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**"MAMA PAPA PLEASE HEAR ME": THE PARTICIPATION OF CHILDREN IN CHILD CUSTODY MEDIATION IN THE SYARIAH COURTS OF MALAYSIA**

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**ABSTRACT**

The laws in Malaysia uphold the rights of children to participate in family law proceedings, particularly in custody disputes. However, with regard to the practice of mediation (*sulh*) in child custody disputes, the specific legislation that highlights measures to obtain the views of children is still vague. This paper will discuss the practice of children's participation during mediation (*sulh*) in child custody disputes. The study reported in this paper has also highlighted the challenges and the adequacy of legal provisions on the practice of children's participation during mediation (*sulh*). The present qualitative study has adopted a library-based research method to collect information, data, and theories from selected materials, including journal articles, textbooks, statutes, and interview methods. It also discussed how children were engaged in court-directed mediation proceedings in the Syariah Court of Malaysia. It has also examined the practice of the Syariah court in accepting the voice of children in mediation regarding decision-

making in child custody dispute cases. The examination focused on the relevant legislations and policies relating to children participating in mediation in the context of international legal provisions and Syariah laws. The paper further discussed the analysis of whether the rules and procedures in Malaysia are adequate to sustain children's participation during mediation. The data were also gathered from interviews conducted with mediators or *sulh* officers. Finally, the study revealed that interviewing children during *sulh* sessions at the Syariah Court is common even though there are no clear regulations on the practice. It is suggested that a broader interpretation of the current legislation on the voice of children enables the legality of the practice of accepting children's voices during the Majlis Sulh. Furthermore, it is recommended that a proper standard operating procedure (SOP) for obtaining children's views during the mediation (*sulh*) process is also needed.

**Keywords:** Sulh, mediation, Syariah court, children participation, child custody dispute.

## INTRODUCTION

Mediation is widely accepted as one of the most efficient means of reaching dispute agreements, seen in the legal and social sectors (Tabernacka, 2021). It is becoming a more popular alternative to litigation in family law, especially in child custody cases (Abbruzzese, 2019). According to Tabernacka (2021), mediation should be used to ensure children's rights throughout the judicial proceedings (Tabernacka, 2021). Mediation is often seen as a dispute resolution that achieves long-term results as quickly as possible. Family disagreements or other conflicts involving children should be resolved as soon as possible to avoid long-term effects on the psychology of the children (Tabernacka, 2021).

Participation of children has a beneficial effect on parents' attitudes toward the court system. Letting the child have a say in the decision-making process results in better decisions regarding the child's needs and thus, a more favorable effect on the child's communicative, emotional, intellectual, and social development (Heimer et al., 2018).

Since 2010, the Council of Europe (*Children's Rights*, n.d.), an organization dedicated to human rights, democracy, and the rule of law within its 47 member states, has approved the Child-Friendly

Court Guidelines as a legal and political foundation for children's rights in criminal, civil, and administrative justice systems (*Child-Friendly Justice*, n.d.). Child-friendly justice attempts to improve the focus of justice systems on children's rights, interests, and participation in official and informal decision-making processes affecting them (Liefwaard, 2015). Regulations 14 and 15 of the First Part of the Guidelines underline the importance of proper interdisciplinary training for professionals who deal with children of various ages and procedures tailored to them (Europe, 2011). Professionals who work with children should be skilled in communicating with them at all ages and stages of development, and also those in vulnerable situations.<sup>1</sup>

In the Islamic legal system, Islam encourages parties in disputes to settle their conflicts by way of *sulh* because of its ability to resolve the dispute without negatively affecting the existing relationship among parties. It is evident in verses of the Al Qur'an<sup>2</sup> and the prophetic traditions, as well as *Ijma'* (unanimous opinion of Muslim jurists) (Hammad Mohamad Dahalan & Mohamad Azhan Yahaya, 2016).

Due to a backlog of cases in the Malaysian Syariah Court, the Malaysian government in 2002 made a progressive initiative of introducing mediation (*sulh*) throughout Malaysia to provide amicable, speedy, and inexpensive settlements for the disputing parties without having to resort to litigation (Jabatan Kehakiman Syariah Malaysia, 2013). Section 99 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 provides that the parties to the dispute at any proceeding stage may hold *sulh* (mediation) to settle their dispute. The *sulh* council or Majlis Sulh will be led by a *sulh* officer whereby the parties will discuss and decide their dispute amicably. The *sulh* officer does not have the authority to decide on the case. If the parties cannot reach a mutual agreement, the case will be brought to the court for trial.<sup>3</sup>

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<sup>1</sup> Guideline 15 of the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice

<sup>2</sup> Verse 128 *Surah An-Nisa (Women)*. The Quran encourages parties to use *sulh* in order to resolve their disputes: 'reconciliation between them, and reconciliation is better' and Verse 9 in *Surah AlHujurat (The Chambers)* which states 'If two parties among the Believers fall into a quarrel, make ye peace between them . . . make peace between them with justice, and be fair: For God loves those who are fair and just.' Also verse 114 *Surah An-Nisa (Women)*.

<sup>3</sup> Ramizah Wan Muhammad, "Sulh (Mediation) in the Malaysian Syariah Courts," in *Mediation in Malaysia: The Law and Practice*, pg 424; see also the Official Website of Federal Territory Syariah Court available at <http://www.mswp.gov.my/index.php/en/warga-mswp-3/aplikasi-online/helpdesk-e-syariah/124-about-mswp/division-unit/223-sulh-section>



The proficiency of the *sulh* officer, who runs the Majlis Sulh following its established procedures, is crucial to the outcome of cases in the Syariah Court (Wan Azimin et al., 2022).

With regard to the practice of interviewing the children in deciding the custody disputes, the judge may call the child who has reached the age of discernment (*mumaiyiz*) to give input on child custody disputes (*hadhanah*) under section 84 (2) of the Islamic Family Law (Federal Territory) Act 1984 (IFLA). However, whether such a provision can be regarded as a source of law in allowing child participation in the mediation (*sulh*) process is unclear. Moreover, although taking children's voices during *sulh* sessions is already being practiced, no specific regulation provides measures to obtain children's views during the mediation (*sulh*) process. The study reported in this paper sought to study the practice of taking the views of children during the mediation (*sulh*) process, its challenges and shortcomings, and the adequacy of the relevant regulations. It has further suggested the improvement needed to ensure that the practice of taking children's input during mediation sessions is organized, structured, and followed the stated rules and regulations.

## LITERATURE REVIEW

### Islamic Law on Voices of Children in Child Custody (*Hadhanah*)

Under Islamic Law, according to one hadith narrated by Abu Hurairah r.a., the Prophet states that:

*“A woman came to the Prophet s.a.w and said, “My husband wants to take away my son, although he (the son) gives me comfort and brings me drinking water from the well of Abu Inabah.” Thereupon, the husband appeared, denying her claim over his son. The Prophet s.a.w then said: “Child! Here is your father, and here is your mother; make a choice between the two whomsoever you want.” The son caught hold of the hand of his mother, and she went away with her son”.* (Sunan Abu Dawud)

According to this hadith, when a child reaches a certain age, they can make their own choices and decisions. The *mumayyiz* child was granted the right to select with whom he or she preferred to live, either



the mother or father. The chosen party is considered close to the child, kind and caring, and acts in the child's best interests (Azzis & Azhar, 2018).

However, not all of a child's wishes are accepted in determining custody rights. An exciting story has been recorded in *Nail al Autar*, a hadith book by Imam Mohammad ibn Ali Shaukani, highlighting that the child's welfare precedes their wishes (Shaukani, 1981). In this case, both parents contested the issue of child custody. The court granted the child the right to choose his or her custodian. The child had decided on the father's custody. The mother requested that the court question the child as to why he favored the father in this case. According to the boy, his mother forced him to attend school, where the teacher punished him daily, but his father allowed him to play with the other children and do whatever he wanted. After hearing the arguments, the court awarded custody to the mother. Wishes of minors have always been subjected to the consideration of their welfare while deciding their custody, even in the classical Muslim legal system.

It is mentioned in *Nail al Authar* that "It is essential to look into the interest of the children before they are given the option to choose between the parents for their custody. If it becomes clear that they would be more beneficial to the children from the point of view of their education and training, then there is no need for the children's choice."

*Hadhanah*, in Islamic Law, mainly refers to the right of custody in cases where the kid has not yet reached the age of discernment, i.e., is not *mumayyiz*. Upon reaching the age of discernment (*mumayyiz*), the *hadhanah* period ends. *Mumayyiz* children have the right to give their views on custody issues. *Hadhanah* is the act of nurturing and taking care of children at an age when they require supervision and support from their guardian or custodian to manage themselves and who are still incapable of distinguishing between good and wrong. Custody rights for *mumayyiz* children, is referred to as *kafalah*, according to Al Mawardi. The *mumayyiz* child has the right to choose whom to live with when the parent divorces, according to Mazhab Shafie and Hanbali, because of their ability as a growing kid to think and decide based on their needs and desires for affection and warmth. On the other hand, Hanafis and Malikis oppose this idea, believing that the father should have custody of the *mumayyiz* child based on education for the male child and marriage for the female child (Roslina Che Soh @ Yusoff, 2014).

## **The International Legal Provision on Taking the Views of Children**

The right of children to express their opinions on all matters affecting their lives is considered critical to their welfare (Soh, 2014). In developed countries like America, Australia, Canada, and the UK, children's opinions on their care when their parents have decided to divorce are highly valued to protect their interests and well-being (Quennerstedt et al., 2018). Specific regulations and policies are enacted addressing the execution of taking the children's opinions, emphasizing techniques of obtaining their views, and managing their emotional stability (Fernando, 2009). The paramount consideration in deciding on child custody disputes is looking at the child's best interest. Although the term "best interests of the child" is not defined in the United Nations Convention on the Rights of the Child ("UNCRC"), it should be at the heart of any decision regarding a child (Cilečková et al., 2021). In light of Article 12 of the UNCRC and the UN Committee on the Rights of the Child's Commentary No. 14 (2013), the child's view is essential in deciding what is in the child's best interests (Ross, 2013).

Article 12 (1) UNCRC clearly stated that:

*"... child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child. ... opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative...".*

The above international provision can be summarised into the following four main ideas: (a) the degree of significance of having the opinion and views of children in matters related to them; (b) the condition to allow the views of the child to be heard; (c) age and maturity are crucial to be taken into account and; (d) methods of allowing the views of children (Roslina Che Soh @ Yusoff, 2014).

## **The Good Things About Taking Children's Views**

When the husband or wife files for divorce, it is a painful process for most children because it can harm their sense of trust and security, their



relationships with others, and affect their living standards (Paquin, 1987). Participation of children in mediation and respect for their views benefits all parties involved in the family breakup (McIntosh et al., 2008). Parents and children agreed they were happier with their care and contact arrangements and less inclined to change them after attending mediation. Children's participation in mediation improved family interaction patterns between parents (McIntosh et al., 2008).

The child expressing their expectations about the family structure after the parents' divorce helps the family avoid a situation where the parent who wants to keep caring for the child is attacked by the other parent (Tabernacka, 2021). Additionally, parents will be aware that they should behave in the child's best interests (Tabernacka, 2021). Family mediation should create conditions for a child's well-being through negotiating daycare and parental contact. If children and their affairs are "controlled" authoritatively, it will be impossible to provide them with optimal living conditions tailored to their requirements and the family's capacities (Tabernacka, 2021). Family ties can only be restored in non-violent ways in post-conflict situations if the child is included in the decision-making process through mediation (Tabernacka, 2021).

There is limited study on 'how' the child's view is weighted in decision-making processes within the child welfare context in general and when regulating visiting rights when a care order is imposed in particular. Previous research mainly focused on 'if' or 'when' a child's input is considered (Gerds-Andresen & Hansen, 2021).

According to Deidra (2018), children should be allowed to participate in divorce mediation sessions through discussions with the mediator and their parents (Howard, 2018). In addition, child engagement in parenting plans should be promoted by allowing the child to approve the final custody and visitation plan, or by physically collaborating with the parents to build a plan that works for both the parents and the child, as both parties are impacted (Howard, 2018).

In Australia, the child's best interests are the paramount consideration in deciding the child's living arrangements after the parents' breakup. The children's views are one of the many factors the court must examine.<sup>4</sup> As a signatory to the United Nations Convention on the

<sup>4</sup> See ss 60CC(2) and 60CC(3), Family Law Act 1975 (FLA) of Australia

Rights of the Child (UNCRC)<sup>5</sup>, Australia recognizes that children have the right to voice their opinions and have the opportunity to be heard in any procedures that may have an impact on their lives.<sup>6</sup>

To protect children's rights to express themselves in the circumstances involving them, Australia has reformed its family law by establishing three ways in which children can express themselves (Fernando, 2009). Firstly, according to s. 62G (2) of the Family Law Act 1975 (FLA), the court may consider the report written on a meeting with a child before the court session begins. Secondly, lawyers can represent and speak for the children.<sup>7</sup> Thirdly, qualifying children as permitted to testify in court in the presence of a child counselor.<sup>8</sup> Besides these three methods, encouraging children to express their ideas is not permissible.<sup>9</sup>

### **Reasons Why Children's Voices Are Not a Priority**

Skivenes (2018) and McEwan-Strand and Skivenes (2020) identify and elaborate on the five reasons why decision-makers do not sufficiently engage children in decision-making processes (McEwan-Strand & Skivenes, 2020; Skivenes, 2018). The first barrier highlights the dilemma of protecting the child from potential harm while not burdening or putting the child in a situation where there is a conflict of loyalty. The second cause is a lack of confidence in children's reasoning ability. Whether a child possesses the ability and maturity necessary to express an opinion critical to their growth is an issue.

Another factor impeding children's engagement is the decision-maker's belief that the child's participation, or the weighting of the child's viewpoint, has no bearing on the final decision. The fourth obstacle focuses on the issue of incompetence, insecurity, and a lack of training for decision-makers regarding how to engage and communicate with children about tough and sensitive matters. Finally, the fifth obstacle raises the question of whether sufficient organizational structures or bureaucratic case management norms are in place to include children in the decision-making (McEwan-Strand & Skivenes, 2020; Skivenes, 2018).

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<sup>5</sup> Adopted by the United Nations in 1989, ratified by Australia in 1990

<sup>6</sup> UNCRC, Art 12.

<sup>7</sup> FLA of Australia s 68L

<sup>8</sup> FLA of Australia s 60CD (2).

<sup>9</sup> FLA of Australia s 60CE



## Voice of Children in the Malaysian Syariah Court

Under Section 84 (1) of the Islamic Family Law (Federal Territory) Act 1984 (IFLA), it is stated that,

*“The right of the hadinah to the custody of a child terminates upon the child attaining the age of seven years, in the case of a male, and the age of nine years, in the case of a female, but the Court may, upon application of the hadinah, allow her to retain the custody of the child until the attainment of the age of nine years, in the case of a male, and the age of eleven years, in the case of a female.”*

The age at which a child can have the right to choose varies by gender under this provision (Azzis & Azhar, 2018). The provision continues under subsection 2 that:

*“After termination of the right of the hadinah, the custody devolves upon the father; and if the child has reached the age of discernment (mumaiyiz), he or she shall have the choice of living with either of the parents, unless the Court otherwise orders.”*

Subsection 2 provides that children who attain the age of *mumayyiz* are presumed to have the right to express themselves. When deciding on child custody (*hadhanah*), the court might consult the child on custody and living arrangements. The choices made are not permanent. They can be switched based on the child’s preference until the child reaches the age of 18 (Tajuddin, 2021). The judge will get input from the child either in the judge’s chambers<sup>10</sup> or in an open court<sup>11</sup>. The following are among the information that will be acquired and discussed by the court while interviewing the child (Tajuddin, 2021):

- 1) With whom the child currently resides.
- 2) Children were asked to choose whom they wanted to stay with.

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<sup>10</sup> YA Tuan Kamal Bashah Ahmad Tajuddin, when delivering online lecture on “Apakah Pertimbangan Mahkamah di dalam membuat Keputusan Hadhanah dan Hak Penjagaan Anak?”, 9<sup>th</sup> September 2021, organized by Pejabat Pembangunan Wanita Wilayah Persekutuan and Jabatan Kehakiman Syariah Malaysia.

<sup>11</sup> Based on the online interview session conducted with YA Tuan Mohd Yunus Bin Mohamad Zin on 10<sup>th</sup> May 2021.

- 3) The reasons and factors that led to the decision.
- 4) Determine whether the child's choice and desire are his own or the result of any party's coercion.
- 5) The child's perspective/reactions if custody is granted to someone other than his preferred party.
- 6) The child's relationship with a non-chosen party.
- 7) Determine whether the child's choices and desires are consistent with and accomplish the goals of their *maslahah* and welfare. This information is usually gathered during the trial.
- 8) The child's perspective on the living conditions of the party of his choice. As well as non-chosen parties' residence differences.
- 9) Activities that the child typically do when living with the party of his choice.
- 10) Determine whether other factors influence the child's views. For instance, friend factors, entertainment, and other comforts of life affect his well-being.
- 11) School, religious classes, prayer, and fasting.
- 12) The children's views and wishes on the visitation right and stay overnight with non-custodial parents.
- 13) How the visitation right is to be exercised in terms of frequency, duration, pick up, and sending over methods.
- 14) Advise the child appropriately regarding their role, responsibilities, and relationship with the parents.

Shanizah et al. (2021) argued that the provision of Section 84 (2) of IFLA is general (Ngatiman et al., 2021). There are no provisions stating what the court should consider, how the child's opinion should be obtained, whether the child's counselor should accompany the child to court, or whether certain aspects, such as sensitive questions and the state of the child's emotional stability while answering should be considered by the judges, or the extent to which the child's voice should be considered (Ngatiman et al., 2021). According to Roslina (2021), the position of children's voices in court procedures involving *hadhanah* disputes following parental divorce is an important issue that must be addressed (Soh@Yusoff, 2021).

The study by Shanizah et al. (2021) on the cases conducted at the Selangor Syariah High Court indicated that most judges consult the child before deciding *hadhanah* disputes (Ngatiman et al., 2021).



The study also found that the Syarie High Court Judge takes three approaches to children's participation in *hadhanah* proceedings (Ngatiman et al., 2021). Children are called, their views are gathered, and their choices are accepted. Second, children are given the opportunity to attend court and given the right to speak, but their opinions or preferences are rejected. Third, children are not called even if they are *mumayyiz*. Shanizah et al. (2021) observed that only one (1) file out of 40 contained a Judge commenting on the child's psychological and emotional state when listening to their views (Ngatiman et al., 2021). Another issue noted by Shanizah et al. (2021) is the lack of a clear guideline or manual that guides the judge on specific methods for obtaining a child's opinion (Ngatiman et al., 2021). The engagement of counselors or welfare workers from the Social Welfare Department (JKM) is also crucial in conducting a psychological examination of children called to court (Ngatiman et al., 2021).

Nadia and Alias (2018), in their study of cases deliberated at the Syariah High Court of Kedah, also examined the involvement of children in *hadhanah* cases before the Syarie High Court Judge and the decisions on these *hadhanah* cases (Azzis & Azhar, 2018). Even though the child was called to the court to express their opinions, there is no clear guideline for the age at which the child should be brought before the judge to participate in the proceedings. As for the *sulh* session, the study found that children were not called to participate in the session. Only parents attend and negotiate the disputes.

Even though allowing for children's voices is generally practiced in the Malaysian Syariah Court, the respective states in the country have their different respective practices regarding children's participation in a *hadhanah* case. For instance, the study conducted by Nor'asyikin and Raihanah (2018) of the Syariah Court of Federal Territories of Kuala Lumpur found that only a small number of Malaysian children of discerning age (*mumayyiz*) were being called to have their voices heard in front of the Syarie High Court Judge when determining child custody disputes (*hadhanah*) cases (Nor'asyikin Hamzah & Abdullah, 2018).

According to Nor Fadzlina and Nurhidayah (2010), interviewing a child helps determine custody, but judges must have the necessary skills and training to interview children (Nawi & Hashim, 2010). Getting the views of children is beneficial because they provide

valuable information for a custody determination (Kuehnle et al., 2004). However, child interviews are complex and demand a high level expertise (Kuehnle et al., 2004). Only expert interviewers of children will have a thorough awareness of children's talents, limitations, and memory processes, as well as the impact of development on each child's distinctive characteristics (Kuehnle et al., 2004).

Although children are called on to provide their input, the court cannot accept all of a child's wishes and choices (Tajuddin, 2021). The final decision on the determination of *hadhanah* rights is at the discretion of the court, which will assess and consider the facts of the case and what is best for the child by holding to the principle of child welfare as the primary consideration. Apart from that, consideration is given to the wishes or desires of both parents and the children's will if they have reached the discernment age that allows them to give their own opinion (Tajuddin, 2021). Judge Bashah K. of the Syariah High Court of Negeri Sembilan (2021) pointed out that children of divorced parents, compared with regular children, have a different level of maturity when asked for an opinion (Tajuddin, 2021). This is because their maturity and opinions exceed their actual age (Tajuddin, 2021).

In a situation where the child is called before a judge to provide input, but the child had no issue with living with whom, the *maslahah* and welfare of the child will be given priority by the court. This is explained in the case of *Noornita Kamaruddin v. Faeiz Yeop* [2007] 4 SHLR 97. The judgment mentioned, "*We have interviewed the child himself in the judge's chambers and found that the child is brilliant. And from our interview, it was clear to us that the son was really in love with both his parents and, if possible, he wanted to live with both of them. He refused to make a choice between the two of them. thus, it is up to the Appeals Committee here to make this difficult decision.*"

Since the child, in giving his views, did not make any choice, it is up to the Appeals Panel to make a fair decision. The court's primary consideration is the *maslahah* and welfare of the child. This can be seen when the Appeal Panel considers how long the child has lived with the Respondent before hearing the appeal. The four-year period is long, and the court believes that the child is already comfortable and affectionate with the Respondent and his new family during that period. Therefore, the Appeal Panel considered that his *maslahah* and welfare would be affected, especially in his learning, if the court had to change the child custody to the Appellant.



## Legal Issues Concerning the Voice of the Child During a *Sulh* Session

A few legal issues will be addressed in this study. Firstly, what law allows children to participate in *sulh* sessions? The legality of the practice of allowing children's participation is vested under Section 84 (2) of the Islamic Family Law (Federal Territory) Act 1984 (IFLA), which states:

*“After termination of the right of the hadinah, the custody devolves upon the father, and if the child has reached the age of discernment (mumaiyiz), he or she shall have the choice of living with either of the parents, unless the Court otherwise orders.”*

Under Section 86 (2) of the IFLA, the wishes of the parents and the child would be taken into account by the court in deciding the custody of a child.

- (1) ...
- (2) *In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and, subject to that consideration, the court shall have regard to –*
  - (a) *the wishes of the parents of the child; and*
  - (b) *the wishes of the child, where he or she is of an age to express an independent opinion.*

Secondly, is the *Majlis Sulh* considered within the court process as the basis of allowing children's voice under Section 84 (2) of the IFLA? As highlighted above, some judges believe that taking a child's voice is solely within their power. Is that view accurate? Based on the practice of *sulh* at the Syariah Court, the authors believe that the *Majlis Sulh* is within the court system. Based on the generality of the provision in section 84 (2), such power to take children's voices is not only vested in judges, but might also be extended to other officers, especially those dealing with the subject matter of the children.

*Sulh* that is practiced in the Syariah Court is court-directed or court-mandated. It is conducted inside the court building using all the court facilities. The *sulh* officers are the Federal or State appointed Syariah officers. In addition, even in the Syariah Court Civil Procedure (*Sulh*)

Rules, the *sulh* officer is appointed by the Chief Syariah Judge. For example, rule 2 of the Syariah Court Civil Procedure (*Sulh*) (State of Penang) Rules 2021 mentioned that “*Sulh Officer*” means any Registrar or Syariah Officer appointed by the Chief Syariah Judge as a *Sulh Officer* to preside the *Majlis Sulh*.

Furthermore, Section 99 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 states that:

*“The parties to any proceedings may, at any stage of the proceedings, hold sulh to settle their dispute in accordance with such rules as may be prescribed or, in the absence of such rules, in accordance with Islamic Law.”*

In practice, the *Majlis Sulh* will not commence without any filing being registered by the parties. It is argued that the practice of *sulh* in the Syariah Court is within the court process. Thus, the relevancy of taking children’s voices, which is vested under Section 84 (2) of the IFLA should also be construed in its broader meaning to include children’s voices during the *Majlis Sulh*. However, as the judge and *sulh* officer is under the same roof of the court system, it is good that proper engagement and understanding be made between these officers on the issue of allowing the *sulh* officer to take into consideration a child’s views. After all, an amicable settlement achieved in the *Majlis Sulh* will not be enforced except with the judge’s endorsement as a court order. This is highlighted in the Syariah Court Practice Direction No.4 Year 2006, which states:

*“... Any sulh consent agreement cannot be executed or enforced without first obtaining a Court order.”*

The third issue is whether children can be invited to the *sulh* session, even though they are not a party to the disputes. Even though in normal circumstances, only parties to the disputes can attend the *Majlis Sulh*, i.e., the mother and father of the child, there can be an exception. Whenever the *sulh* officer thinks that the other party’s presence is helpful as it is crucial in ending the disputes amicably, he can allow this. This is clearly stated under the Syariah Court Civil Procedure (*Sulh*) Rules of the States. For example, under rule 9 (2) of the Syariah Court Civil Procedure (*Sulh*) (State of Penang) Rules 2021, it is spelt out as follows:



*Procedure of sulh*

9. (1) *Sulh shall be conducted in a Majlis Sulh attended by parties to the cause of action.*

(2) *Each party shall attend the Majlis Sulh personally without any Syarie Counsel or any other parties unless with the leave of the Sulh Officer.*

Based on Rule 9 (2) above, it is clear that the children can be brought before the *Majlis Sulh* in appropriate circumstances. The *Sulh* officer may grant and allow the presence of other parties, including the children who are the subject matter in *hadhanah* disputes cases.

The fourth legal issue concerning the child's voice in the *Majlis Sulh* is whether the input given by the child is final. It is argued that feedback given by the child is not final but will become a basis for the parents to conclude an amicable settlement. As for the judge, the child's views also help the court endorse the agreement entered into by the parties.

Furthermore, the judge has the power not to accept the child's view if he believes that the child's welfare is at stake. The court could order otherwise as stated under section 84 (2) of the Islamic Family Law (Federal Territory) Act 1984 (IFLA) that has been discussed above.

From the above literature review, it is worth noting that previous studies have focused more on studying the voices of children during the trial. This appears to the practice of all the judges. However, there were few studies which had focused on taking children's inputs and views during mediation or *sulh* sessions, even though such practices did occur at the Syariah Courts. The research gap on this matter makes this study relevant and essential, especially the need to look into the issues that arise in taking children's inputs and views during mediation or *sulh* sessions and then propose solutions and recommendations to address the problems.

## METHODOLOGY

The methodology adopted in this study was library-based research, which was to collect information and data from selected materials, including journal articles, textbooks, and statutes. Apart from that, semi-structured interview methods were also conducted. The researcher has employed open-ended questions to enable flexibility

of answers from the respondents. The interview questions were constructed based on the purpose of this study, which was to analyze whether the current legal framework on children's participation in child custody mediation at the Syariah Court was sufficient; to identify the approach taken by the mediator when the child was brought to the mediation session, and to identify the constraints and problems encountered by the mediators in handling sessions with the children. There were 15 mediators (*sulh* officers) from the Syariah Court of Pahang, Malacca, Selangor, Penang, Perlis, Sarawak, Kedah, and Perak. They were interviewed to get their views on getting input from the child during a *sulh* session involving child custody disputes application.

The researcher took the following steps in order to conduct the interviews. In the beginning, an official letter stating the intention to undertake the study was addressed to the headquarters of the Department of Syariah Judiciary Malaysia, or in Malay the Jabatan Kehakiman Syariah Malaysia (henceforth, JKSM) in Putrajaya. After receiving approval from the JKSM headquarters, the researcher submitted a similar application letter to conduct the present study to the respective Departments of Syariah Judiciary in the other states in Malaysia. As soon as the states gave a positive response, the researcher contacted the respective heads of the state *Sulh* Unit. In analyzing the data collected from the semi-structured interviews, the researcher used a Qualitative Data Analysis (QDA) Software, namely the ATLAS.ti. Thematic analysis was used to analyze the data collected in codes and categories.

This study employed a triangulation technique in which the researcher gathered and analyzed data from multiple sources to address all the research questions of the present study. The researcher gathered and analyzed data from two main sources: semi-structured interviews and document analysis. Those two sources of data collection enabled the process of triangulation, which enhanced the study's reliability and validity. In addition, it has helped the researcher to gain support for the findings of this study.

## FINDINGS AND DISCUSSION

Based on the interview with the mediators, the study has revealed that bringing children to the *sulh* session is not new, and it also depended



on the *sulh* officer who was conducting the session. Some states like Pahang,<sup>12</sup> Malacca,<sup>13</sup> Selangor,<sup>14</sup> and Penang<sup>15</sup> allow the child who has attained the discernment age (*mumayyiz*)<sup>16</sup> to be brought before the *sulh* session upon the request and permission of both parents. However, in the States of Perlis<sup>17</sup> and Sarawak<sup>18</sup>, taking the children's views during their custody and visitation arrangements are not practiced. As for the state of Kedah, previously, the *sulh* officer was allowed by the Syarie High Court Judge to get input from the children in the *sulh* session,<sup>19</sup> but this is not being practiced anymore.<sup>20</sup> There is also inconsistency in allowing children's voices in *sulh* sessions in the State of Perak. Some officers do allow children to participate in giving views in the *Majlis Sulh*,<sup>21</sup> while some said that they were not allowed to do that as no permission was granted by the Syarie High Court Judge.<sup>22</sup>

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<sup>12</sup> Interview with Puan Halipah Binti Abdul Manaf, *sulh* officer at the Jabatan Kehakiman Syariah Pahang on 19 July 2021

<sup>13</sup> Interview with Puan Norazita Binti Mohd Ali, senior *sulh* officer at the Mahkamah Syariah Melaka on 27 July 2021

<sup>14</sup> Interview with Puan Noralwani Binti Waimin, *sulh* officer at the Jabatan Kehakiman Syariah Selangor on 27 July 2021

<sup>15</sup> Interview with Puan Nurulhuda Bt Dzulkifli, *sulh* officer at the Jabatan Kehakiman Syariah Pulau Pinang on 18 November 2020; Interview with Tuan Mohamad Khateb Bin Harun, *sulh* officer at the Jabatan Kehakiman Syariah Pulau Pinang on 16 November 2020; Interview with Tuan Abdul Rahman Bin Abdullah, *sulh* officer at the Jabatan Kehakiman Syariah Pulau Pinang on 23 November 2020; Interview with Tuan Muhammad Fadlan Bin Othman, *sulh* officer at the Jabatan Kehakiman Syariah Pulau Pinang on 1 December 2020

<sup>16</sup> All *sulh* officers interviewed agreed that the *mumayyiz* age of children is 7 years for males and 9 years for females, in accordance with the provisions of the Islamic Family Law Enactment of the States

<sup>17</sup> Interview with Tuan Muhamad Shahril Bin Hussain, senior *sulh* officer at the Jabatan Kehakiman Syariah Perlis on 17 August 2020

<sup>18</sup> Interview with Tuan Haji Najarudin Bin Haji Nedri, senior *sulh* officer at the Jabatan Kehakiman Syariah Sarawak on 29 September 2021

<sup>19</sup> Interview with Syeikh Faizal Bin Mohd Mahayadin, court registrar and former *sulh* officer at the Jabatan Kehakiman Syariah Negeri Kedah on 19 August 2020

<sup>20</sup> Interview with Puan Nurul Yaqen Binti Salleh, *sulh* officer at the Jabatan Kehakiman Syariah Negeri Kedah on 23 August 2020

<sup>21</sup> Interview with Puan Nor Atikah Badri, *sulh* officer at the Jabatan Kehakiman Syariah Perak on 3 December 2020; Interview with Tuan Ahmad Azaruddin bin Yamin, *sulh* officer at the Jabatan Kehakiman Syariah Perak on 19 November 2020

<sup>22</sup> Interview with Tuan Nor Azam Omar, *sulh* officer at the Jabatan Kehakiman Syariah Perak on 18 November 2020; Interview with Tuan Helmi Bin Abdul Kadir, *sulh* officer at the Jabatan Kehakiman Syariah Perak on 29 March 2021

According to Puan Halipah, a *sulh* officer of Pahang, when the child is called, the *sulh* officer may counsel the child that, for their welfare, they should not avoid meeting the mother/father who did not have custody rights.

Syeikh Faizal, a former *sulh* officer in Kedah, had suggested that when a child was brought to the *Majlis Sulh*, the meeting should be conducted calmly and informally. For example, to make the children feel more relaxed and comfortable, the officer will address themselves as “*abang*” or “brother”. He once witnessed a horrifying incident in which the father, unable to accept the child’s desire to live with the mother, scolded the child. Before receiving any input from the children, he held the belief that focusing first on their emotions and readiness was critical. Meeting with the child in a short period has raised the concern about whether the *sulh* officer could clearly understand the child’s situation, as he is not a child expert. Syeikh Faizal had further suggested that the Syariah Court could explore collaborative work with the Social Welfare Department to get a child counselor involved when appropriate. A more conducive, less formal, and child-friendly environment for taking children’s opinions, especially those younger children who had just reached the age of *mumayyiz*, was suggested by Sheikh Faizal. Furthermore, if children are to be invited to a *sulh* session, training for *sulh* officers should be emphasized.

A few *sulh* officers said that taking the view of the child is unsuitable since the mother or father might influence the child. As a result, the views expressed by the child may not be genuine. Some claim the child was not called to the *sulh* session because the judge refused permission, despite the *sulh* officer’s readiness to conduct the *sulh* session. The judge believes he alone has the authority to decide whether or not to call the child.

In summary, the procedure to accept the child’s opinion during the *sulh* session in the Syariah Court is as follows:

- 1) If more than one child is involved, each child will be called to meet the *sulh* officer separately. However, one *sulh* officer responded that he allowed siblings to sit together in the same discussion room to avoid the younger kids feeling frightened to talk with him. Still, each of them will be interviewed separately. While one discusses with the



- officer, the other sibling(s) will be asked to sit at the back or corner of the discussion room.
- 2) Most *sulh* officers take the child's testimony without the presence of both parents. Parents are asked to wait outside the discussion room. Only the *sulh* officer and the assistant were present with the child in the interview room. However, one *sulh* officer mentioned that he was interviewing the child in the presence of the parents.
  - 3) Apart from listening to the child's opinion in the *sulh* room, there are *sulh* officers who hold an interview session with the child in the officer's room.
  - 4) One of the officers mentioned that the child is instructed to meet *sulh* officer outside of school hours, not to interrupt the learning session, and to avoid the experience of emotional disturbance resulting from friends finding out that they have been called to attend court.
  - 5) The *sulh* officer will record the terms in the agreement prepared, including "*this consent agreement is made after discussion with the child.*"
  - 6) Some *sulh* officers have taken the initiative to attend a child counseling course so that they become better equipped to interact with the children during *sulh* sessions.
  - 7) Sessions with the child are not made at the regular discussion table in the usual *sulh* session conducted with parents, but on the sofa in a relaxed, friendly atmosphere so that the child is not stressed and feels uncomfortable.
  - 8) In the introduction of the interview session, the *sulh* officer will not ask directly about the child's wish for custody, but will start with general questions about the child's life first, so that the child will feel comfortable and be at ease to engage with the officer. Towards the end of the session, the *sulh* officer will ask about the child's choice. However, sometimes *sulh* officers deviate a bit by asking indirect questions to the child, such as "with whom they are comfortable to stay with?" to get certainty about the child's choice.

All the *sulh* officers interviewed in this study agreed that when the parents themselves decided and permitted the child to attend a *sulh* session, the parents would be more prepared to accept the child's decision without blaming the *sulh* officer. In many instances, with

input from the child, the disputed case will be easier to resolve through a consent agreement.

From the literature review and the findings from the interviews of the present study, it is worth repeating again at this juncture, that the practice of taking into consideration a child's voice during a *sulh* session is not something new. Malaysia already has the proper legislation regarding consideration of the child's voice in the Syariah Court. It just needs to broaden the accepted practice in order to further emphasize the legality of the practice of considering children's voices during the *Majlis Sulh*. By taking the views of children, it is hoped that this will lead to a more harmonious parenting environment, as parents will still be the ones making decisions during the *Majlis Sulh* process (Kadir et al., 2020). As there are inconsistent practices in handling children's views by the *sulh* officers, it is about time for additional rules, manuals, or standards to be drafted. This is because by filling in the details, they can serve as guidance for the *sulh* officers, the support staff, and the judges. Proper training for the *sulh* officer should also not be neglected. Allowing the child's voice in a *sulh* session also aligns with international law approaches.

The present study has also found that child counselors were not involved when children gave opinions, as has been practiced in foreign countries. In addition, only a few studies have been conducted on children's participation during *sulh* sessions. Consequently, more research is needed to ensure that their involvement contributes to the peaceful resolution of child custody disputes, without jeopardizing the welfare of children.

Regarding the category of children called to provide input, this study has come to the conclusion that the current practice aligns with the *Hukum Syarak* and the applicable law. This is because only *mumayyiz* children, i.e., males aged 7 years and above and females aged 9 years and above, have been called to give their views during the *sulh* session.

## CONCLUSION AND RECOMMENDATIONS

Considering the child's point of view during the *sulh* session is a good initiative, especially if calling the child can soothe the parties in dispute and help them to reach an amicable agreement on *hadhanah*.



When the *sulh* officer calls the child, it is suggested that proper notes should be taken on the handling of the process. Notes on the questions asked, the situation and emotions of the child, and their reaction to the issues discussed are essential to give the presiding judge a reasonably high level of confidence in endorsing the agreement reached by the parties in the dispute.

Details on the procedure and SOP for accepting the child's views should be provided. The procedure or SOP should include, among others, an explanation of the agreed upon categories of children who can be considered as acceptable to give views, the age of the child, who can be together in the interview session, the readiness of the parties, handling procedures, appropriate discussion room facilities, dress code of officers when taking the child's testimony, preparation of the report to the judge, and the need to seek the services of a family counselor if any.

Further studies on the effectiveness of the *sulh* session, for example, the judge's acceptance of the child's views documented by *sulh* officers, and what needs to be improved in children's participation during *sulh* sessions must be conducted. Finally, as calling children to attend *sulh* sessions is not widely practiced, it is suggested that *sulh* officers, *sulh* assistants, and judges be given further exposure and training on documenting a child's testimony. This can further support efforts to maintain the welfare of the children and their best interests, and ensure it does not negatively impact the mental and emotional well-being of the children involved in the Syariah judicial process.

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