in 2003, 90% of cases registered were settled through *Majlis Sulh* (Saodah & Nora 2010).

Even though *sulh* is recommended, there should be no coercion either by the Shariah Court or any party to compel the other party to proceed with it. Any element of coercion found in the agreement will lead to the judgment being considered as invalid. Dr Mahmud Saedon A Othman

(1982) in his article quoting what Imam Malik once said: “I do not think that the government (ruler) should impose a peaceful settlement on the disputing parties, or refrain from holding a trial solely to accept such peaceful settlement”. On this point, Al-Imam Muhammad Ibn Hassan al-Shaibani also commented that “It would be unreasonable for the judge (*Qadi*) to reject the trial more than twice for the sake of attaining peaceful settlement” (Muhammad Salam Madkur 1964). Based on the above arguments, whenever peaceful settlement is difficult to be achieved or there is no attempt by the parties to resolve the dispute amicably, a hearing (trial) should be held.

In handling *sulh* process, it can be divided into two main components. Firstly, the management of *sulh* cases and secondly, the *Majlis Sulh* itself. To make sure the smooth running in the operation of *sulh* at the Shariah Court, there is a specific manual namely “*Sulh Work Manual*” provided by the court. The manual explains that the whole *sulh* process begins with the registration of the case until the endorsement of the court order based on the mutual agreement reached by both parties (Jabatan Kehakiman Syariah Malaysia, 2013). *Sulh Work Manual* was formulated as a guideline to be followed by all *Sulh* officers. It clarifies and standardizes procedures in conducting *Majlis Sulh*.

The Practice of *Sulh* in Child Custody Disputes at the Shariah Court

The cases related to Muslim families in Malaysia are within the jurisdiction of the Shariah court but they are categorized according to the types of cases that are heard either before the Shariah Subordinate Court or the Shariah High Court. Cases related to betrothal and defaulted betrothal, marriage and divorce, as well as matters related to maintenance are heard in the Shariah Subordinate Court, while the cases related to custody, verification and denial of consanguinity, *mut'ah* and matrimonial property claims and cases of re-hearing from the Subordinate Courts are heard in the Shariah High Court. Shariah Appeal Court also serves as the final stage of all appeal cases against a decision made by the Shariah Subordinate Court or the Shariah High Court.

Dissolution of marriage cases recorded the highest number of cases compared to other cases such as the defaulted betrothal, marriage outside the territory verification, polygamy application, custody, maintenance, *mut'ah* and matrimonial property claims. Shariah Court in Malaysia does not only hear cases on Islamic Family Law but also try criminal

acts such as offences related to marriage, seclusion or the beginning of adultery, drinking alcohol, apostasy, offences relating to religion and beliefs, ethical disobedience such as not fasting and respecting the month of Ramadan, cross-dressing as well as cases related to inheritance, bequest, endowment or vow claims.

Any couple who wants to divorce in Malaysia must apply for divorce to take place in court. Any party, either the husband or wife, may make this application. In the application for the pronouncement of *talaq*, generally, after an application is filed, the court will issue a summon order to beckon the parties involved to appear before the court to pronounce *talaq* before a Shariah judge. When both parties have come to the court, the judge will order the husband to pronounce *talaq* against his wife once if there is no objection from either. A divorce will be pronounced voluntarily by the husband and the judge will order the spouse (wife) to undergo an *'iddah* period for three complete menstrual cycles after the divorce. The husband will also be instructed to pay maintenance during the period in addition to the financial maintenance of their children if any.

Due to the increase in the number of divorce cases over the years, the court is also overwhelmed by other post-divorce claims like child custody disputes (*hadhanah*), maintenance of children, consolatory gift (*mut'ah*), matrimonial property claim (*harta sepencarian*), *nafkah Iddah* and other claims (Mohd Fuad, 2006).

Protecting the children's interest after parties' separation is a must, as children need full attention after the divorce of their parents. The effect of divorce in terms of insecurity to the children's lives and their educational attainment (Jennie E. Brand et al., 2019). Maximizing contacts with the children help the children to become aware that their parents play a meaningful role throughout their development even though both of them are separated. According to Kim Blank and Tara Ney (2006) when parents are divorced; the child is easily exposed to the ongoing battle between his/her parents, which results in him/her suffering with a tendency to developing many psychological and behavioral problems.

Child custody enables the custodial parent(s) to make major decisions like education, religion and decisions on the well-being of the child. The parent who gets the custody of the child will have the care and control of the child involving the child's day-to-day matters since the child is residing with him/her (Zanariah Noor, 2010). As for the other parent, he/she will be granted with reasonable access to the child for a

period agreed by them or by what the Court deems appropriate. Having a mutual and reasonable agreement by both parents in mediation or *sulh* session will safeguard the positive relationship between children and their parents, and also helps in creating a co-parenting arrangement that suit with the needs of each child, instead of leaving it for the judge to decide. Mohd Norman Shah (2008) argued that the custody of a child is neither absolute right of the mother nor the father, but it is under the responsibility of both parents even though they are divorced.

Sulh in child custody disputes in the Shariah Court is now a prominent feature in the judicial landscape. Between 2011 until 2014 it was reported that *sulh* for *Hadanah* constituted the highest number of cases being filed in the MSWP (Asmidah et al, 2015). Starting with informal mediation practiced by the community leader, the practice of *sulh* nowadays is institutionalised, formalised and slowly being accepted by the community as a useful tool for managing family conflicts, especially for child custody disputes. It was reported that between the year 2011 until 2015, out of 294 *hadanah* cases being filed at the Shariah Court of Tawau Sabah, 288 cases were successfully resolved by way of *Sulh* (Tarmizi et al 2018). Another statistic by the Jabatan Kehakiman Syariah Malaysia (JKSM) revealed that between the year 2013 until 2017, 31.66% or 4,826 out of 15,243 of the child custody dispute cases brought to *sulh* process in the Syariah court throughout Malaysia could not proceed due to the failure of one or both parties to attend the *sulh* proceeding (Nora et al 2019).

The success of *sulh* as an alternative mechanism in disputes resolution will only be realized once both parties to the disputes agree to use and abide by the decision reached during the negotiation process in *sulh*. It is something that cannot be forced, even if parties later decide to bring such matter to be decided by the judge at the open court, they are free to do so. Forcing them to settle their disputes by *sulh* process will not lead to an agreeable solution and will cause a delay in solving the disputes (Hammad and Mohamad Azhan, 2016).

There are many advantages in implementing *sulh* in child custody disputes. Mohd Naim (2019) commented that *sulh* allows settlement of the dispute(s) without going through the court process, saves cost and time of the parties, preserves the good relationship between the disputants and families, protects the dignity and privacy of the parties and makes mutual agreement concluded by the parties to be respected and blessed. On the contrary, the trial process does not allow the parents to

"tell their story" and may not be the best way to handle custody and visitation issues.

Peaceful settlement through *sulh* reduces the burden and trauma of the parties, and also it ensures that the disputed case does not last for a long period as it will affect the children too. In the case of *Abdul Rahman bin Shafie vs. Husna binti Senawi dan seorang lagi*⁷ involving a child custody disputes (*hadanah*) of a 5-year-old boy, the Shariah Appeal Court in its judgment stated that the case has been postponed many times due to the absence of the party. Upon the divorce application, the Shariah High Court has granted the custody of the child to the mother—respondent. Later, the mother remarried to another man, and due to this, the Plaintiff-Appellant made an application to the High Court to vary the existing *hadanah* order. The Plaintiff failed in such application and later appealed to the Syariah Appeal Court. The appeal case was postponed many times and had taken about 4 years to be decided due to the non-attendance of the party. Finally, the application was heard by the Shariah Appeal Court on 18 April 1998, when the child was already 9 years old, and during that time he was entitled by the law to give his opinion on the issue of custody.

Although the above case was decided prior to the enforcement of the *sulh*, the case clearly shows that the child custody disputes may take years to be settled, and this certainly affects the parties especially the Appellant (mother) as well as the child. If such case is successfully resolved by *sulh* in an amicable way, definitely it will not last for years and it enables the parties to start a new life as soon as possible.

To strengthen the implementation of *sulh* in child custody disputes, innovation should be made like the introduction of a hybrid system involving mediation and arbitration (med-arb) (Iman Jauhari, 2011). As of this paper is prepared, Syariah Judiciary of Selangor (JAKESS) through its Alternative Disputes Resolution Division has taken a step ahead by looking into the implementation of med-arb in their courts (JAKESS 2020).

***Sulh* in Child Custody Disputes helps in Realizing the Maqasid Shariah**

In determining the rights for *hadanah*, the court is bound to follow Islamic Law and also the legal provisions. The paramount consideration in child custody disputes (*hadanah*) is the welfare of the child (Hi-

⁷ JH Vol XII, (II), p. 23.1

dayati and Najibah, 2016). Protecting the rights of children is also in line with five objectives of the Shariah (*Maqasid Shariah*) (Mohd Nai'm 2020). Under the preservation of religion (*hifz din*), it is the duty of parents to teach Islam to their children. This includes the duties of being a Muslim, the concept of *halal* (permissible) and *haram* (prohibited), also the awareness on the responsibility and accountability that every good or bad deed that they are doing will be accounted for. As for the preservation of life (*hifz nafs*), parents are under the duty to maintain children's growth by encouraging a healthy lifestyle, providing nutritious food and making sure the children live in a clean environment and with adequate immunisation (Abdulraheem and Farah, 2018). The parents should also protect the children against any violence and mistreatment.

To ensure the mind and intellect of the children is guarded, under the preservation of intellect (*hifz 'aql*), a child has the rights to be provided with the opportunities to experience the excitement of exploring, learning new things to develop their intellectual capabilities and to protect the child's mind from anything that can destroy or ruin his/her intellectual capacity. Another *maqasid shariah* that is to be observed is the preservation of lineage (*hifz nasab*). Every child is entitled to the right of paternity (*nasab*) in order to establish his/her legal rights and status of legitimacy. Lastly, the preservation of property (*hifz mal*) (Muhammad Alhaji & Alhaji Umar 2015). The guardian has to protect the property of the child. The father has a duty and responsibility in providing maintenance or *nafaqah* to his children. The child has the right to financially support and sustain their physical needs. They should not be left to live in hardship (Muhamad Isna, 2017).

In the implementation of *Majlis Sulh*, the *Sulh* officer has an important role in ensuring that the welfare of the child is well served in line with the preservation of the five *objectives of the Shariah* as outlined above.

Introducing Special Court for Hadanah to the Shariah Court of Federal Territories (MSWP)

Recent innovation made by the MSWP of Kuala Lumpur is the introduction of the Special Court for Hadhanah and Maintenance.⁸ Such

⁸ Based on the interview conducted with Tuan Muhammad Khairul Nizzam bin Kassim, Chief Registrar of the Syariah Court of Federal Territories (MSWP), both *hadhanah* and maintenance cases are selected as they are among the highest cases being registered and

initiative is done in response to the complaints regarding the need to expedite the resolution of the said cases and also as one of the efforts to empower the Shariah Court. Together with the introduction of these special courts, a progressive step taken by MSWP is the introduction of a new division for the enforcement and execution of the court order. The idea once started during the previous government (Barisan Nasional) in April 2018⁹ and it was later welcomed and supported by the Pakatan Harapan (PH) government in May 2019.¹⁰

Since the initiatives do not involve any amendment of the law and only can be implemented administratively, it has been endorsed by the Cabinet Ministers Meeting on 8th May 2019 (MSWP 2020). In addition to the approval of the establishment of the special courts and the new division for execution and enforcement, the meeting also approved 32 new positions involving officers and support staff as well as a total of RM 3,060,412.00 budget for emolument, renovation and logistics equipment. With the government-approved budget, these special courts will be equipped with a digital recording system called Court Recording and Transcribing System (CRT). There will be no additional courtroom or building to be built, as there are existing courtrooms that are still unoccupied since the new MSWP Complex in Jalan Duta was built.¹¹

There are two committees established in the implementation of this new initiative. Among the efforts made is by having a working visit to the Family Court of Australia (FCA) to understand the family law pro-

these cases have often become the concern and focus of the public. The interview session was held on 7th February 2020 at the MSWP, Jalan Duta, Kuala Lumpur.

⁹ “Majlis Pengisytiharan Penubuhan Mahkamah Khas Perkahwinan, Hadhanah Dan Nafkah Di Mahkamah Syariah Wilayah Persekutuan,” accessed February 14, 2020, <http://www.mswp.gov.my/index.php/ms/berita-semasa/232-tahun-2018/619-majlis-pengisytiharan-penubuhan-mahkamah-khas>; “Mahkamah Khas Perkahwinan, Hadhanah Dan Nafkah Mula Operasi | Astro Awani,” accessed February 12, 2020, <http://www.astroawani.com/berita-malaysia/mahkamah-khas-perkahwinan-hadhanah-dan-nafkah-mula-operasi-172083>.

¹⁰ “Kes Hadhanah, Nafkah Selesai 6 Bulan | Harian Metro,” accessed February 12, 2020, <https://www.hmetro.com.my/mutakhir/2019/09/495293/kes-hadhanah-nafkah-selesai-6-bulan>.

¹¹ “MSWP Kuala Lumpur,” accessed February 14, 2020, <http://www.mswp.gov.my/index.php/ms/mengenai-mswp/pengenalan/sejarah-penubuhan/sejarah-penubuhan-mswpkl>.

cess, learn about the child support system and find the best practices in dealing with family cases.¹²

Through the implementation of the new program, there will be two (2) High Court (*Hadhanah* and Maintenance Division),¹³ two (2) Lower Court (Maintenance Division)¹⁴ and one (1) Enforcement and Execution Division established at the MSWP Kuala Lumpur. It is targeted that the special courts will be able to speed up settlement of cases to six (6) months as compared to fourteen (14) months previously. As of February 2020, one of the Shariah Lower Court specializing in maintenance has commenced its operation since 1st September 2019, while the remaining three courts will commence their operation any time soon once the issue of human resource is filled up by the Malaysian Public Service Department (JPA).

Parties involved in the *hadanah* disputes will firstly, after registration of their case go through *Majlis Sulh* as one of the processes prescribed by the Syariah Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004 and the Practice Direction No. 1 Year 2010 of the Syariah Court. In line with the target of MSWP to resolve *Hadhanah*'s cases through this special court within 6 months from the date it was registered, the implementation of *sulh* also will be affected. Under rule 3 of the Syariah Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004, it allows *Majlis Sulh* to be completed within three months (90 days). However, with the implementation of the new system, *Majlis Sulh* must be completed within 45 days from the registration date if such cases are categorized as cases within the jurisdiction of the court. For cases involving one party from outside the jurisdiction of the court, *Majlis Sulh* must be completed within 60 days (Syariah Court of Federal Territories, 2020). If there is no mutual agreement reached by both parties toward the settlement, the case will then proceed to trial before the judge. This is a challenge faced by the *Sulh* Unit at the MSWP and since the new idea is yet to be enforced, we cannot see the real outcome, whether such new policy is effective or not. If the implementation is successful, it is suggested that the idea should be followed by the other States to empower the Shariah Courts in Malaysia.

¹² "Australia Ucap Tahniah Malaysia Ada Mahkamah Khas Hadhanah, Nafkah - Alhijrah Online," accessed February 11, 2020, <https://alhijrahnews.com/delegasi-mswp-jksm-fahami-pelajari-undang-undang-keluarga-di-australia/>.

¹³ To be filed by the High Court Judge of LS 54 grade.

¹⁴ To be filed by the Lower Court Judge of LS 48 grade.

Conclusion

It can be summarized that the practice of *sulh* in the child custody disputes (*hadanah*) at the Shariah Court is in line with the Islamic Law and the law being enforced. Peaceful settlement outside the court in child custody disputes is more effective and efficient, without affecting the psychology of the children. In *sulh*, the welfare of the child is of paramount consideration as compared to the wishes of the parents. To ensure the children enjoy their rights without discrimination, the government plays an important role. By introducing *sulh*, many have benefited. The practice of *sulh* in child custody disputes is not only in line with the Islamic Law but also plays a vital role in protecting the children's rights as outlined by the *Maqasid Shariah*. It is also hoped that many innovations will be introduced into the administration of *sulh* particularly in child custody disputes in the future for the sake of providing convenience to the people.

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