

**High Rate Divorce among Muslims in Malaysia:
A Study of Legal Reconciliation and Islamic Matrimonial Dispute Remedy**

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Abstract: Islam encourages parties in conflict to resolve their disputes through amicable settlement and it also introduces *Sulh* as an amicable way to settle matrimonial disputes. This paper deals with the dissolution of marriage among the Muslim community in Malaysia by examining solutions to the issue from the Islamic perspective. By this, the paper mainly adopts the qualitative method to study the ways and manner of dissolution of marriage among Malaysian Muslims. The study is primarily based on the library resources where the data are collected from classical and contemporary works and treatises on the subject matter. The paper concludes that there is a need for reevaluating the process of *Ṣulḥ* in the *Shariah* Courts in settling the dispute between two parties (husband and wife) as it should be seen not only as a mode of facilitating the resolution of dissolution of marriage but also to be known as a mechanism for keeping them together. And by this, the paper proposes a new framework for dispute resolution in the dissolution of marriage based on the hybrid processes (Med-Arb), of alternative dispute resolution (ADR).

Keywords: High Rate Divorce, Dispute Settlement, Dispute Resolution, *Ṣulḥ*

INTRODUCTION

One of the indisputable and acknowledged commandments of Islam is marriage - the sacred union that takes place only between a man and a woman. In relation to this revered bond, there are many verses of the *Qur'an* and numerous traditions of the Prophet that encourage marriage. In *Qur'an* 30 *ar-Rum* verse 21, God tells us that: ***“And one of His signs is that He has created for you, spouses from amongst yourselves so that you might take comfort in them and He has placed between you, love and mercy. In this, there is surely evidence (of the truth) for the people who carefully think”***. In this verse, we see that Allah (SWT) regards the creation of spouses - the husband and wife - as a sign of His greatness. Not only has Allah (SWT) created these two individuals, but in order for there

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to be peace and harmony between the two of them, He has placed love and mercy between them so that they can live a life of tranquility. Marriage is indeed a sacred bond that brings together a man and a woman by virtue of the teachings of the *Qur'an* and the *Sunnah*. Thus, each partner in this sacred relationship is expected to treat the other beautifully and properly. Elsewhere, divorce is described as the most aversive permissible act in the sight of Allah. It was narrated from 'Abdullah bin 'Umar that, The Messenger of Allah said: ***“The most hated of permissible things to Allah is divorce”***. (Sunan Ibn Majah, *hadith* no. 2018) Therefore, before the actual dissolution of marriage happens, a final effort for reconciliation is always to be made to smooth out any differences between the couples and try to bring about settlement between the disputing parties. However, Islam does not rule out the possibility of incompatibility of mistakenly married couple, thus, the chance of dissolution, as the last result, is given as a blessing to the involved man and woman, allowing them to have their way to find a more compatible mate.

The alarming rate of divorce occurrence among Malaysian Muslims calls for an inevitable inquiry into the reasons and factors causing dissolution in the Shariah Courts. This inquiry becomes necessary because of the social stigmatization it causes in the public to both parties. Thus, this article examines the number of divorce occurrence among Muslims couples in Malaysia, and also to examine *ṣulḥ* as one of the dispute resolutions in Islam and the practices of the instrument in *Shariah* Courts in Malaysia.

The Understanding of the Dissolution of Marriage (Ṭalaq)

According to an English-Malay Dictionary of Dewan Bahasa dan Pustaka, the term divorce refers to *perceraian*, which means the dissolution of marriage from a legal perspective (Civil or *Shariah* law) (Azmawaty Mohamad Nor, Rafidah Aga Mohd Jaladin, Dharatun Nissa Fuad Mohd Karim, and Norazani Ahmad, 2013). Divorce or the dissolution of marriage is defined as an ultimate legal separation of married couples under the civil or religious court. It gives the right to the spouse to remarry after the divorce case has been settled (United Nation, 2011).

Ṭalaq is Arabic word which means “to release” or “to divorce” (Azmawaty Mohamad Nor et.al, 2013). Under the *Shariah* law, *Ṭalaq* means to untie the matrimonial knot by articulating a word denoting divorce. According to the Prophet (SAW), the law of divorce is *Makruh* (disapproved), this is in line with the hadith of Prophet (SAW) as he said: ***“The most hated of permissible things to Allah is divorce”***. (Sunan Ibn Majah, *hadith* no. 2018) It is clear that Islam strongly discourages divorce because the negative effects of divorce outweigh the positive effects on the affected couples, their children, families and the community in large. Family disputes, in particular divorce has a traumatic effect. These emotions range from disappointment and anxiety to depression, sadness, grief and anger (Sa'odah Ahmad and Nora Abdul Hak, 2010). When the dissolution of marriage materializes, it is often associated with emotional trauma, reduced resources, damaged self-esteem, and feelings of failure. Furthermore, the emotional trauma and depression may slippery smooth to other social problems (Hamidah Ab. Rahman and Hamdan Ab. Kadir, n. d; Samuel Chan Hsin Chlen and Mohamed Sarif Mustaffa, 2008; Azmawaty Mohamad Nor et.al, 2013).

Numbers of Divorce among Muslims in Malaysia (2006 - July 10, 2016)

Those who believe that skyrocketing divorce rates are a western world phenomenon need look no further than Malaysia to shatter that view because divorce rates in this country have increased a whopping rose. Latest statistic by JAKIM (Department of Islamic Development, Malaysia) showed that 156 Muslim couples divorce daily. (Malaymail Online, 2016) As the discussion grows across the border, 'across Asia', the stigma attached to divorce often was the single biggest barrier to getting one, elsewhere in this generation, the stigma virtually does not exist. In an article posted on the East Asia Forum in 2013, Professor Gavin Jones of the Asia Research Institute of the National University of Singapore, said "divorce rates throughout East and South-East Asia appear to have been generally on the rise since the 1980s, partly because the stigma attached to divorce appears to have faded".

It is not of a particular race or ethnic background or class or only among religious or non-religious, all over the world the divorce rate among couples is increasing at an alarming rate. The number of divorce cases in Malaysia has more than doubled in just ten years from 2006. According to the statistics provided by the Department of Shariah Judiciary, Malaysia (JKSM) and The Department of Islamic Development (JAKIM), from January 1st, up to July 10th, 2016, 48077 divorce cases were recorded. This indicates average marriage dissolution is 250 cases daily. In 2015, a massive number of divorce cases were recorded, 63463 which is equivalent to a marriage breaking down 173 cases every day. Also, in 2014, 59712 cases recorded equivalent to 156 cases in a single day.

Deputy Women, Family and Community Development Minister, Datuk Azizah Mohd Dun quoted from January to July alone, 48077 Muslim divorce cases had been recorded, with three states having the highest cases, namely Selangor (7731), followed by Sabah (6638) and Johor (4700). Meanwhile, in 2015, Malay Muslim couples represent 58,862 divorce cases (Pressreader, 2016). It showed that more than 80 per cent of the total divorce cases in Malaysia are among Muslim couples (The Star, 2012), whereas Muslims only make up 61.3 per cent of the total population in Malaysia (Siti Farhanah Md Sam and Puzziawati Ab Ghani, 2011)

Table 1: Total Number of Muslim Couples Divorces by State, 2006 – July 2016

2006	28 522
2007	30 267
2008	35 540
2009	38 499
2010	41 808
2011	43 897
2012	48 069
2013	49 684
2014	59 712
2015	63 463

Sources: (1) Department of Shariah Judiciary Malaysia (JKSM) (2) National Population and Family Development Board (NPFDB)

Table 1 shows the number of divorce among Muslim couples from 2006 to July 10th, 2016. From the table, it shows that the number of divorce among Muslim couples illustrates a substantial increase, with a stable increase since 2006 to 2013. In 2014, the increasing number of divorce cases recorded with huge number compared with the previous year, which is 49684 in 2013 to 59712, with a total cumulative number is 10028 cases. And it constantly grows sharply from 2014 till July 10th, recorded in year 2016.

Elsewhere, in table 2, the record shows that according to each state, the increasing number of divorce cases is rapidly contributing to the large number of divorce cases yearly. The number of divorce among Muslim is more than 80 per cent compared to the non-Muslims with the highest cases recorded in 2016, Selangor (7731), followed by Sabah (6638) and Johor (4700).

Table 2: Total Number of Muslim Couples Divorces by State, 2006 – July, 2016

STATE	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Johor	2862	2962	3413	3860	4381	4543	5151	5159	5871	6147	4700
kedah	2552	1872	2813	1619	1864	2124	3611	3684	4473	5157	4069
Kelantan	3178	3450	3727	3981	4300	4489	4574	4414	4649	4386	4640
Melaka	1086	1034	1139	1328	1497	1464	1655	1631	1792	1949	1390
N. Sembilan	1383	1524	1794	2112	2260	2312	2276	2395	2575	2664	2274
Pahang	2101	2095	2456	2805	3125	3212	3399	3594	3867	3902	3029
Perak	1243	1799	2237	2579	2728	2817	3182	3371	3767	4105	3117
perlis	491	667	678	695	677	723	683	647	721	888	571
P. Pinang	1469	1513	1675	1797	1957	1992	2035	2080	2358	2406	1540
Sabah	1608	1772	2191	2512	2642	2721	3025	3243	7421	8272	6638
Sarawak	1260	1249	1573	1729	1698	2075	2325	2299	3124	3080	2147
Selangor	4651	5379	6170	7132	8122	8527	9237	10155	11297	11873	7731
Terengganu	2295	2463	2779	3101	3237	3501	3521	3374	3689	4478	3801
w. Persekutuan	2343	2488	2895	3249	3320	3397	3395	3638	4108	4156	3484
Jumlah	28522	30267	35540	38499	41808	43897	48069	49684	59712	63463	48077

Sources: (1) Department of Shariah Judiciary Malaysia (JKSM) (2) National Population and Family Development Board (NPFDB).

The Root Causes of Divorce in Malaysia

Based on the initial findings of the Fifth Malaysian Population and Family Survey (MPFS-5), conducted in 2014 by the National Population and Family Development Board, divorce cases in this country are mostly caused by “incompatibility” which is 35.3 percentile of the total causes, which was cited as couples growing apart, lack of intimacy, and careers getting in the way of the relationship. Followed by adultery or infidelity taking 20.2 percentile, irresponsibility on the husband’s side taking 14.1 percentile, involvement from in-laws 7.3 taking percentile of the total causes, financial problem staking 5 percentile, and other reasons taking the remaining 18.1 percentile. (Malaysian Digest, 2016).

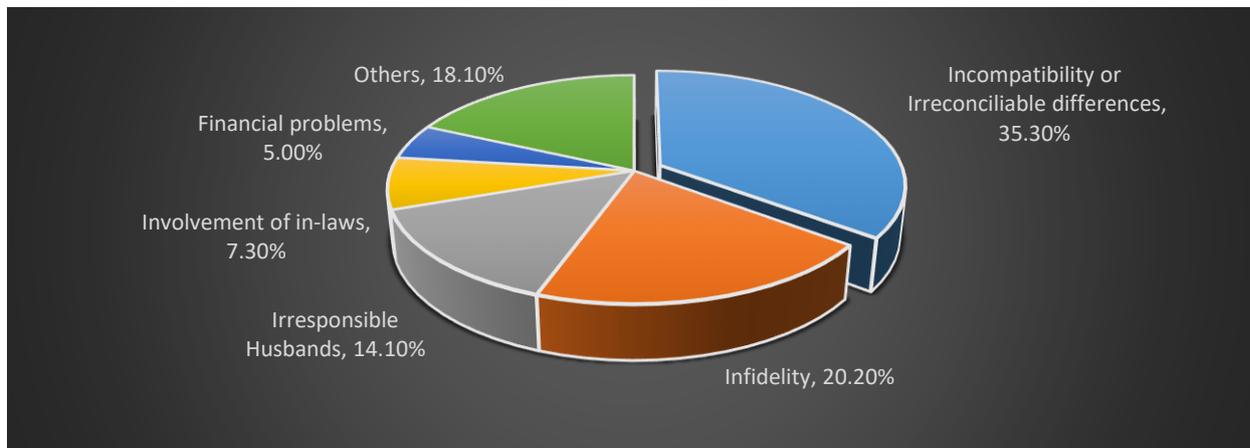
Main Reasons of Divorce (First Marriage)

Table 3: The Main Roots of Divorce in Malaysia (First Marriage)

Incompatibility or Irreconcilable Differences	35.3%
Infidelity	20.2%
Irresponsible Husbands	14.1%
Involvement of In-laws	7.3%
Financial Problems	5.0%
Others	18.1%

Deputy Women, Family and Community Development Minister Datuk Azizah Mohd Dun said: irreconcilable differences have been cited as the main reason for divorce, with claims of infidelity also being one of the highest on the list for wrecked marriages. The figure for divorced men who listed such differences as the reason, was 56.2 percent while for women, it was 38 percent. 20.5 percent of women cited infidelity as the reason for their divorce, while for men the number was 11.8 percent. Moreover, other main reasons for divorce cited by men, Azizah said, were in-laws’ interference as it is 10 percent. Elsewhere, for women, claims of husbands failing to live up to responsibilities was 15.2 percent (Pressreader, 2016).

Chart 1: Main Roots of Divorce in Malaysia (First Marriage)



Source: Fifth Malaysian Population and Family Survey, National Population and Family Development Board, 2014.

Main Reasons of Divorce (First Marriage)

Table 4: The Main Roots of Divorce in Malaysia (First Marriage) Listed by Divorcees

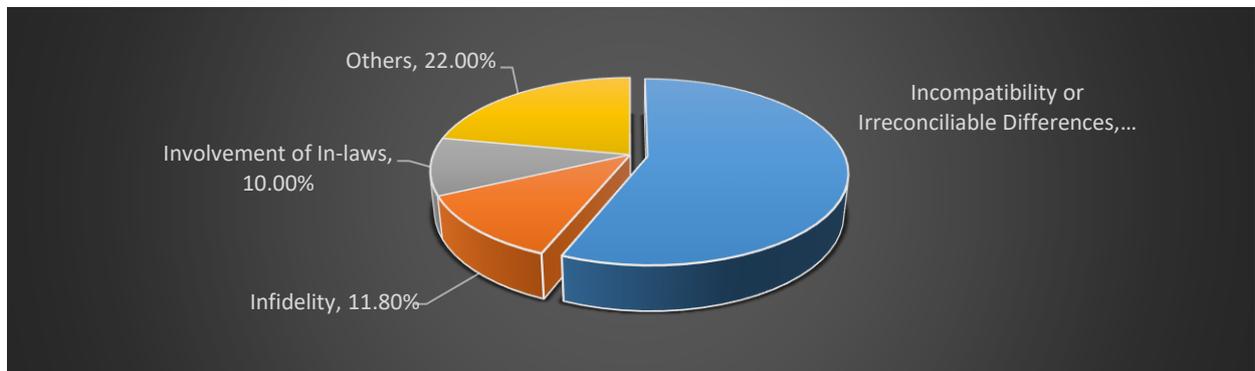
Men

Incompatibility or Irreconcilable Differences	56.2%
Infidelity	11.8%
Involvement of In-laws	10.0%
Others	22.0%

Women

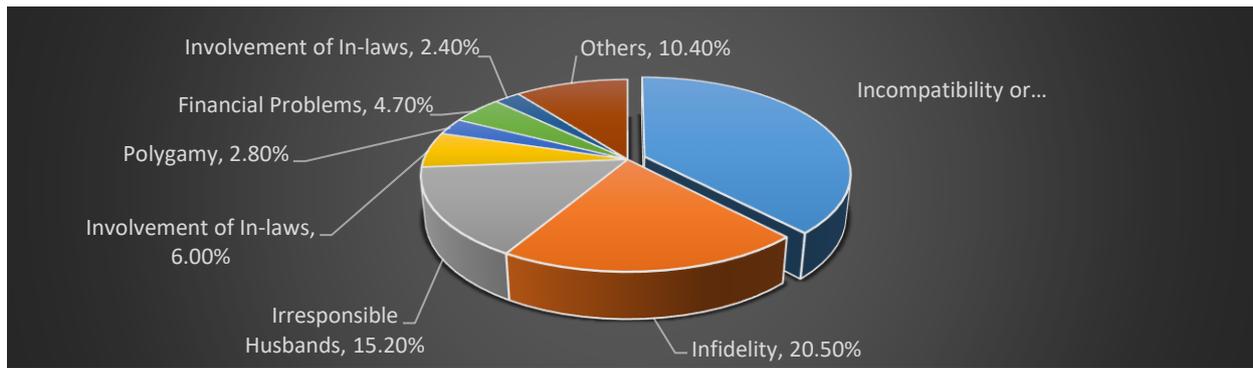
Incompatibility or Irreconcilable Differences	38.0%
Infidelity	20.5%
Irresponsible Husbands	15.2%
Involvement of In-laws	6.0%
Polygamy	2.8%
Financial Problems	4.7%
Involve in Drug abuse etc.	2.4%
Others	10.4%

Chart 2: Main Reasons for Divorce in Malaysia Listed by Divorcees (Men)



Source: Fifth Malaysian Population and Family Survey, National Population and Family Development Board, 2014.

Chart 3: Main Reasons for Divorce in Malaysia Listed by Divorcees (Women)



Source: Fifth Malaysian Population and Family Survey, National Population and Family Development Board, 2014.

Based on above graphic depiction, high number of divorcees have come to agree that incompatibility or irreconcilable differences is one of the main reason for them to go for divorce, and claimed to be the highest percentage listed as cited from the Fifth Malaysian Population and Family survey 2014, which is 35.3% among other reasons.

Incompatibility or Irreconcilable Differences; A common problem arises among married couples is an inherited difference between them and an irreconcilable difference generally refers to incompatibility or couples no longer being able to compromise or tolerate with each other. In general, compatibility among spouses in the Muslim community is often assessed based on short-term factors, like physical attractiveness, level of education. Elsewhere, 56 percent of couples surveyed said too much arguing was the reason for their split. The unnecessary arguments that does not lead to any resolution is incredibly damaging to any relationship. One of the primary reasons arguments occurs is because of lack of understanding regarding the partner's opinions or perspectives on matters like cultural differences, religious understandings, ideological perspectives, life goals, and dreams.

Family Issues, (Sulh) as Primary Vehicle in Resolving Matrimonial Dispute

In Islam, marriage can be conceptualized as a sacred knot, where the nuptial couples are united as husband and wife in a contract (*aqd*) that is meant and expected to be permanent with the purpose of seeking and pursuing Allah's blessings. Marriage is life long relationship full of mutual love, compassion and approval of care for better and for worse.

Nonetheless, commonplace challenges faced by two different individuals nurtured from different background and families trying to live together as couples are inevitable. Hence with variance of opinion, thought, taste, temperament, inclination, and behavior may possibly lead to dispute, conflict or misunderstanding.

Despite of the sacredness and the fact that the marriage contract is supposed to be an eternal, Islam recognises the necessity of keeping it open for dissolution if the parties have made their decision that they can no longer live together as husband and wife. In cases where misunderstanding and conflicts arises, the *Shariah* provides a means for its peaceful resolution. ***“If you fear a (Shiqaq) breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation. Indeed, Allah is Ever All-knower, Well-Acquainted with all things” Qur'an, (4: 35).***

Shiqaq (breach), the word *Shiqaq* as stated in this verse linguistically specifies contradiction, discrepancy, conflict, (Abdullahi Mustapha Muhammad, 2014) clash and disagreement which may lead to breaking apart. The word *shiqaq* is derived from “*shaq*” which literally means discord or hostility. In the context of matrimony, it indicates the conflict between the spouses and signifies that the nature of marriage’s bond between the spouses is strained to a breakpoint (Baharuddin Abu Bakar, 1990).

The understanding given by the *fuqaha* (Islamic jurists) as used in the Islamic jurisprudence (*fiqh*) framework implies *shiqaq* as discord or hostility between couples and its existence is wide enough to include a discordances and differences as a result to the shortcomings of both parties involved which is due to no fault of either party (Abdullahi Mustapha Muhammad, 2014). In a word, *Shiqaq* implies a marital strife in such a way that makes the perpetuation in marriage difficult or unbearable. An irreconcilable hatred between the parties is its main feature (Baharuddin Abu Bakar, 1990). Under such circumstances, Islam encourages the couples not to haste for divorce and insists upon resolving the problems amicably.

The Concept of (Ṣulḥ), the Remedy from the Islamic Perspective

(*Ṣulḥ*) is relatively not a new concept in the Islamic structure of justice. In about more than 1400 years, Muslim societies have a tradition of mediation and negotiation (*Ṣulḥ*) in resolving disputes based on religious injunction, cultural norms, and values. Conciliation, mediation, and compromise in the Islamic Law known as *ṣulḥ*, Islam advocates amicable dispute resolution in every dispute to avoid antagonism between parties. In the nutshell, the word *ṣulḥ* refers to a process of restorative justice and peace making in resolving a dispute amicably.

Thus, it can be beautifully exemplified with a very famous *sunnah* of the Prophet Muhammad in the event concerning the setting of *Hajar al-Aswad* (Black Stone) during the reconstruction of *Ka’abah*. This event illustrates the origin of (*Ṣulḥ*) by serving the rights of reaching a mutual and final resolution of a conflict as in this historical event. It is reported that the Prophet instructed the four leaders of Quraysh to hold each end of the sheet and together they raised the stone to the right place, and by his wisdom and virtue a serious conflict was avoided, and everybody was pleased with the solution (Ibn Ishaq, 1955; Abdullahi Mustapha Muhammad, 2014, Hanis Wahed, 2015).

The concept of *Ṣulḥ* exists as one of structure in the Islamic legal system in upholding justice. From the Islamic legal system point of view, the origin of (*Ṣulḥ*) is in accordance with the principles set forth in the established primary sources of the *shariah* and expounded by the Muslim jurists through the exercise of juridical reasoning (*Ijtihad*), and further agreed as the consensus (*Ijma’*) of Muslim jurists of its legitimacy (Idris Abdullahi Haroon, 2017).

Qur’an as the principal source of the *Shariah* has made mentioned emphatically the provisions relating to *Ṣulḥ* in several verses of the *Qur’an*. However, the evidences for its legality have been derived from the following verse of the *Qur’an*, as in *Surah an-Nisa’* verse 128 (4:128); “... ***if they make terms of peace between themselves; and making peace is better ...***”.

Linguistically, the Islamic parallel of reconciliation is the Arabic word *Ṣulḥ*, which means to reconcile and to make peace with the opponent, or terminating a dispute (Abdullahi Mustapha Muhammad, 2014). It is derived from the verb “*ṣaluḥa, ṣalaḥa*” or “to be sound, righteous, and the process of restoring” (Hanis Wahed, 2015). In the context of an interpersonal relationship,

ṣulḥ signifies the notion of compromise, to make peace, to reconcile, or settlement (Md. Shahadat Hossain, 2013).

Technically, *ṣulḥ* connotes, in classical Islamic thought, an amicable settlement of disputes through good faith negotiation, conciliation or mediation, and even to the extents of compromise action, clinched by two parties (the disputants), in which each party “waives part of his/ her rights” in order to attain a mutual consensus in resolving the conflict (Abdullahi Mustapha Muhammad, 2014). According to Ibn al-Humam (d. 861 AH), Al Kasani (d. 587 AH), *Ṣulḥ* is defined as an agreement (*‘aqad*) to end a dispute. The School of Hanbali and Shafie’ agreed with the latter definition even though in different wordings. However, the School of Maliki defines *ṣulḥ* as an agreement to end dispute even though it does not yet happen (‘Ali Khawtar Kamil, 1984). According to Ibn Qudama al Maqdisi (d. 620 AH), *ṣulḥ* is an agreement between two disputed parties which would lead to peace (‘Ali Khawtar Kamil, 1984).

More contemporary definition of *ṣulḥ* can be found in Sayyid Sabiq (d. 2000 CE). Sabiq states that *ṣulḥ* is an agreement between two parties by relying on the prescribed conditions, which they have agreed earlier on in the process of settling their disputes (‘Ali Khawtar Kamil, 1984). In legal term, *Ṣulḥ* is considered as a settlement grounded upon conciliation negotiated by the disputants themselves or with the help of a third party (Sa’odah Ahmad and Nora Abdul Hak, 2010; Idris Abdullahi Haroon, 2017). Thus, the settlement is the actual result of the conciliatory processes commenced to resolve a dispute.

More pertinent verse highlighted in the *Qur’an* in which Allah commands to reconcile and make peace between two disputants is Surah *an-Nisa’* verse 114, (4: 114); ***“In most of their secret talks there is no good; but if one exhorts to a deed of charity or justice or conciliation between men, (Secrecy is permissible): To him who does this, seeking the pleasure of Allah, We shall soon give a reward of the highest (value)”***.

Another concept of *ṣulḥ* in the *Qur’an* is used in the matrimonial disputes resolution’s framework. Islam encourages mediation between the husband and wife in conflict, to restore peace, harmony, affection, and understanding between couples (Olufadi Lanre, 2014). Thus, Allah the Sole the Sublime guides the following formula in steering disputes between couples, in Surah *an-Nisa’* verse 35, (4: 35), ***“If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers...”***, Allah (SWT) says as specified, if there is dispute between two spouses, appoint two arbitrators one from each side of the spouses to look upon their affairs with a view of either compromise or separation is the best between the two couples, and whatever they decree, it stands binding on the parties (Ibn Kathir, 2000). Hence, if they wish for compromise and conciliation, Allah (SWT) granted their reconciliation as Allah (SWT) says; ***“...if they wish for peace, Allah will cause their reconciliation. Indeed, Allah is Ever All-knower, Well-Acquainted with all things”***. ***“... if you fear a breach ...”*** *Qur’an*, (4: 35).

From the interpretations of surah *an-Nisa’*, verse 35, (4: 35), the above phrase has significantly important legal connotations concerning “when” shall the effort towards matrimonial arbitration be initiated. Consistent with the interpretation given by Ibn Abbas (d. 687CE), the *khauf* in the aforementioned verse means knowledge about such breach when it becomes clearly known or becomes obvious, hence taking precautions about its occurrence. (Abdullahi Mustapha Muhammad, 2014). If that is the case, ***“...appoint (two) arbiters, one from his family, and the other from hers...”*** *Qur’an*, (4: 35).

Islam enjoins an attempt to reconcile the disputes between the parties. In resolving disputes associated with marital discord, the power of reconciliation is vested on the institution of *hakam* as mentioned in surah *an-Nisa'* the verse 35, (4:35). However, jurists have differed as to who is the addressee in appointing of arbitrators. Some jurists said *al-Hakim* (head of the state/ judge), some said the couples themselves, and some said the *Wali* (Guardians to the couples), either of these categories of people, whoever is appointed is in a position to induce a resolution by finding the middle ground and help bring about the settlement. (Abdullahi Mustapha Muhammad, 2014).

Ibn Kathir (d. 774 AH), opines that if there is a dispute between two spouses, a *hakim* (head of the state/ judge) should appoint two arbitrators, one from each side of the spouses to look at their affairs with a view of either compromise or separation between the two couples and whatever they decree, it stands binding among the parties (Abdullahi Mustapha Muhammad, 2014). The same opinion is echoed by Al-Qurtabi (d. 671 AH), in *al-Jami'u li Ahkam al-Qur'an*. Ibn Qudama (d. 620 AH), a renowned Muslim jurist has also stated that all Muslim jurists have agreed that two arbitrators should be appointed when a dispute and dissension occurs between two spouses and it is not known which of the two spouses is at fault. So also, those arbitrators can be appointed where both spouses are in disaccord and the husband has refused to keep his wife in a proper manner or to set her free in a godly way or the wife refuses to fulfill her obligations that Allah (SWT) has imposed upon her towards her husband (Abdullahi Mustapha Muhammad, 2014).

Ibn al-Arabi (d. 543 AH), in his *Tafsir Ahkam al-Qur'an* have also stated that jurists have agreed that one of the arbitrators, if possible, should be from the husband's and wife's family. However, if it is not, other people may be appointed depending on the best interest of the disputants concerned. (Abdullahi Mustapha Muhammad, 2014). In a *hadith* narrated by Amru bin Auf al-Muzani the Prophet (SAW) has been reported to have said: ***“All types of compromise and conciliation among Muslims are permissible, except those which make harm anything which is halal and a halal as haram”*** (*Sahih al-Bukhari, hadith no. 3.861*). An inference from the hadith indicates permissibility of compromise and conciliation among Muslims, except when such compromise tends to forbid righteousness and permit vices.

Reconciliation (Ṣulḥ), in the Malaysian Shariah Courts

Having mentioned the theory of *ṣulḥ* in Islamic legal theorem, the position of Islamic law in the *Shariah* court in Malaysia is governed and supervised by the Department Shariah Judiciary of Malaysia (JKSM), and it is headed by the Director General, who is also the *Shariah* Chief Justice and is currently under the Prime Minister's Department (Hanis Wahed, 2015). The application of reconciliation (*ṣulḥ*) in Malaysia is governed by the laws under each state and such provisions can be found in the *Shariah* Court Mal Procedure (*Ṣulḥ*) (Selangor) Rules 2001, the *Shariah* Court Mal Procedure (*Ṣulḥ*) (Federal Territories) Rules 2004, the *Shariah* Court Mal Procedure (*Ṣulḥ*) (Malacca) Rules 2004, the *Shariah* Court Mal Procedure (*Ṣulḥ*) (Johor) Rules 2004, the *Shariah* Court Mal Procedure (*Ṣulḥ*) (Pulau Pinang) Rules 2006, the *Shariah* Court Mal Procedure (*Ṣulḥ*) (Kelantan) Rules 2007, and also in the *Shariah* Court Mal Procedure (*Ṣulḥ*) (Pahang) Rules 2005 (E-Syariah, Official Website of JKSM).

The concept of *ṣulḥ* in the *Shariah* courts transcends beyond the mode of mediation or mid-man only. The mode of resolution varies depending on the types of disputes, and understanding of *ṣulḥ* is more equivalent to the alternative dispute resolution (ADR) which comprehends

negotiation, mediation, conciliation, compromise, counseling, or arbitration (Zainul Rijal Abu Bakar, 2011). The mode of resolution varies depending on the types of disputes, and there are few approaches to *ṣulḥ*, practices conducted in the *Shariah* courts in Malaysia are as follows (Zainul Rijal Abu Bakar, 2011);

1. *Ṣulḥ* for the dissolution of marriages through counseling, conciliatory body or Arbitration; or
2. *Ṣulḥ* conducted by Legal Aid Department officers; or
3. *Ṣulḥ* conducted voluntarily by parties either directly or through their *shar'ie* counsel; or
4. *Ṣulḥ* conducted by the *ṣulḥ* officers; or
5. *Ṣulḥ* conducted by family support authority.

Reconciliation (Ṣulḥ) for the dissolution of marriage: Legal Provisions in Malaysia

Enactment No. 1 of 1984

Islamic Family enactment 1979 Part V- Dissolution of Marriage

These sections provide the resolution rulings and guidelines regarding divorce and *ṣulḥ* methods

1. Section 40. Divorce by *talaq*, or order or *shiqaq* (Federal Territories):
2. Section 47, Act 303 Part V - Dissolution of Marriage under the Islamic Family Law Act (IFLA) (Federal Territories); Divorce with *talaq* or by order
3. Elsewhere, Act 303 in the Islamic Family Law (Federal Territories) Act 1984, Part V- Dissolution of Marriage, under the Section 48 Arbitration by *Hakam* states;

In addition to the section 48, under the Act 303 in the Islamic Family Law (Federal Territories) Act 1984, Part V-Dissolution of Marriage, the Department of Islamic Judiciary Malaysia has formulated *hakam* rules for the guidance of the court and the *hakams*. It can be concluded that the *hakam* has the authority to dissolve the marriage (Sa'odah Ahmad and Nora Abdul Hak, 2010; Zainul Rijal Abu Bakar, 2011).

The related provisions to *Ṣulḥ* are confined in section 47 and 48 of the IFLE 2003. The following discussions are pertaining to the aforementioned provisions. According to section 47(5): The provision illustrates that in the case of contested divorce, a religious officer will be appointed to chair a conciliatory committee. In appointing the two persons, one to act on behalf of the husband and the other for the wife, and refer the case to the committee under subsection (5), the court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case. In the event of unavailability of relatives, the court will appoint respected people in the community such as *imams*, to represent the parties disputing (Sa'odah Ahmad and Nora Abdul Hak, 2010).

The representatives will be guided by the court as regard to the conduct of the conciliation. If the settlement cannot be achieved or the court is not satisfied with the performance of the committee, another committee will be appointed. Failure in settling the disputes by the

Committee normally will result in the parties proceeding under section 48 of the same act. The principle of *ṣulḥ* will again be applied in arbitration by *ḥakam* under section 48. and in some cases the process may take as long as six months to be concluded. Therefore, section 47 clearly encourages in the event that one party does not consent to a dispute a solution through a third party should be sought. (Zainul Rijal Abu Bakar, 2011).

The implementation of *ṣulḥ* in the form of *taḥkim* is sanctioned in Section 48, which provides that if the court is satisfied that there are constant quarrels between the parties to a marriage, the court may order the appointment of two *ḥakams*, one to act for the husband and another for the wife. However, it is observed that section 47(5) practically leads to the non-application of section 48. Thus, in reality the role of *ḥakam* in section 48 has been executed by the Conciliatory Committee (Sa'odah Ahmad and Nora Abdul Hak, 2010).

From the aforementioned discussions, there are differences between section 47 and 48 of the IFLE 2003 1. *Majlis ṣulḥ* is chaired by a religious officer from the Islamic Religious Department, whereas *taḥkim* is conducted by the appointed *ḥakam* (Sa'odah Ahmad and Nora Abdul Hak, 2010; Zainul Rijal Abu Bakar, 2011). 2. *ḥakam* has the authority to effect divorce even in the occasion where the husband refuses to do so (Zainul Rijal Abu Bakar, 2011), whereas the Chairman of Conciliatory Committee has no such power. Thus, it is observed that *ḥakam* is an arbitrator rather than a mediator (Sa'odah Ahmad and Nora Abdul Hak, 2010).

The Process of conducting *ṣulḥ* with regards to the Malaysian provision

The Chairman/ *Ṣulḥ* Officer conducts *Majlis Ṣulḥ*'s based on the *Ṣulḥ* Work Manual 2002 (the Manual) and the Ethical Code of *Ṣulḥ* Officer (the Code) provided by JKSM. The Manual clarifies and serves as a guidance and standard of procedure that defines the role of *Ṣulḥ* Officers, and uniform the procedure to be followed by all *Ṣulḥ* Officer in conducting *Majlis Ṣulḥ*. Elsewhere, The Code prescribes the ethics of *Ṣulḥ* Officer as well as the credibility of the profession, and failure of compliance with the Code will result in disciplinary action under Civil Servant Rules (Behaviour) 1993. (Sa'odah Ahmad and Nora Abdul Hak, 2010; Zainul Rijal Abu Bakar, 2011; Sa'odah Ahmad, 2012).

From the abovementioned *ṣulḥ* manual, it implied the practice of *ṣulḥ* helps the parties in resolving their conflict by giving them the right to be heard, accepting relevant documents or if necessary, postponing the *Majlis Ṣulḥ* for the purpose of giving more time to parties to prepare for *ṣulḥ* or mediation. According to the Manual, the Chairman/ *Ṣulḥ* Officer is responsible to perform a brief *taaruf* (introduction of self) session that will create conducive environment for *Ṣulḥ*. And in this session, the Chairman/ *Ṣulḥ* Officer will inform the parties about the procedure of *Majlis Ṣulḥ*, and further encouraged parties' involved to ask question pertaining to *Hukum Shara'* and Islamic Family law. This will help them to understand more on the case and law.

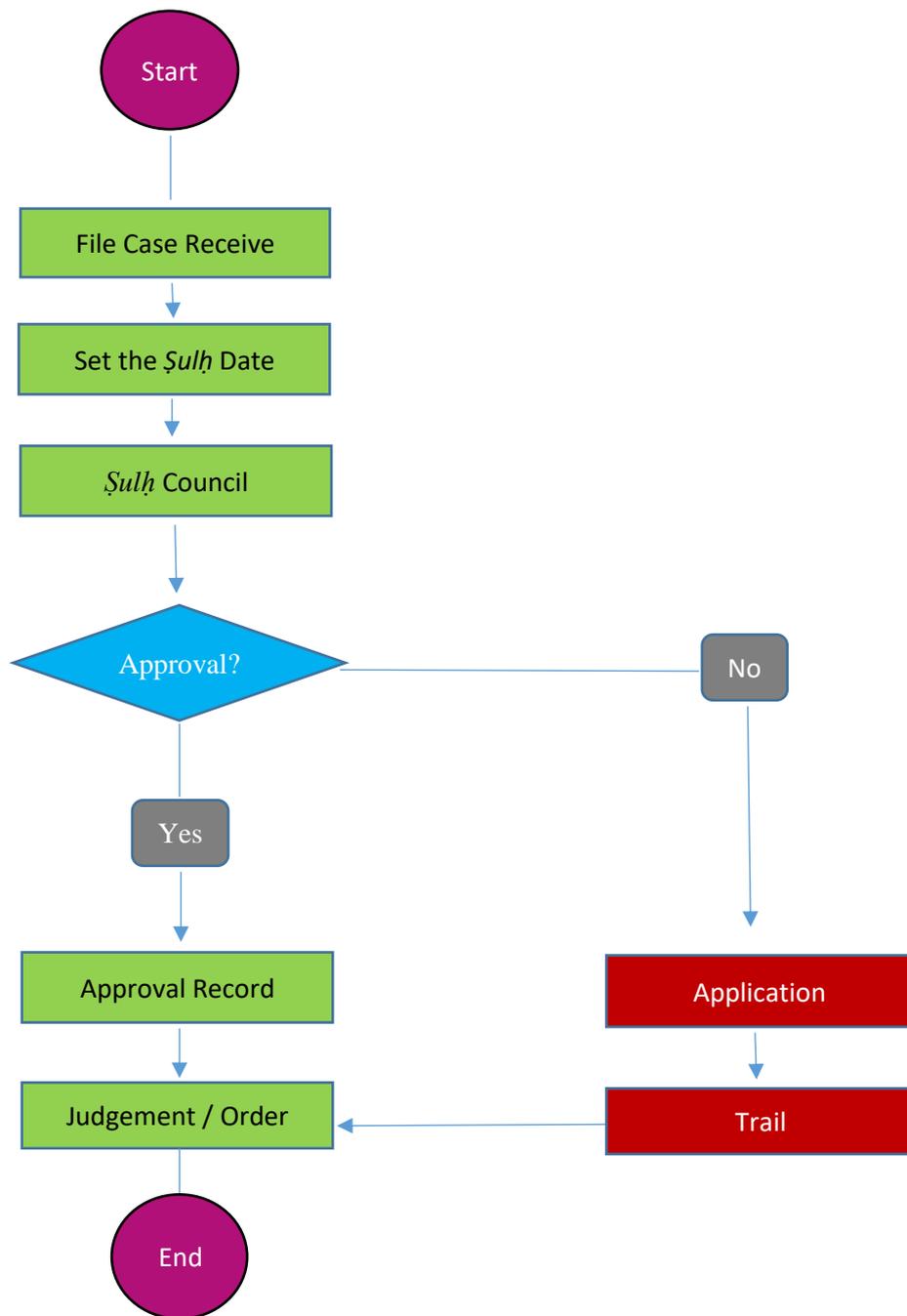


Figure 1: *Sulh* Flow Chart

Source: E-Syariah, Department of Shariah Judiciary Malaysia (JKSM)

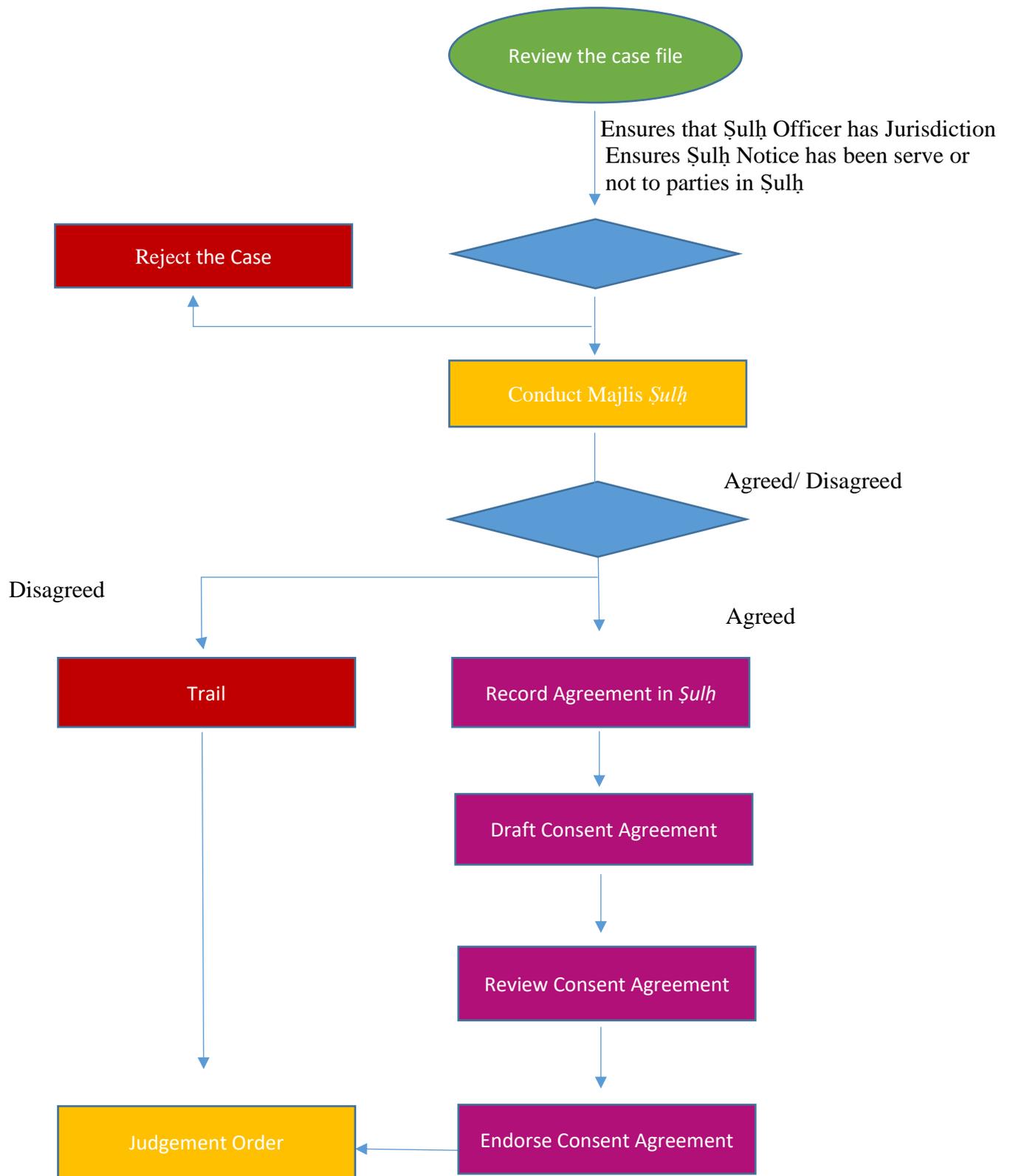


Figure 2: *Sulh* Work Process in the Shariah Court
Source: Sa'odah Ahmad and Nora Abdul Hak, 2010

Recommendation

The paper intends to address the misconception that *Ṣulḥ* is only a process where disputing parties discuss an arising matter in a relationship which facilitates and aids the dissolution of marriage. Whereas it should also be seen as a dynamic and progressive medium in handling dispute between two parties (husband and wife), and also as a mechanism for keeping them together.

The provisions pertaining to *Ṣulḥ* can be found in sections 47 and 48 of IFLE 2003; sections 99, 94 and 131 of SCCPE 2003 and in SCCPSR 2003. It is perceived that *Ṣulḥ* is not a process where the parties discuss whether to divorce or not but it is a process to settle matters after divorce. In practice, *Ṣulḥ* may arise from the application for divorce or confirmation of divorce. In this situation, the Registrar will take action to ensure that parties have already decided to divorce and agree to settle claims arising thereof by way of *Ṣulḥ*. In other words, discussion on whether to divorce or not to divorce will never take place in *Ṣulḥ* (Sa'odah Ahmad and Nora Abdul Hak, 2010; Sa'odah Ahmad, 2012). *Ṣulḥ* can only be implemented after divorce or after the Court granted a leave for polygamous marriage (Zainul Rijal Abu Bakar, 2011). Thus, it can be implied that the responsibility of *Ṣulḥ* Officers is mainly to conciliate rather than to reconcile the parties in dispute.

According to section 47(5): The provision illustrates that in the case of contested divorce, a religious officer will be appointed to chair a conciliatory committee. In appointing the two persons, one to act on behalf of the husband and the other for the wife. Failure in settling the disputes by the Committee normally will result in the parties proceeding under section 48 of the same act. The principle of *ṣulḥ* will again be applied in arbitration by *ḥakam* under section 48. The implementation of *ṣulḥ* in the form of *taḥkim* is sanctioned in Section 48, which provides that if the court is satisfied that there are constant quarrels between the parties to a marriage, the court may order the appointment of two *ḥakams*, one to act for the husband and another for the wife. However, it is observed that section 47(5) practically leads to the non-application of section 48. Thus, in reality the role of *ḥakam* in section 48 has been executed by the Conciliatory Committee (Sa'odah Ahmad and Nora Abdul Hak, 2010).

Insufficient knowledge and parties' lackadaisical attitude, Perspective and stigma on religious institutions as it seen and described as ineffective, not well organized or not well structured compared to litigation which is known and well shown as high standard and refined. Parties sometimes display a nonchalant attitude towards the amicable resolution of cases, it is difficult sometimes to get the co-operation of the parties to arrive at an amicable settlement. Moreover, most of the parties are not knowledgeable about marital rights and responsibilities and this affects the progression of the *ṣulḥ* process.

From the revision on section 47, it is perceived that there are no specific details that illustrated the rules that govern the conduct and ethics of the committee members as well as their qualification. The difficulty arises if members of the conciliatory committee, particularly representatives of the parties, do not really comprehend the committee's objective and their responsibility in the reconciliation process. On the other hand, the court's practice resorts to Conciliatory Committee rather than Arbitration by *Ḥakam* due to the difficulty of getting people with the qualification of *ḥakam*.

There is no doubt that with regards to the effectiveness of family mediation, researches have generally found it to be an effective and satisfying means for resolving dispute outside the

litigation process in court. Benefits attributed to successful mediation reported in the literature include the avoidance of financial and emotional costs of litigation (Sa'odah Ahmad, 2012).

As far as Malaysia is concerned, the present study is very distinct, important and timely (Sa'odah Ahmad, 2012) Viewing the records of the practise so far, it does shows improvemnet in terms of the settlement of cases. As the volume of cases keeps on increasing, there is the need for continous improvement of the service direction and organisation, knowledge and skills of the officers in various levels. Evaluating mediation program is important and helps to ensure that services are continually improved and refined (Sa'odah Ahmad, 2012).

Proposed model for hybrid mechanism, Med-Arb in the reconciliation of marriage

Med-Arb, s the names implies, Med-Arb is an acronym of two processes of dispute resolution -Mediation and Arbitration. Within the context of Islamic law, Med-Arb is the hybrid of both the *ṣulḥ* and *taḥkīm* processes in order to arrive at an amicable resolution of the dispute. This hybrid process is well-known within the conventional practice of ADR. However, the Med-Arb process has been recognized and prescribed by the Qur'an and it was practiced in the Islamic legal history. The basis of Med-Arb is given in the following legal text as contained in the Quran:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا

From the above Qur'anic verse (*an-Nisa'*, 4: 35), in the problem of *shiqaq* Allah (SWT) mentioned two very important key points, (*taḥkīm*) and (*ṣulḥ*), there are in need of negotiation, mediation, conciliation and compromise and also *nasihah* (counseling), but in the same time the result from the processes or *ḥukm* should be binding and applies to all parties. The Med-Arb process is a mechanism for dispute resolution enmeshed within the general framework of *ṣulḥ* (amicable settlement) in Islamic jurisprudence. *Ṣulḥ* is a broad term which literally means amicable settlement. It juristic meaning is all-embracing as it includes good faith negotiation, mediation, or conciliation, and compromise of action. In most cases during the *taḥkīm* proceedings, both *ṣulḥ* and *taḥkīm* are combined to facilitate the process of dispute resolution.

Important notes: (1) The arbitrators should be two qualified officers, 1. Specialise in Islamic studies and law, 2. Counsellor or family therapist. (2) if the couples reach an agreement with reconciliation; the couple will have to continue attending post-marriage courses (preferably online courses).

Conclusion:

From the above discussion, the position of Islam on dispute resolution is meant to be realistic considering the nature of humans. Islam encourages mediation between husband and wife in conflict in order to restore peace, harmony, affection, and understanding between them. The main goal in performing *ṣulḥ* is to attain mutual understanding between the disputing parties by taking into consideration every aspect of misunderstanding between the couples, the consequences of the outcome towards both families, individual interest. Its objective is to strive to save the marriage and further, to rebuild the trust, love, and compassion between couples. It also denounces any discord that could lead to disorder and divorce. To that effect, it calls for institution of arbitration from which an arbitrator will be appointed from each family of the couples. However, in recognition human egocentric, room for dissolution is allowed to

maintain peaceful coexistence in situation where the two couples cannot longer live together. This is a balance position of Islamic law. Nevertheless, the reconciliation is given preference over dissolution in any given scenario.

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