

# LAW IN THE DIGITALIZATION ERA

**ICLAS 2019  
PROCEEDINGS BOOK**



**Edited by**  
**Murat Oruç**

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Edited by Murat Oruç

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**Edited by**  
**Murat Oruç**  
School of Law  
Fatih Sultan Mehmet Vakif University

# LAW IN THE DIGITALIZATION ERA

**ICLAS 2019  
PROCEEDINGS BOOK**

# **ICLAS 2019 - Law in the Digitalization Era**

## **6 April 2019, Istanbul-Turkey**

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## **PREFACE**

We are pleased to organize the 8<sup>th</sup> International Conference on Law and Society (ICLAS) in Istanbul, Turkey, the beautiful city of cross cultures.

Hosted by Fatih Sultan Mehmet Vakıf University, this year ICLAS 2019 is held under the theme of “Law in the Digitalization Era”. The idea of the theme of the conference is arising from the fact that the digitalization is expeditiously spreading to all the fields of life and it has become an undeniable phenomenon of today’s world. This new phenomenon has also brought new problems, necessities, and new facts that the field of law needs to involve in. Therefore, we aim to monitor and discuss the new challenges to the field of law in this new digitalization era and propose new solutions accordingly.

The conference brings together many academics from different countries from Southeast Asia to Europe, and offers an opportunity for them to meet and discuss such contemporary academic issues under the framework of the conference, which is held in a global metropolitan basin like Istanbul.

I would like to thank all the members of ICLAS organizing committee, scientific committee and student staff for their hard work. Special thanks go to Prof. Dr. Farid Sufian Shuaib, Mr. Serdar Çöp, Mr. Mustafa Zafer Küçükkurt, Mr. Erol Öz and sponsors for their cooperation and support.

Following the success stories of the previous ICLAS experiences, we hope to contribute to the academic knowledge in this field and carry the ICLAS experience further for the upcoming conferences and other academic works.

**Murat Oruç**

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Istanbul, Turkey

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# Online Mediation in Malaysia: With Reference to the Practice of Mediation in the Family Support Division of the Syariah Judiciary Department

Nora Abdul Hak<sup>a\*</sup>

<sup>a</sup>Department of Legal Practice, AIKOL, International Islamic University Malaysia, Kuala Lumpur, Malaysia

\*Tel: (+60) 122136057, E-mail: ahnora@iiu.edu.my

## Abstract

*Mediation as one of alternative dispute resolution (ADR) mechanisms is getting popular and becoming a preferred choice amongst the disputing parties. Mediation process is more relax, inexpensive and has many advantages. Online mediation is a new development in mediation practice in many countries now. However, Malaysia has yet to fully practice online mediation in resolving the dispute. In this digitalization era, it is important for Malaysia to have an online mediation since many Malaysian citizens are working overseas either as a professional or non-professional. The existence of online mediation system will assist the parties if there is a need to attend mediation session in Malaysia. It will further support the current mediation centres in Malaysia to expand their coverage globally. In future, there is a need to introduce specific law to regulate the practice of online mediation. Currently, the Family Support Division of the Syariah Judiciary Department offers online mediation to their clients. The division has just launched its latest guidelines book on mediation which covers online mediation as well. The paper adopts library based and qualitative research method. The aim of the paper is to discuss the advantages and disadvantages of online mediation, the issues faced by parties and the challenges of online mediation in Malaysia. Subsequently, in this paper, the roles and functions of the Family Support Division in helping single mothers and their children are discussed and it also proposes the procedures to be adopted by the Division that provides online mediation service to their clients.*

**Keywords:** Online Mediation, Malaysia, Law, Family Support Division.

## 1. INTRODUCTION

In 2007, the Malaysian Syariah court upgraded its portal e-syariah by allowing the clients to sort out their claims with the help of mediators through online system. Under the plan, plaintiffs and respondents will meet face-to face not across the mediation table, but *via* video teleconferencing or Skype. It was reported that the former Director General of the Department, Datuk Sheikh Ghazali Abdul Rahman said they were planning to allow teleconferencing and mediation *via* the Internet as one way for the department in upgrading the level of services to public.<sup>1</sup> According to him, it was hoped that by having this online mediation, the number of backlog cases in the Syariah court would be reduced. The then Director General further said they would study the legal implications of allowing teleconferencing for mediation. He also hoped that the government would top up the number of mediators for every state in Malaysia as the request for more mediators has been made to the Public Service Department.<sup>2</sup> At present, through the portal e-syariah, not only lawyers, prosecutors, plaintiffs, defendants and the public are able to file their suit or affidavits online, they can also get a mention date for a hearing and follow up on the status of their cases from the comfort of a computer or smart phone anywhere and anytime. This portal acts as a one-stop counter on all matters related to court, including allowing people to calculate *faraid* (distribution of intestate estates), download forms, refer to all enactments pertaining to the administration of the court system as well as read up on the last case laws and court decisions, check personal profiles of its list of syariah lawyers and view various mention dates for cases in the court calendar.

The latest development that has recently taken place in the Syariah courts in Malaysia is online mediation offered by the Family Support Division of the Syariah Judiciary Department to their clients. The Division

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<sup>1</sup> Sim, Leoi Leoi, The Star online, Thursday, 19 April 2007 at <https://www.thestar.com.my/news/nation/2007/04/19/bold-plan-for-syariah-portal/>

<sup>2</sup> Sim, Leoi Leoi, The Star online, Thursday, 19 April 2007 at <https://www.thestar.com.my/news/nation/2007/04/19/bold-plan-for-syariah-portal/>



has just launched its latest guidelines book on mediation which covers online mediation as well.

The paper adopts library based and qualitative research method. The aim of the paper is to discuss the advantages and disadvantages of online mediation, the issues faced by parties and the challenges of online mediation in Malaysia. In this paper, the roles and functions of the Family Support Division in helping single mothers and their children are discussed and it also proposes the procedures to be adopted by the Division that provides online mediation service to their clients.

## **2. ONLINE DISPUTE RESOLUTION (ODR)**

Kaufmann-Kohler and Schultz define Online Dispute Resolution (ODR) as a broad term that encompasses many forms of ADR and court proceedings that incorporate the use of the Internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process.<sup>3</sup> Setting-up a technology-assisted dispute resolution is vital in this age of digitalization, as this effort can also be considered as part of e-government service to the society, which in turn is parallel with the government efforts in making processes to go online. The twofold advantages are, first it brings citizens into contact with the government, and secondly the ODR itself can add new element to the government-citizen relationship.<sup>4</sup> ODR can also be used for the parties involved that could not meet face to face, or for those who can, it will be inconvenient or costly to do so.<sup>5</sup> The online interaction will not replace all face-to-face meetings, but to reduce as many as necessary.<sup>6</sup>

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<sup>3</sup> G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*. The Hague: Kluwer Law International, 2004.

<sup>4</sup> E. Katsh, "Dispute resolution and e-government," *Proceedings of the 2nd International Conference on Theory and Practice of Electronic Governance (ICEGOV '08)*, pp. 494–495, 2008.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

Historically, the first applications of ODR were detected in the late 1990s.<sup>7</sup> The applications were in the private sector, and in resolving disputes arising out of e-commerce related field.<sup>8</sup> Mainly, the ODR were using automated tools, such as eBay<sup>9</sup>, that has handled over forty million disputes between buyers and sellers in 2008.<sup>10</sup> Similarly, since 2000, the Internet Corporation for Assigned Names and Numbers (ICANN) has managed resolutions of over 25,000 domain name disputes.<sup>11</sup>

With regards to online mediation, Kaufmann-Kohler and Schultz<sup>12</sup> stated that it is a 'human-assisted' negotiation due to the absence of authoritative (or limited) in its decision-making by the accepted third party. According to Kaufmann-Kohler and Schultz<sup>13</sup> too, where necessary, a distinction can be made between ODR service providers and ODR application service providers. The former refers to those who provide actual dispute resolution services, and the latter is referring to those who only provide the technical architecture for ODR.

Specifically in Malaysia, to the best of our knowledge, there are two online, paid services of dispute resolution in Malaysia. The first one is called ODR Malaysia,<sup>14</sup> where it is also self-claimed as the first ODR site in Malaysia. It highlighted that it does not guarantee a settlement. The services offered are assisted negotiation, automated negotiation, mediation and conflict resolution. It can be assumed that it is a one type ODR service provider. The second online, paid ODR service is called

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> N. Sondheimer, E. Katsh, and L. Clarke, "Dispute prevention and dispute resolution in networked health information technology," *Proceedings of the 10th Annual International Conference on Digital Government Research: Social Networks: Making Connections between Citizens, Data and Government (dg.o '09)*, pp. 240–243, 2009.

<sup>11</sup> Ibid.

<sup>12</sup> G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*. The Hague: Kluwer Law International, 2004.

<sup>13</sup> Ibid.

<sup>14</sup> "ODR Malaysia." [Online]. Available: <http://www.odrmalaysia.com/service.php>. [Accessed: 18-Jul-2012].

Asian International Arbitration Centre (AIAC).<sup>15</sup> The services offered are adjudication, fast track arbitration, conciliation/mediation, Islamic banking and financial services arbitration, domain name dispute resolution, and sensitive names disputes resolution. Basically, this online site is only for displaying information, rules, guidelines and fees. The services offered are being carried out manually. Thus, it can be assumed that it is a one type of ODR application service providers.

Both ODR are focusing on the large scale of dispute resolution, with the mediation services are part of their whole services.

### **3. DEFINITION AND CHARACTERISTICS OF MEDIATION AND ONLINE MEDIATION**

#### **3.1. What is Mediation?**

To mediate is to act as 'an intermediary to intervene for the purpose of reconciling and to settle a dispute by mediation'.<sup>16</sup> There have been numerous discussions on the definition of mediation in many literatures.<sup>17</sup> Some of the literature even described mediation as not a simple term to define.<sup>18</sup> Mediation refers to a process to facilitate disputing parties with the assistance of a third party who acts as a mediator in their dispute.<sup>19</sup> In mediation, this third party has no power to impose a settlement on the parties, who retain authority for making their own decision. The mediator also must not have any competing interests in

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<sup>15</sup> "Kuala Lumpur Regional Center for Arbitration (KLRCA)" [Online] Available: <http://www.rcakl.org.my/Scripts/default.asp>. [Accessed: 18-Jul-2012].

<sup>16</sup> The Oxford English Dictionary, Oxford, At The Clarendon press, Reprinted 1961, vol. VI, at 291-2.

<sup>17</sup> For example, Brown, Henry and Marriott, Arthur, *ADR Principles and Practice*, Sweet & Maxwell, London, 1999, 127-8.

<sup>18</sup> Boulle, Laurence and Nesic, Miryana, *Mediation, Principles Process Practice*, Butterworths, London, Dublin, Edinburgh, 2001, 3.

<sup>19</sup> Haynes, John, M, *The Fundamentals of Family Mediation*, State University of New York Press, Albany, 1994, 1.

the case.<sup>20</sup> In order to help the parties negotiate a resolution of their dispute by agreement, the mediator uses certain procedures, techniques and skills.

Mediation is different from other types of dispute resolution in the sense that in mediation, the parties are helped to work out their own decisions and arrangements. They are encouraged to take independent legal advice before entering into an agreement that may be legally binding.

Online mediation refers to a process done remotely; it is defined as an immediate and direct process on the Internet which aims at facilitating the cooperation and negotiation between the disputing parties to reach a fair resolution acceptable to the parties to the conflict.<sup>21</sup> Electronic mediation is no different from traditional mediation in terms of purpose and general framework, although it differs in terms of means, by having it done using electronic means. Online mediation has a lot of benefits when the circumstances are right and the locations of meeting in person are difficult due to the geographical locations of the parties.

Online mediation would serve as an effective, practical and suitable mode of resolving small-scale disputes. In Malaysia, two professional mediators, Tunku Alina Alias and Gunavathi Subramaniam have launched Malaysia's first Online Mediation Service (Mediate2 Resolve Online) as recently as September 2016. The service aims to resolve disputes between family members, friends, business partners, co-workers, neighbors etc.<sup>22</sup> The online mediation space supports video and audio, as well as document sharing. The mediation process allows a person to determine the outcome of their communications with the other party. Every session is consensual, voluntary, private and completely confidential. A profes-

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<sup>20</sup> Roberts, M, *Mediation in Family Disputes: Principles of Practice*, Ashgate publishing Company, 1997, 4.

<sup>21</sup> Julio Cesar Betancourt and Jason A Crook, ADR, Arbitration and Mediation: A Collection of Essays: An Overview" 2014, 313.

<sup>22</sup> Sundra Rajoo, Technology in Alternative Dispute Resolution: The Future in Focus, A paper presented in the International Conference on Dispute Resolution (ICDR 2017), 9-10 August 2017, Ahmad Ibrahim Kuliyah of Laws, IIUM, Kuala Lumpur.

sional, impartial and neutral mediator is appointed for the purpose of conducting the proceedings under his supervision.<sup>23</sup>

### **3.2. Characteristics of Mediation**

There are four fundamental and universal characteristics of mediation and the same characteristics applicable to online mediation.<sup>24</sup> They are;-

1. The neutrality or impartiality of the mediator;
2. The voluntariness of the process;
3. The confidentiality of the relationship between the mediator and the parties; and
4. The procedural flexibility available to the mediator.

If these characteristics of mediation are altered or if one or more is absent, then the process cannot be characterised legitimately as mediation.<sup>25</sup>

#### **3.2.1. Neutrality or Impartiality**

It requires that the mediator has knowledge of the dispute or the substantive issues involved. According to McCrory, *"the quality of the mediation effort should be improved where the mediator has at least general knowledge about the subject matter of the dispute and the issues involved."*<sup>26</sup> Impartiality is central to the trust both parties must have in the mediator if his/her intervention is to be effective which depends on skill and knowledge, as well as on the personal integrity and commitment of the mediator.

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<sup>23</sup> Ibid.

<sup>24</sup> McCrory, John, P, 'Environmental Mediation - Another Piece for the Puzzle', *Vermont Law Review*, 1981, Vol. 6, No. 1: 56.

<sup>25</sup> McCrory, John, P, 'Environmental Mediation - Another Piece for the Puzzle', 51.

<sup>26</sup> Ibid.

### 3.2.2. Voluntariness

Mediation is premised on the principle that the parties are to make their own decision as they are in better position to know what is best for them. Voluntary participation of the parties involved is considered as one of important characteristics of mediation that differentiates it from other common forms of dispute resolution.<sup>27</sup> Thus, mediation is consensual in which it does not involve any authority or compulsion.

### 3.2.3. Confidentiality

Confidentiality between the mediator and the parties is considered as integral to the relationship and the cornerstone of the relationship of trust that must exist between them.<sup>28</sup> In mediation, the confidentiality can be categorized into two aspects; “internal and external.” Internal confidentiality refers to a mediator’s private sessions with each party.<sup>29</sup> Hence, nothing of what he or she is told by any party will be revealed to the other party without express permission. While, external confidentiality, refers to parties’ acceptance in the agreement to mediate that each of them will treat everything in the mediation as confidential.<sup>30</sup>

Thus, it is understood that, this characteristic of confidentiality in mediation requires both the mediator and the parties to trust one another, as this is important for the successful of mediation.

The following are the steps that should be taken to ensure privacy of the mediation process;<sup>31</sup>

- The mediation meeting is conducted behind closed doors;
- Outsiders can only observe proceedings with the parties’ consent;

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<sup>27</sup> Marc, Lampe, ‘Mediation as an Ethical Adjunct of Stakeholder Theory’, *Journal of Business Ethics*, Dordrecht, May 2001, vol. 31, at 165-173.

<sup>28</sup> McCrory, ‘Environmental Mediation - Another Piece for the Puzzle’, 54-6.

<sup>29</sup> Marcus, S, *Representing Clients in Mediation-New professional Skill*, Butterworths, 1998, 21.

<sup>30</sup> Ibid.

<sup>31</sup> Boulle and Nesic, *Mediation, Principles Process Practice*, 2001, 41.

- No recording and transcript is normally kept
- There is no external publicity on what transpired at the mediation; and
- Any disclosure of the terms of settlement is a matter that can be negotiated.

It is to note that confidentiality is not absolute; hence, the parties must be given clear information about its limits right at the beginning of the process. Cases involving child abuse and domestic violence will limit the confidentiality and justify a consequent interruption or termination of the process of family mediation.<sup>32</sup> If a mediator has reasonable grounds to believe that there is a case for child abuse he or she must report this to the concerned bodies or authorities. Thus, the mediation procedure must be stopped immediately.<sup>33</sup>

#### **3.2.4. Procedural Flexibility**

This is important to ensure that the mediator is able to work in the environment that suit him best so as to achieve the best solution for the parties.<sup>34</sup> Mediation as a highly flexible dispute resolution process.<sup>35</sup> Mediation process can be conducted in a variety of physical settings, the procedure can be negotiated and adapted, additional participants can be involved for part of the mediation, and additional mediators can be added if necessary.<sup>36</sup>

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<sup>32</sup> Ibid.

<sup>33</sup> Boulle and Nesic, *Mediation, Principles Process Practice*, 2001, 41.

<sup>34</sup> McCrory, 'Environmental Mediation - Another Piece for the Puzzle', 56.

<sup>35</sup> Boulle and Nesic, *Mediation, Principles Process Practice*, 2001, 33.

<sup>36</sup> Ibid. p. 33-4.

## **4. ADVANTAGES AND DISADVANTAGES OF MEDIATION AND ONLINE MEDIATION**

### **4.1. Costs**

The cost of mediation is relatively cheap when compared with litigation and arbitration. The costs of the mediator are normally shared by the parties. Section 17 of the Malaysian Mediation Act, 2012 states the costs of mediation shall be borne equally by the parties. In the case of online mediation, there are different models for pricing e-mediation services, and these are often no different than face-to-face services. However, there certainly is enhanced cost effectiveness, given that parties save on travel cost and perhaps do not dedicate costly work time to a mediation process.<sup>37</sup>

### **4.2. Time**

Delay has long been recognized as enemy of justice. Excessive delay makes effective adjudication of a dispute impossible. Memories fade, witnesses go missing, the judge hearing a case may retire or gets promoted or transferred and cost escalation may make difficult for the parties to continue. Mediation is time saving as it takes a short time to settle the dispute. In the case of online mediation, it is speedier to use videoconferencing when the parties are not living in the same place and at the same time, mediating online will save transportation cost that need to be spent by the parties and mediator.

### **4.3. Confidential**

Communications in mediation are private and confidential. Thus, any statements made and documents produced are on a without prejudice basis. Section 15 of the Mediation Act, 2012 provides that no person shall disclose any mediation communication. However, in certain situa-

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<sup>37</sup> Ebner Noam, E-Mediation, the electronic copy of the article is available at: <http://ssrn.com/abstract=2161451>



tion communication in mediation may be disclosed if the disclosure is made with the consent of the parties. If the disclosure is required under the Act or for the purpose of any civil or criminal proceedings under any written law, it can also be disclosed. It can be disclosed if it is required under any other written law for the purposes of implementation or enforcement of a settlement agreement.

#### **4.4. Control**

Mediation process is in the control of the parties. Mediator manages the process but disputing parties dictate the process. In mediation, there is no decision is imposed on the parties. The parties own the decision and issue is resolved only if both parties agree.

#### **4.5. Parties Work Together and not Against Each Other**

Mediation is informal and non confrontational. Hence, successful implementation of agreement is more likely compared to adjudication and arbitration.

#### **4.6. Parties are Helped to Focus on Future Arrangements**

In mediation, arrangements can be worked out to fit individual circumstances. The parties can explore options that they believe will work for them. Encouraging the parties to explore ideas and suggestions helps them to shift from fixed positions and work out possible solutions that they can both accept.

#### **4.7. Creative Solutions**

Judges make decisions based on evidence, thus, only certain remedies can be imposed. In court system, judges cannot expand options and cannot give a solution that was not argued and the application of the law would not allow. Mediation allows for creative options and solutions. In mediation, parties can vent their emotions and express in their own words the issues and get them off their chests. In online mediation, the

party also can express his or her feeling and dissatisfaction against the other party and subsequently, generating creative solutions to the dispute faced by them.

#### **4.8. Flexible and Convenient Process**

Online mediation assists the parties who are having difficulty to meet at the same place on a specific time for a mediation session. It allows the parties to meet regardless of their geographical locations. It allows the parties to meet virtually and proceed with mediation session. Deborah Hope Wayne<sup>38</sup> states that the online communication connects the parties from different areas, lets the parties to take times between sessions to think about the issue presented in the mediation session and allows them formulate response. She further discusses that online mediation is good for parties who want to avoid uncomfortable confrontation and assist the mediator to concentrate on mediation process instead of handling issue on logistic.<sup>39</sup> The area covered by online mediation might be unlimited as long as the parties are able to connect with each other and the mediator. Online mediation saves cost and energy of the related parties.

According to Pon Staff, online mediation offers convenience to the parties since they may participate according to their free time.<sup>40</sup> When the traditional element of mediation such as meeting face to face in the same room is difficult, online mediation is handy for the parties or feel threatened and intimidated by the others.<sup>41</sup>

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<sup>38</sup> Deborah Hope Wayne, 2013. Mediation in Digital Age. <https://www.familylawmatters-blog.com/mediation-in-the-digital-age/>

<sup>39</sup> Ibid.

<sup>40</sup> PON STAFF - ON AUGUST 14TH, 2018 / MEDIATION Using E-Mediation and Online Mediation Techniques for Conflict Resolution <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>

<sup>41</sup> Ibid.

In online mediation, external experts can be consulted with, or brought into the process as necessary, regardless of their geographical location, and without disrupting the process' dynamics.<sup>42</sup>

#### **4.9. Disadvantages**

Below are among the disadvantages of online mediation discussed by Noam Ebner in E-Mediation;<sup>43</sup> the most commonly discussed process disadvantages of online mediation are the lack of warmth, empathy, immediacy, rapport and other attitudes and affects of mediation. While efforts are made to explain how to compensate for these in online communication, and even to utilize certain characteristics of online communication to achieve gains on these elements beyond what face-to-face communication permits, this is still, in many aspects and to many communicators, an uphill battle.

The other issue that we need to pay attention is that messages conveyed online, and particularly those conveyed through text, are prone to misinterpretation, to misattribution and to causing deterioration of trust. In mediation, both the mediator and the parties must trust one another, as this is important for the successful of mediation process.

The online venue challenges the function served by apology in mediation, given that party sincerity cannot be gauged without contextual cues.

Online mediation increases potential for mediator manipulation and for worries about mediator neutrality. This uncertainty, particularly when left unaddressed might cause suspicion and loss of trust.

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<sup>42</sup> Ebner Noam, E-Mediation, the electronic copy of the article is available at: <http://ssrn.com/abstract=2161451>

<sup>43</sup> Ibid.

## 5. ONLINE MEDIATION PROCEDURE

The process of mediation uses certain techniques and procedures by mediators. There are many different models, in theory as well as in practice, that exist under the label of mediation. Haynes,<sup>44</sup> in his book, stated that there are nine stages involved in mediation process. They are;

- Reorganising the problem;
- Choosing the arena;
- Selecting the mediator;
- Gathering the date;
- Defining the problem;
- Developing options;
- Redefining positions;
- Bargaining and
- Drafting the agreement.

The procedure of online mediation session is similar with the normal session. The mediator and the parties must have an advanced agreement concerning the mediator's roles, issues on confidentiality and the mediator and parties' expectations.<sup>45</sup> It is important that the parties and the mediator make a determination that online mediation is the right process for the dispute. It is also important that it is conducted subtly so that parties leave feeling as if they have reached accord largely on their own, a strategy that is meant to deepen their commitment to honour the agreement.<sup>46</sup>

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<sup>44</sup> Haynes, John, M, *The Fundamentals of Family Mediation*, 1-6.

<sup>45</sup> Deborah Hope Wayne, 2013. Mediation in Digital Age. <https://www.familylawmatters-blog.com/mediation-in-the-digital-age/>

<sup>46</sup> PON STAFF - ON AUGUST 14TH, 2018 / MEDIATION Using E-Mediation and Online Mediation Techniques for Conflict Resolution <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>

Parties to online mediation not only need an introduction to the concept and nature of mediation, they also need to understand the nature and rules of the online venue they will be employing for the mediation process. Providing parties with a tour of the platform or some initial training in its operation increases their satisfaction and comfort levels. Parties' sense that their mediator is capable with the technological platform and has a clear road map for the process affects their degree of trust in the mediator. Combined, these issues would suggest the need for a new process stage, in which parties are walked through the platform (individually or jointly), and given an introduction to the online environment as it is used for mediation. Elements of this might include a site tour and tutorial, communication ground rules, instructions for participation, comments regarding language, time zones and technical support available to parties.<sup>47</sup>

The range of disputes being mediated online has expanded to include workplace and family conflicts involving people who live in the same area.<sup>48</sup>

## 6. THE CHALLENGES OF ONLINE MEDIATION

There are challenges that might be faced by the parties and mediators in practising online mediation. First, there is possibility that the parties or mediator's computer being hacked which will allow the hackers to gain access to the files. Second, they might encounter spyware problem. It is *"a software that enables a user to obtain covert information about another's computer activities by transmitting data covertly from their*

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<sup>47</sup> Ebner Noam, E-Mediation, the electronic copy of the article is available at: <http://ssrn.com/abstract=2161451>

<sup>48</sup> PON STAFF - ON AUGUST 14TH, 2018 / MEDIATION Using E-Mediation and Online Mediation Techniques for Conflict Resolution <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>

hard drive.”<sup>49</sup> This issue also discussed by Sherri Donovan in discussing cyber abuse in domestic violence. According to Sherri Donovan,<sup>50</sup>

*“Spyware allow one to take snapshots of another’s computer through remote access. Creating false profiles, changing passwords to delete critical e-mails, sending fraudulent e-mails, interception of e-mails, distributing photos, videos, personal information, and damaging one’s public image, or employment through the internet may occur in high-conflict family matters.”*

Online mediation is a disadvantage for the parties in cases where they file a case and are contacted by a mediator assigned by the service provider as it is challenging for the parties to connect with mediators or to assess them. Parties cannot rely on local reputation, and there are few internet resources to assist them. A good face-to-face negotiator will be able to steer interactions (including mediated interactions) his/her way through communication techniques, conversation dominance, volume or body language.

Problem with archived materials that are preserved as video or text so these materials are always out there. Once a party posts something in a discussion forum or participates in a recorded videoconference, their words are out of their hands forever. While, many service providers are explicit about their security procedures, there are no certain guarantees in internet security.<sup>51</sup>

In Malaysia, we are yet to have any law/regulation that regulates the practice of online mediation. Thus, enactment of a law that will govern this practice is highly recommended. The law/regulation should include its definition, its procedures such as notifications, submission of applications, appointment of mediators, attendance to the mediation session, termination of mediation, mediation agreement.

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<sup>49</sup> [https://www.google.com/search?q=spyware+definition&rlz=1C1SQJL\\_enMY789MY789&oq=Spyware&aqs=chrome.1.0l6.2362j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=spyware+definition&rlz=1C1SQJL_enMY789MY789&oq=Spyware&aqs=chrome.1.0l6.2362j0j7&sourceid=chrome&ie=UTF-8)

<sup>50</sup> Sherri Donovan mediate.com Family Mediation In The Digital Age <https://www.mediate.com/articles/DonovanS2.cfm>

<sup>51</sup> Ebner Noam, E-Mediation, the electronic copy of the article is available at: <http://ssrn.com/abstract=2161451>

## 7. THE FAMILY SUPPORT DIVISION IN MALAYSIA

### 7.1. The Background

In Malaysia, it is reported that in the year 2000 there were 128,810 single parent families, and the number has been increasing. Past research had found that single parent families and their children experienced more difficulties in the context of family life and well-being than two-parent families.<sup>52</sup> From the legal perspective, one of the problems of single parents is the difficulty of enforcement of the maintenance (*nafqah*) order granted by the courts upon divorce. Recognizing this, the Government in 2008, decided to establish a new division known as the Family Support Division under the Department of Syariah Judiciary of Malaysia. This division is to handle matters related to the enforcement of the maintenance orders issued by the Syariah courts against ex-husbands/fathers. Alimony advances will be made by the division to help the divorcees and their children whose ex-spouses or fathers failed to provide maintenance (*nafqah*), or comply with the Syariah court's order. In principle, this function is similar to that of the Child Support Agency (CSA) found in other countries such as Australia, New Zealand and UK, except that they are independent of the courts.

Concerns and criticisms about the disposal of family related cases such as the delay in managing matrimonial cases, especially in settling divorce cases, the claims for maintenance and child custody, polygamy, *muta'ah* and matrimonial property, are regularly discussed publicly. The Department of Syariah Judiciary Malaysia has identified these issues, the most prominent one being the lack of enforcement of maintenance order of the Syariah Court. Thus, the National Council for Islamic Affairs Malaysia in its 47th meeting, chaired by the then Prime Minister on 7 June 2007, made a decision that the Department of Syariah Judiciary Malaysia will take immediate action to resolve the issue of maintenance of wives and children. As a result, the Family Support Division was established as

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<sup>52</sup> Anjli Panalal K. Doshi, 2005.

one of the divisions under the Department. It is the aim of the Division to manage the enforcement and implementation of the Shariah Court maintenance order more effectively and efficiently. It is also to improve case management system in the State Shariah Courts.

In Islam, any effort towards managing and enforcing decisions in relation to maintenance for children is to be in the form of an order from the Shariah Court, after the case is brought to court. And this is the basis of establishment of this Family Support Division in the Department of Shariah Judiciary Malaysia.

## **7.2. The Establishment of the Family Support Division**

Claims for maintenance and their enforcement, are major issues to single mothers in Malaysia. Although, the Islamic Family Law has legal provision on the maintenance of children, there are significant weaknesses in the enforcement of maintenance order, especially if the former husband or father negligently fails to cooperate. In early 2010, it was reported that over 12,300 ex-husbands/fathers still err in paying maintenance to their ex-wives and children.<sup>53</sup> Although, action has been taken by the ex-wives to apply for the enforcement and execution order, the errant husbands simply refused to comply with the orders. This shows that there are loopholes in implementation of order by Shariah court.

There are several research projects that have been undertaken concerning child maintenance in Malaysia<sup>54</sup> pointing to the post-divorce problems including that single mothers with children faced serious financial problems after divorce. With no legal knowledge, some of them did not know how to claim for child maintenance and tend to rely on their siblings for the maintenance of their children.<sup>55</sup> Another research

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<sup>53</sup> Berita Harian, 20/3/2010.

<sup>54</sup> Zaleha Kamaruddin, Mohd Sahari Nordin and Azizah Mohd, A Research on the enforcement of the Maintenance Orders for Wives and Children in Malaysian Syariah Courts (2001-2005), (JKSM, 2007).

<sup>55</sup> Norasyikin Hamzah, A Socio Legal Perspective on the Impact of Divorce on Children's Welfare: a Pilot Study on Children Living with Single Mothers in Selected Rural Areas in Selangor (MCL Thesis, IIUM, 2006).



work emphasizes that the absence of guidelines is the reason that contributes to the inconsistent amounts decided by the civil as well as syariah courts.<sup>56</sup> Cases of non-compliance of a court order are still continuing particularly in maintenance of children and most of the problems mentioned in the research are related to human factors.<sup>57</sup>

In 2008, through the National Council for Islamic Affairs Malaysia, it has been decided that the establishment of the Family Support Division is necessary. Thus, the Division was officially established on October 22, 2008. During the launch, the Division received the first financial contribution to the fund in the amount of RM 500,000.00 from the Federal Territory Islamic Religious Council. The Division's establishment aims at solving the problems associated with the claims and the enforcement of maintenance (*nafqah*) order.

Before the Division was set up, there were more than 12,300 ex husband/negligent fathers who failed to pay *nafqah* to their former wives and children. Despite actions being taken by the ex-wives/mothers who applied for an enforcement and execution of court orders, the irresponsible ex-husband/fathers were still reluctant and refused to comply with the orders. Apart from the weaknesses in the enforcement procedures, there are many other factors that have contributed to this problem.

The establishment of the Division has effectively managed the enforcement and execution of the maintenance orders particularly the maintenance for children. It has also improved the case management system especially maintenance related cases in the Syariah Courts of each state. In addition, the Division has also been instrumental in channeling cash advance assistance to the qualified applicants in order to help alleviate their burden while awaiting the completion of their case.

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<sup>56</sup> Nora Abdul Hak, et al. Right of a Child to Maintenance: Harmonising the Laws in Malaysia. Paper presented at the ASLI conference, IIUM, 20-22 May 2010.

<sup>57</sup> Zaini Nasihah, Penguatkuasaan dan Pelaksanaan Perintah Nafkah: Kajian di Mahkamah Syariah Selangor (1999-2004), unpublished doctoral Dissertation, University of Malaya, Kuala Lumpur.

### **7.3. Among the Aims of the Division**

- To be the first place of call by an applicant aggrieved by failure of compliance of court order (post-divorce) specifically with reference to maintenance of children.
- To improve the status and jurisdiction of the Syariah Court, especially in terms of compliance with court orders and the implementation of the orders.
- To address the issue of delay in handling the problem of enforcement of maintenance orders.
- To safeguard the rights and responsibilities of the parties involved in the family institution.
- To ensure that the Syariah Court order is respected and implemented.

### **7.4. Role and Function of the Division**

- To provide legal advice to the Muslims parties concerning claims that can be made at the Shariah Court after divorce particularly claim for maintenance of children and procedures for the enforcement and execution of the court order;
- To perform the task of Sharie lawyer, and bailiff work in executing the judgment and enforcement order issued by the court concerning child maintenance in order to ensure the order is complied with and executed by all parties;
- To perform administration of the enforcement and execution of the court orders between States so that they function smoothly and without delay; and
- To manage immediate financial assistance as required by the wives and children, after approval by the Trust Fund Committee.

## **7.5. The Organization**

Currently, the posts of the Division at the Department of Shariah Judiciary are headed by a Director (Grade Shariah Officer LS 52) and assisted by officers and employees of the Division in every state in Malaysia. In each of the states, it is headed by an Assistant Director (Shariah Officer Grade LS 44). Secretariat Committee of the Division is divided into two.

## **7.6. Secretariat Committee**

Secretariat Committee of the Division is divided into main committee and working committee. The main committee is chaired by the Director General of JKSM and the members are all State Sharie judges, while members of working committee are from academics, representatives from Syarie Lawyer Association, officers of the Shariah Judiciary Department and experienced personalities in this area.

Following are the roles of the main and working committee respectively.

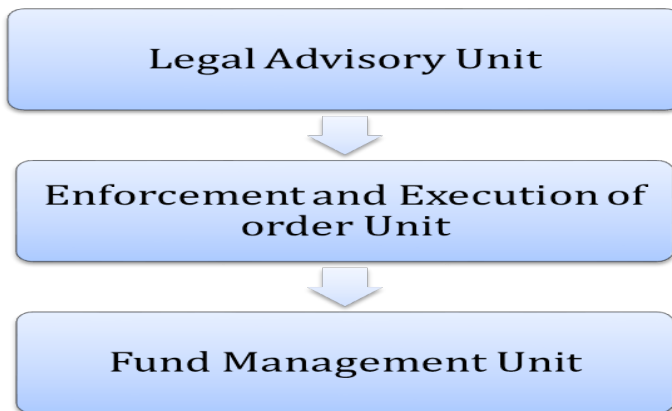
- i. The Main Committee
  - Responsible over policy development of the Division;
  - Appointment of Working Committee of the Division; and
  - Proposal and submission of policy to the highest authorities
- ii. The Working Committee
  - Planning the role and function of the Division;
  - Implementing the decision made for the functioning of the Division;
  - Assessing and reviewing the performance of the Division;
  - Conducting research to identify weaknesses and limitations and to explore new ideas for the improvement of the Division; and

- Planning future development.

### **7.7. Main Units under the Division;**

1. Legal Advisory Unit
2. Enforcement and Execution of order Unit
3. Fund Management Unit

For the purposes of operation, each unit has its own flow chart to assist the aggrieved party.



### **7.8. The Operation of the Division**

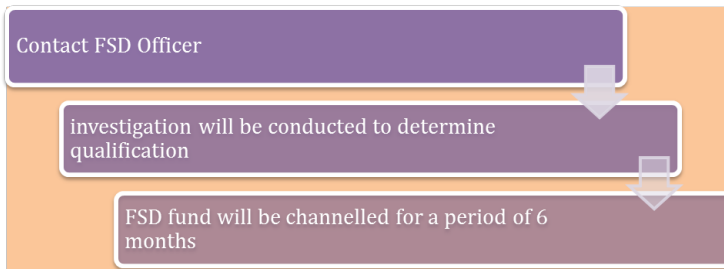
On 8 July 2010, a Trust Fund established under subsection 10 of the Financial Procedure Act, 1957 was approved by the Ministry of Finance. A federal fund amounting to RM15 millions was credited to the Trust Fund of Family Support Division. By 6th September 2010, the Division had distributed the fund to 79 deserving single parents from all over Malaysia as immediate financial assistance to them. In ensuring the coordination and control of the Trust Fund, two trust fund committees were formed; one under section 9 for the States and the other under section 10 for the Federal level.

The Division's Counters have been established at each of the Shariah Courts in the country as agreed by the Meeting of Shariah Court

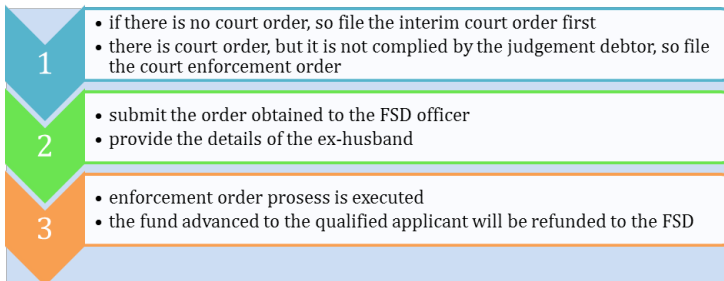
judges on 20 July 2010. E-maintenance system at the Shariah Judiciary Department has been established and now has been fully operational.

A special transit service was introduced as a temporary accommodation provided to the women who attend the proceedings at the Shariah court. The priority is given to those women who live far from the court and cannot afford to pay for their temporary stay. For the purpose of the transit services, the Federal Territory Islamic Religious Council contributed RM100,000.00 to the Division while, the Property Management Division contributed two units of apartments in Putrajaya, Kuala Lumpur.

Enforcement and Execution of Order Unit of the Division plays important role in ensuring all orders issued by the Shariah Court are complied with by the judgement debtor. Moreover, the effectiveness of this Unit will definitely give positive impact in ensuring repayment of the fund advanced by the Division to the wives. Various ways have been used by the officers of the Division in order to make sure enforcement and execution cases can be filed and subsequently, tried at the Shariah Court. This includes requesting cooperation from the Legal Aids Department to prepare pleading to be filed by the applicant. However, there are some constraints on the part of the Legal Aids Department in rendering their assistance as their lawyers are already overburdened. To date, the majority of the officers in most of the States have been accredited to practice as shari'e lawyers. In addition, most of the enforcement orders for maintenance have successfully been settled within a reasonable period.



**Fig 2.** Immediate fund assistance to the child.



**Fig. 3** Action that need to be taken within 6 months.

## 8. ONLINE MEDIATION SERVICE AT FAMILY SUPPORT DIVISION

Today, most court systems are moving towards e-filing (since digitization of paperwork is more organized, easily traceable and has a ready backup available at all times). In fact, in many common law jurisdictions, family matters are increasingly being conducted by means of technology. For example, marriage counseling between couples filing for divorce, hearings involving cases of child custody etc. is all being conducted by means of Skype or FaceTime. A few years ago, such a concept would have seemed despicable.

The technologies, which have been introduced by the Malaysian Judiciary<sup>58</sup>, can be summed up as follows:

<sup>58</sup> Speech delivered by Honourable Chief Justice of Malaysia Zaki Tun Azmi J. at the Asia Pacific Judicial Reform Forum, October 26, 2010.

- 1) Electronic filing
- 2) Queue Management System (QMS)
- 3) Case Management System (CMS)
- 4) Court Recording and Transcription
- 5) E-Cause List
- 6) E-Monitoring

The Tele-video Conferencing System (TVCS) is particularly popular in Malaysia. Lawyers and parties can appear before a Judge from their hometowns, saving the costs and time required for travel.

It is provided in the Mediation Manual Book of the Family Support Division that if the parties are separated by distance; they live in different cities, be limited by transport options as well as having financial problem, thus online mediation may be arranged by the Division between the parties *via* Skype or teleconference. This arrangement is made, as it is difficult for the parties to attend face-to-face mediation session.

In Malaysia, understanding that family members are now having access to a range of communication options, thus, the Division needs to respond to this by providing facilities where online mediation such as Skype and teleconference is made possible. According to Melamed, the online world is an extension of the physical world and offers new capacities that have not previously existed.<sup>59</sup> It is observed that online communications are mostly instant and cheap thus, online mediation should be available to the clients who need this technology.

When mediating *via* video link, which a different approach is required, it still allows the mediator to use the same techniques as in the normal mediation session, as long as he or she is comfortable with it. One of the problems of online communication is that due to lag, it is difficult to politely interject when someone is speaking. Thus, it is important to remind the parties at the start of the session of this possible problem.

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<sup>59</sup> Melamed 'The Internet and Mediation' (2009) *mediate.com* weekly 298.

To be able to conduct an effective online mediation session, a thorough understanding of the way in which the technology works is important. There are preparations that need to be done before online mediation session is conducted as discussed below;

The Internet line must be reliable and stable, a computer with good performance, Skype apps, and suitable room for discussion, big screen and other related online facilities. It is important to make sure that the Internet connection is stable. If the connection is poor, this will make the parties lose confidence not only in the mediator conducting the session but also the concept of online mediation.

When conducting online mediation, the time should be comfortable for all, so that on the selected date and time both the parties are present.

Before conducting a videoconference, there is necessary equipment to be provided by the Family Support Division and these are; a display monitor, a camera and a network. This videoconference mediation is very new in the Division thus, it is expected that the parties and mediator as well will be skeptical about conducting mediation session by videoconference. It will be hard for the first time and they will have to get use to this new mode of conducting mediation session. They just need to go ahead with it and try it. Both the parties and mediator might be hesitant initially to conduct mediation session by videoconference. So far experience from other countries that practice online mediation is said to be working very well and they find it very helpful.

## **9. CONCLUSION AND RECOMMENDATIONS**

The commitment of the Shariah Judiciary Department in handling the issue of child maintenance in Malaysia through the establishment of the Family Support Division is a noble effort in reducing problems associated with enforcement of maintenance orders. The Division is committed to improve all the weaknesses and problems faced at the moment in protecting the interest of single mothers and children. Though the Di-



vision may not resolve all the cases on enforcement orders, however, the establishment of this Division is able to address the problems in a more appropriate manner while strengthening the Islamic family system for the creation of caring, stable families of quality holistically. The initiative made by the Division in introducing online mediation to facilitate the parties in dispute over the enforcement of *nafkah* ordered by the Syariah court is an achievement to be proud of.

This paper is proposing the procedures to be used by the mediators of the Division; where it is believed that it is high time to have such application in this the era of Internet and digitalization. The online mediation discussed in this paper is specifically focusing on the enforcement of *nafkah* mediation where, as far as we concern, there is none available yet in Malaysia. It is believed that it can be a part of e-government efforts in improving the country's dispute resolution processes.

There are technical aspects that need to be analyzed in making the online mediation more efficient, accurate and effective. There are many prospects in this work. The goals are, firstly, to examine and follow-up on the mediation process in Malaysia, especially when the new Mediation Act has been introduced in June 2012. However, mediating online is generally less satisfactory than face-to-face meeting, in the case of enforcement of *nafkah* dispute, it is a useful service available to the clients who are living in two different cities and it is the only way for them to attend the mediation session.

To ensure that mediation session is conducted comfortably and successfully, there is a need for properly designed mediation facilities attached to courts, such as, mediation rooms with suitable furniture, round tables, whiteboards, comfortable chairs, waiting areas and air-conditions. This is important because an environment promoting confidence, security and privacy is essential for the parties to deliberate their disputes towards resolution. As the awareness of online mediation among the public in Malaysia is still low, it is thus, suggested to the government and the relevant NGOs to organize road shows, seminars, conference, work-

shops to disseminate to the public about the use of online mediation in resolving disputes and its benefits/advantages.

Online mediation except, in certain situations, such as, domestic violence and child abuse, is the best way to resolve enforcement of *nafkah* disputes. The court's judgement on the enforcement and execution of *nafkah* is not always to the satisfaction of the parties. Thus, mediation should be offered to the parties so as to arrive at the amicable settlement.

It is necessary also to introduce or to amend relevant legislation in order to facilitate the use of online mediation in Malaysia. There should be rules drafted to govern the practice of online mediation, such as, a code of ethics and complaints procedures, rules for privilege and confidentiality and etc.

Online mediation should be conducted by a suitably qualified and experienced mediator thus; there is a need for mediation training to train the mediators. It is suggested that the government should make an allocation/fund for setting up of mediation centres as well as mediation training centres in Malaysia. Accreditation of mediation services is the aspect that should be considered by the government for monitoring the quality of mediation services including online mediation in Malaysia.

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