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ROLE AND ETHICS OF HAKAM IN RESOLVING MATRIMONIAL DISPUTES

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Abstract:

Conflicts and disagreements are part and parcel of married life. As revealed in the Qur'an the best way to resolve conflict in family is by the efforts of the spouses themselves. In the event of failure to restore harmony between the spouses, Islam laid out other remedies from outside the conjugal home where competent third parties are available to assist in resolving the conflict. In Malaysia, provisions relating to third party intervention can be found, for instance, under sections 47 and 48 of Part V on the Dissolution of Marriage of the Islamic Family Law (Selangor) Enactment 2003. The sections respectively provide clauses for conciliatory committee and arbitration. The courts, under s. 48 will appoint two hakam (arbitrators) to act for the husband and the wife. In agreement with the Islamic law of Tahkim, it is recommended that where possible, for a hakam to be from among the family of the spouses. This paper seeks to examine first, the role of Hakam in a Tahkim process and, second, the ethics of Hakam. To achieve this, apart from field research, the Hakam Rules 2014 of Selangor was referred to to examine detailed aspects on the qualifications, role and ethics of Hakam. A minor fieldwork was conducted at Shah Alam Syariah Subordinate Court. 20 case files involving settlement reached through tahkim sessions were examined. Separate interviews with Syariah Court Judge as well as 'court-annexed' hakam were also carried out. The findings suggest that besides emphasizing on the principal requirements, it is equally important to pay greater attention to promoting additional qualification and nurturing relevant skills in the light of the hakam duties as third party in resolving family disputes. Furthermore, maintaining the characteristic as hakam by following the code of ethics is another key to the successfulness of majlis tahkim.

Keywords:

Arbitration, Ethics, Family, Hakam, Mediation

Introduction

Marriage is an institution that creates a balanced society and helps to enhance the success and happiness of the family units (Doi, 2008; Nora, 2002). Some regard it as sacred and irrevocable (Doi, 2008; Tucker, 2008), while others see it as a contract (Mahdi, 2009; Tucker, 2000) which lasts so long as there is 'offer' and 'acceptance' from each side. Regardless of the different perception, marriage has now been accepted as requiring a common willingness from both man and wife and is therefore revocable by the wills of both parties.

In married life, despite the bond that was made of love, trust and respect minor quarrels or disagreements between husband and wife are still unavoidable. Generally, conflicts and disputes in a marriage can be for many reasons. Situations such as those described in Islamic law as *shiqaq* (discord) between a husband and wife, include *nushuz* (disobedience) either from the husband or the wife; issues related to family affairs such as *nafaqah* (maintenance), or matters related to the rights of husband and wife which have been violated by either party during the course of their marriage.

The word *shiqaq* literally means dispute or conflict (*khilaf*) or enmity (*`adawah*) (Zaidan, 1993; Ibn Manzur, n.d; Al-`Adawi, 1988). It is also referred to as dissension and discord (Shah, 2009). The term *shiqaq* found in verse 35 of surah al-Nisa' is derived from '*shaqq*', meaning 'breaking into two' (Zahraa and Hak, 2006). Literally, *shiqaq* refers to disagreement, discord or hostility (Al-Zuhayli, 1991). It has a literal meaning of hostility, discord or breach between husband and wife, and it has the same meaning juristically (Al-Qurtubi, 2006; Al-Razi, 2004; Al-Shawkani, 2004; Zaidan).¹ It usually begins with conflicts and over time starts to develop into severe enmity and hostility between both parties. The seriousness of the conflict may lead the bond of marriage to breaking point (Ahmed, 1978; Al-Sharbini, 1997; Goolam, 2002). Interpreters (*mufasssir*) Ibn Manzur and al-Qurtubi define the word *shiqaq* from its root *shaqq* as breaking asunder, breaking into two or tearing apart. It is defined as such to describe the grave discord between the two breaking parties and each of them making the other an enemy. Al-Zuhayli agrees with this definition, seeing *shiqaq* as hardship ignited by one of the spouses over the other.

Shiqaq in a marriage happens when there is a problem with communication between the husband and wife so that one or both parties cannot fulfil their obligations and each other's rights as prescribed by Allah, such as good conduct (*ma`ruf*). Meanwhile Doi describes *shiqaq* as occurring when the marital agreement between the spouses is breached. As marriage is regarded a contract between a husband and wife to live together and fulfil each other's duties, situations such as misconduct or cruelty on the other part of either party or the inability to continue in marriage life can be seen as a violation of the agreement. If a grave *shiqaq* occurs it will be essential for both husband and wife to seek help.

¹ Further explanation can be found in al-Qurtubi, Muhammad bin Ahmad bin Abi Bakar al-Qurtubi, *al-Jami` li Ahkam al-Qur'an* (Muassasah al-Resalah 2006) vol 2, 208, 419, vol 6, 289-290; Fakhr al-Din al-Razi, *al-Tafsir al-Kabir aw Mafatih al-Ghayb* (Dar al-Kutb al-Ilmiyyah 2004) 74; Muhammad bin `Ali al-Shawkani, *Fath al-Qadir al-Jami` baina Fanni wa al-Riwayah* (hereinafter '*Fath al-Qadir*') (Dar al-Ma`rifah 2004) vol 1, 296; Zaidan, *Ahkam al-Mar'ah* (n 19) 415.

Islamic law delineates specific procedures to be followed in managing marital conflicts between a husband and a wife as well as members of the family, either to remove the conflict or to find a solution. The law provides several methods to facilitate a reconciliation process to reconcile an estranged relationship between spouses and to save the marriage before it reaches the ultimate end. These methods have been clearly prescribed in the Qur'an.

Allah the Exalted has revealed in the Qur'an that the best way to resolve conflict in family life is firstly by efforts on the parts of the spouses themselves. In surah an-Nisa' verse 128, once it is accepted that the parties are becoming estranged, everyone is encouraged to quickly find a way to re-establish peace. In family disputes, for instance, in the case of *nushuz* (disobedient), Islam gives a clear guideline for a husband to educate his disobedient wife and bring her back to the state of being obedient and dutiful to Allah and him. The beauty of Islam lies in its teaching on, for example, how a husband, as a leader in the family, may play his role (as a mediator) and educate (and make *islah* with) the *nashiz* (disobedient) wife to return to good married life. The same steps will apply to a wife on her *nushuz* husband. When carelessness and negligence on the part of the husband is evident, the wife is advised by the law to relinquish (*sulh*) some of her rights (Ahmed, 2005; Sabiq, n.d). The Qur'an says that their coming to terms of peace (*sulh*) and amity is better than separation (Ahmed, 2005).

Nevertheless, in certain conditions when the discord is severe and *shiqaq* and separation is feared, recourse to a third party is seen as a necessary step after all personal efforts have failed to restore harmony. These procedures have been precisely provided for in the Qur'an, surah An-Nisa' verse and further elaborated upon by Muslim scholars (Ahmed, 2005).

Research Objectives

This study seeks to answer two objectives that are:

1. To examine the selection, appointment and role of hakam in Selangor Syariah Court
2. To analyse the ethics of hakam when conducting tahkim

The research was conducted at Shah Alam Subordinate Syari'ah courts in Selangor due to their reputation as being among the most advanced Shari'ah courts in Malaysia and that Selangor is the only state in Malaysia that has a specific rule on hakam (Hakam Rules 2014 of Selangor). This is arguably sufficient to justify the credibility and validity of the data collected. By this, the research seeks to promote effective procedure and uphold the best practice among the existing Shari'ah courts. However, due to confidentiality of the process, the researcher was not granted permission to attend and observe the majlis Tahkim.

Problem Statement

According to divorce statistics, Selangor has a high number of divorces (Farah Safura, 2020, Siti Zubaidah, 2011). Divorce cases in this state increases every year (Nora, 2017; Rogayah et al, 2021). Based on a research conducted by the staff at Family Law Division, Selangor Department of Religious Affair, (Khadijah Abdul Wahid, 2019). Selangor has recorded a highest number of divorce cases compared to other states. For example, in 2016, half of the marriages registered in Selangor ended up with divorce.

Table 1: Statistic Of Marriage And Divorce In Selangor From 2011-2016

Year	Marriage	divorce
2011	17, 416	5, 791
2012	19, 816	6, 049
2013	20, 200	6, 198
2014	21, 476	6, 890
2015	22, 911	8, 181
2016	22, 709	8, 823
Total	22, 709	41, 932

Source: Selangor Department of Islamic Religious Affair

In a recent news, a media reported that 7 in 10 cases registered at Syariah courts were on divorce (Ida Lim, malaymail, 2023). According to a study by JKSM's Corporate Communication Chief, Roziana Mat Amin, five "dominant" factors of marriage breakdown among Muslim families are "finances (with subfactors of not giving "*nafkah zahir*" or maintenance funds, a lifestyle of having debts, finances which are not yet firm, spending beyond means); being abandoned by the other spouse; interpersonal skills or character (spouse's bad attitude, lack of responsibility, lack of communication and ineffective communication); abuse; and sexual (not fulfilling "*nafkah batin*" or marital obligations for more than four months, not achieving satisfaction, sexual intercourse against the order of nature and frequent sexual intercourse)" (Ida Lim, malaymail, 2023). In addition to the high rate of divorce case, Syariah courts facing challenges and criticism of its backlog divorce cases. Fasakh and pronouncement of divorce are the two most delayed cases at Syariah court in Selangor (Farah Safura, 2020). Apart from the issue of backlog cases, the courts were also criticised for their as poor management of cases (Farah Safura, Sti Zubaidah, 2011)

In Malaysia, in an effort to improve Shari`ah Courts case management and speed up settlement of cases, resort to ADR method has now been seriously considered. Prior to the full force implementation of ADR in divorce proceedings in particular *Sulh* (mediasi), Conciliatory Committee (jawatankuasa pendamai) and *Hakam* (timbangtara), all divorce petitions including contested divorce (*talaq*, *khul'*, *ta'liq*, *fasakh*) were litigated before the Syari`ah Courts - a process or what may seem as 'battlefield'. Consequent to this, Syari`ah Courts not only facing with backlog cases due to prolonged proceedings, but also high expenses spent on logistic. As for the clients they will have to invest huge amount of money for the legal cost. Not only that the situation itself is not healthy for spouses but also the children who must experience bitter phases in their life.

In Malaysia, provisions relating to ADR can be found under sections 47 and 48 of Part V on the Dissolution of Marriage of the Islamic Family Law (Selangor) Enactment 2003. S. 47 (5) stipulate that in a case where one of the parties does not consent to the divorce or that the courts find the marriage is still saveable, the courts will appoint a Conciliatory Committee (Jawatankuasa Pendamai) and tahkim/hakam to help with the case (Nora, 2008, 2017; Mimi, 1998).

The lacunae in the existing procedure especially concerning contested divorce cases could be moderated with the provision of Hakam (Zaini Yusnita et al, 2022: 101). Contested divorce could be understood as involving cases such as fasakh, ta'liq and khulu'. Apart from these, it also involves cases where one of the parties such as the husband does not cooperate or disagree with the divorce petitioned by the other party, or that the husband refused to pronounce talaq

(Section 47 (5- 14) EUUKI) Selangor 2003). In these situations, if the court found that there are room for reconciliation, the court will first refer the case to the reconciliation team (Jawatankuasa Pendamai). Finally, if the wife insists on ending the marriage while husband refuse to it, the court will forward the case to majlis Tahkim/hakam. Reviewing the procedure, while the court, with best intention, trying to save the marriage and effect reconciliation, the matter has been delayed unintentionally before it finally reaches majlis Tahkim. A research conducted at Shah Alam Subordinate Syariah Court demonstrated that majlis Tahkim had significantly assisted the court in resolving contested divorce cases thus dissolving broken marriage (Rafidah Mohamad Cusairi, 2024, Zaini Yusnita et al, 2022). Therefore tahkim/hakam seems to be the effective method to resolve issues relating to contested divorce (Nora & Sarafuddin, 2017) in which the wife for instance, no longer wishes to continue living as a wife. The judge interviewed also express his concern if court were to force the parties or the wife to live in such unhappy relationship.

The discussion above also manifests the possibility that the available procedure in the statutes such as through sections 48 to 52 proved ineffective and in dire need of reform in terms of resorting to another drastic and effective method that could immediately bring into effect a divorce. This is especially so considering the existing law governing marriage and divorce in most of the States enactments. The absence of comprehensive rules such that applied in Selangor through Hakam Rules 2014 would hamper the effectiveness of hakam (Nora Abdul Hak, 2017).

The Practice Direction No 1 of 2006 on Amalan Hakam Mahkamah Syariah also includes stipulations on the ethic of *hakam*. A *hakam* must ensure justice is done and achieved and that they are warned against using their position for personal or other parties' gain. In delivering the task *hakam* must ensure that their personal interests do not influence or contravene with their duty as *hakam*. With these in mind, not only the issues of justice and fairness are at stake but also the successful of the *tahkim* procedure. Even though not many literatures found so far to raise awareness on these aspects, the contents of the *Direction* and the new Selangor's Hakam Rules serve as safeguard and clear indication that *tahkim* must be conducted not only with proper procedure but the third parties responsible in effecting peace and saving the marriage must abide by the law, both procedural and ethical.

Literature Review

A considerably fair amount of literature in reference to the subject of *sulh*, mediation and *tahkim* has been published in Malaysia. Even though the US, Australia and UK are among the first to dominate ADR and that by comparison literature found on ADR practice in Malaysia are yet to flourish, mediation as of today family mediation may no longer seem a new phenomenon (Cecil, t.t). However, the literature reviewed in this section is limited to that which is directly related to the main themes of this research based on the aims and objectives.

Tahkim (Med-Arb) as Alternative Dispute Resolution (ADR) Method in Resolving Marital Discord

In the event of failure to restore harmony between the spouses, Islam has laid out other remedies from outside the conjugal home where competent third parties are available to assist in resolving the conflict. Verse 35 of surah an-Nisa' set forward the procedure:

If ye fear a 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: for Allah hath full knowledge, and is acquainted with all things.

This verse unequivocally provides a specific method and procedure of *tahkim* in resolving family conflicts and disputes. In general, this verse refers to the task of a third party in helping couples in enmity to confront their differences in a process called *tahkim*. The verse explicitly explains the concept of intervention and reconciliation of dispute in Islam by a third party (Al-Ramli, 1993; Al-Baijuri, 1999; Al-Khassaf, 1994; Zaidan, 1989).² Furthermore, this verse seeks not only to explain the procedure of *tahkim* but also to encourage the parties to resolve their discord within the family boundaries without need for formal litigation.

Initially, *tahkim* is sanctioned when there is *shiqaq* between spouses (Al-Mawsu'ah, 2001; Zaidan). Jurists have briefly outlined circumstances where a *qadi* will need to appoint *hakams* to help investigate and resolve the dispute. When a wife becomes disobedient and the husband failed to address and educate the wife and all the methods (Doi, 2008; Kurait & Al-Shatiwi, nd; Al-Farmawi, nd; Al-'Adawi) provided in Islamic law have been observed, then the husband may bring the matter to a *qadi*. The situation is the same when the matter or issue between them becomes more complicated and it is not clear who is at fault or the oppressor. The *qadi* may appoint a respected person (*thiqah*) to observe and to advise on the matter between them before *hakams* are sent. However, if the effort proves ineffective, the conflict and discord are grave or physical violence persists and there is a fear that the limits will be transgressed, the matter will be raised to a *qadi* who will appoint *hakams* (Zaidan; Al-Mawsu'ah).

Definition of Tahkim

Tahkim literally means to make someone a third party or arbitrator in a dispute, and to authorise the person to pass judgement (The Mejjelle: 1790, Ibn Sidah: 325, Al-Azhari: 110, Ibn Manzur: 953, *al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyah*: 233). According to Ibn 'Abidin (2003: 125), tahkim literally means a judgement of another person in a case of disputing parties (Nora Abdul Hak et al, (2013:58, Ibn Manzur: 952). Therefore, the third parties who are the arbitrator (hakam) will usually be given authority to decide on the disputed matters according to Islamic law (Ibn 'Abidin: 125; Ibn Nujaym: 24, Al-Zuhayli, 1985: 756, Al-Mawardi, 1972: 379). This definition refers to the intervention process itself. This definition is similar to its terminological definition, ie a voluntary appointment by the disputing parties of someone they trust to resolve the disputes between them (Raihanah Azahari, 2008:64, Ibn Manzur: 952). The Qur'an, in fact, uses the verb *hakama* to refer to the settlement of disputes and conflicts, as opposed to the verb *qada* which refers to judicial or divine rulings (Morsy, 1984: 47, Goolam, 2002: 144)). *Tahkim* is a verbal noun of the Arabic word *hakkama*,³ which 'primarily signifies the turning a man back from wrongdoing' (EW Lane, 1984: 616). Al-Zamakhshari explains the meaning of the word *hakkama* as making someone an arbitrator (*hakam/muhakkam*) (1998: 206). *Tahkim* as defined by al-Zuhayli and the Mejjelle is a process in which competent (1985: 756-757) third parties were voluntarily (al-Zuhayli, C.R. Tyser et al.: 317) selected and appointed as a *hakam* (The Mejjelle: 317) by disputing parties to resolve disputes between them. The overall understanding of *tahkim* from some scholars' definitions demonstrate *tahkim* as an intervention process by a third party appointed and authorized (Al-Zamakhshari: 73, Zahraa and Hak, 2006: 3) with awarding power by the disputing parties to help resolve the disputes as well as make a decision (Ibn Sidah: 235, Al-Azhari, Ibn Manzur: 952, *al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyah*: 233).

² This settlement by *tahkim* is also strongly encouraged in all types of disputes.

³ For further discussion on the word *hakkama* and its derivatives, see Ibn Manzur (n 19) 952; Mahmud bin Ahmad Al-'Ayni, *al-Banayah fi Sharh al-Hidayah* (Dar al-Fikr 1990) vol 8, 66.

Conditions and Qualification of Hakam in Islamic Law

In general, there is agreement among the jurists that hakam must have qualities such as justice/impartiality (*`adalah*) and be knowledgeable on the law and the principle of disobedience (*nushuz*). However, they disagree on conditions such as being male and free (al-Mawsu'ah al-Fiqhiyyah). The qualifications or conditions of a hakam as laid down in Islamic law are as follows: the hakam must be a muslim, have attained the age of majority and be of sound mind; be of just character; be of male gender; be a mujtahid (a learned scholar); and be free from physical defects (Nora Abdul Hak, Sa'odah Ahmad and Umar A Oseni, 2013; Mahdi Zahraa and Nora A. Hak, 2006; Rafidah Mohamad Cusairi and Mahdi Zahraa, 2015). These qualifications however are discussed in the light of the role and duties of hakam in family disputes. Among the qualifications and conditions above, it is interestingly relevant to note here on two important conditions. First, the opinion that the hakam must be free from physical defects and second, the hakam must be of male gender.

Free From Physical Defect

The opinion that the hakam must be free from physical defect can be an impactful condition. Many scholars discuss the issue regarding the physical abilities of hakam as one of the criteria to allow their participation in the process (al-Tarablisi, Ibn Nujaym, Al-Sarkhasi, Al-Fatawa Al-Hindiyyah, Zahraa and Hak). The hakam needs to acquire physical abilities, i.e. 'faculties of a clear speech, hearing and eyesight' (Zahraa and Hak). Further, the hakam is also required to be 'attentive, able to write and pronounce the text of the award for the people to hear and comprehend his award clearly'. In this case, if the hakam falls short of or has defects in any of these physical qualities, his office might be subjected to uncertainties and contentions (Zahraa and Hak, Ibn Abi Al-Dam, 1982).

Examination of this requirements is necessary and useful considering that hakam involves direct and open communication with the disputants. This poses question of whether or not physical defects hugely affect the hakam's ability – first, to carry out the duty assigned and second, to achieve the objective of the process. A negotiation based process will heavily rely on the ability of the third party, ie the hakam, to physically communicate with the parties. From a psychological point of view, the parties' appearance, communication, facial expressions and body gestures will reveal the degree of conflict between them. This will crucially contribute towards the hakam's observation of the case. Against this background, it is argued that only defects in speech, hearing and eyesight that could considerably impede communication between all parties and therefore should be avoided. Notwithstanding the concern, a physically defective hakam should not become an issue if they were chosen and appointed by the disputing parties or with their prior consent (Amin, 1988).

The Gender Of Hakam

One of the characters of a *qadi*-competent as agreed among the majority of schools is being of male gender. However, the strictness of such condition remains an area of debate for scholars. Maliki School does not allow a woman to arbitrate. If she is appointed and gives an award, the award would be void (Al-Baji, 1999: 405, Al-Husayni, 201: 727-728, Malik Ibn Anas, 1994: 266-267, Al-Buti, 2006: 167-179, Zahraa & Hak, 2006: 20).⁴ However, Al-Syarbini of the Shafi'i School laid down a different condition or requirement between a *qadi* and a *hakam*. While a person appointed as a *qadi* is required to be male (1997: 501-502), a *hakam*, on the

⁴ They rely on a verse in the Qur'an which translates, 'Men are the protectors and maintainers of women'. Al-Quran: al-Nisa':34.

other hand, is not required to be male (1997: 345). A *hakam* quoted as including women in the meaning of scholars (*fuhaqa'*) whose rulings are accepted (Al-Buti: 176). The strongest (*azhar*) opinion in the School also does not being put male as one of the conditions⁵ (Zaidan, 1993: 421, Al-Sharbini, 1997: 261). The Shafi'i's view is supported by the Hanafis. The School bases its view on the right of women to give testimony (*shahadah*). Al-Kasani relates the competency of a *qadi* to the competency of a witness (testimony) and concludes that being male is not considered as one of the requirements of a *qadi* (1986: 3). He and Al-Marghinani also opine that a woman is permitted to judge in all cases except *hudud* and *qisas* (2008: 150). If a woman is allowed to take the office of a *qadi*, she should then be allowed to arbitrate (al-Kasani, 1986: 3). This view is further emphasised in Al-Fatawa al-Hindiyyah (Al-Hummam, 2000: 398),⁶ that a female arbitrator is permissible in disputes concerning property and in issues specifically related to women:

It is permissible for the (opposing parties) to make a woman as an arbitrator between them except in the case of *hudud* and *qisas* for what we have already mentioned that arbitration is established upon the witness qualifications and the woman is able to witness but not in *hudud* and *qisas*.⁷

Meanwhile, other Maliki jurists (Zahraa & Hak: 20-21, Al-Baji, 1995: 218-219, Al-Bahuti: 309, Al-Ghamrawi: 401) allow women to become arbitrator. However, they reach their conclusion from a different perspective. An arbitrator is equal to an agent, not a judge; a woman is allowed to act as an agent; therefore she is also allowed to arbitrate. Al-Dusuqi (nd: 136-137) refers to other Maliki scholars who permit a woman as arbitrator in property and injury matters (Al-Baji: 218, Zahraa & Hak: 20-21).

Contemporary Muslim scholars Zaidan (1993: 421) Al-Buti (2006: 171-184) and Surty⁸ (2012: 57, Ibn Manzur: 953) also recognise women's role and their opinion in the decision-making process. Bringing clear examples from the practice during the Prophet's and Companions' time, Al-Buti argues the absence of any sufficient evidence from the Islamic traditions which say women do not have right in *Shura* or which disallow their involvement in matters that are also adjudged by men.⁹ Equally, women's role in *Shura* was acknowledged during the time of Caliph Umar (Al-Buti: 175-176) and by the massive activities involving the issuance of verdicts and opinions by the Prophet's wife, 'A'isyah. She was incomparably one of the experts among the Companions and one of the main points of resort concerning matters relating to Islamic jurisprudence (Al-Asqalani, 1972). Umar himself had consulted 'A'isyah regarding women's issues as well as on the conducts and treatments of the Prophets with his family. He also asked the opinion of his own daughter, Hafsa (Al-Buti: 176). These show that in some issues, especially relating to or involving women, women's opinions were given full recognition.

⁵ Although Al-Qalyubi views that if they are in the position as *hakams*, they are required to be male as stipulated in the second opinion. *Hashiyah al-Qalyubi*, vol 3, 307 cited in *al-Mawsu'ah al-Fiqhiyyah*, 310.

⁶ See also Ibn Nujaym, nd: 44, Al-Zuhayli, 482-483, 757. Al-Zuhayli states that whoever fulfils the requirement of testimony competent may take up the role as *hakam* and this includes a woman.

⁷ Zahraa and Hak, 20.

⁸ Surty, for example, records that Nabigha al-Dhubyani advised Nu'man bin Mundhir to follow the decision of a woman; Hind al-Ayadiyyah, Sahr bint Luqman, Khusayla bint 'Amir bin al-Zarid were some prominent female *hakams*; see also a long list of *tahkim* activities recorded in Muhammad Ibrahim HI Surty, *Studies on the Islamic Judicial System* (Qur'anic Arabic Foundation 2012) 57.

⁹ See also al-Bukhari, Abu 'Abd Allah bin Muhammad bin Ismail, *Sahih al-Bukhari* vol 3, 182.

To relate, mediation or the first stage of *tahkim* does not involve decision making where a *hakam* is simply required to facilitate communication exchanges between the disputing parties and to assist achieving a *sulh* settlement. On the contrary, arbitration or the second stage of *tahkim* deals with a decision-making task particularly on separating or uniting the parties (Al-Shirazi, 1996: 251). For this reason, being male and just become obligatory requirements. However, a female *hakam* (mediator-arbitrator) is necessary to deal with some intimate issues which are too private to disclose or discuss in front of a male mediator-arbitrator. Certain issues are also more easily understood by a female mediator than a male counterpart.

The absence of unanimous objection by scholars in the area where woman's participation is permissible could be taken as an indirect approval for a woman to take up the role. In this case, referring to the source of *hakam* in the Quran, surah An-Nisa' verse 35 where both the husband and the wife are required to appoint *hakam* to represent them, it is therefore suggested that the wife should be given option by the courts to choose from among her trusted female relatives to be her *hakam*.

Tahkim/Hakam in Syariah Court

In Malaysia ADR or Alternative Dispute Resolution is a fairly new phenomenon. Regarding itself as still at infancy, researchers and legal practitioners started to share experiences and understandings with regards to the application of ADR in the settlement of marital disputes. Nevertheless, there are growing interests on ADR in Malaysia particularly its application in the family realm. In fact, as in other parts of the world, ADR is believed to be the best and appropriate (Lisa, 2011; Cecil, n.d.) method of resolving matrimonial disputes as well as saving marriages at their breaking point.

The basic foundation of family mediation has been thoroughly discussed by prominent scholars in Malaysia and worldwide. As for the practice of *tahkim* (arbitration) in Malaysia, there is comparatively less written literature about *tahkim* and its operation in the Syari'ah Courts. Even though mention on *hakam* can be found generously in a number of literatures on divorce and marital dispute in Syariah Courts. They are as such Sharifah & Cadderroth (1997); Mimi (1998); Zaleha (2005); Ghazali, (2006) and Raihanah (2008), Nora (2013). These writings however provide a general outline on *hakam* in Syariah Courts and types of conflict or divorce that are applicable without details of every aspect of *hakam*. This probably in particular as demonstrated above that *hakam* was only seriously considered after the issuance of Practice Direction in 2006. Prior to this, the Syariah Courts in Malaysia resolved matrimonial disputes and conflicts using another ADR method known as *sulh* (Ghazali, 2006; 2000).

Back in 1997, research on the Islamic methods applicable in the resolution of marital disputes in Syariah Courts can be found in Sharifah & Cederroth (1997). Methods such as consultation, conciliation, mediation, arbitration, and adjudication were mentioned briefly together with narration of cases tried at Syariah courts. Nevertheless, the research has made no direct reference or comparison to any statutes.

The tendency to scrutinise detailed aspects of *hakam* emerges within the span of the past decade following the implementation of ADR methods in divorce proceedings in Syariah Courts. Within the limitation, Nora was among the scholars and researchers identified to be working closely on the subject and whose literature is widely referred to in this research. Nora (2006) among other compares between the practice of *Hakam* or arbitration in the Syariah Courts of Malaysia and Singapore and, between *tahkim* in Islamic law and *sulh/tahkim* practiced in

Syariah courts. Referring to provisions on *hakam* in Islamic Family Law Act (Federal Territory) (IFLA 1984), it is important that *hakam* must have adequate knowledge in Islamic law. In the absence of that qualification, a non-relative may be appointed by the courts to carry the task in place of the incompetent relatives. Similarly, this aspect was also among the main concerns raised by a Syariah Court's judge (Naim, 2001; Idid & Oseni, 2014).

Methodology

The study adopts a qualitative approach in gathering and analysing data and relevant materials information essential for the conceptual, theoretical as well as practical understanding of tahkim/hakam. This includes the principles, rules, and aspects of *tahkim* (Islamic arbitration); the law, rules and regulation governing tahkim/hakam and the practice in Shari'ah courts. Data was collected mainly through library research method supported with minor empirical study. A fieldwork study was carried out to collect data and information for Objective 1 and Objective 2 on the selection, appointment and the role Hakam and, the ethics of hakam respectively. This method was employed to verify data and information collected through the library research and the Hakam Rules and to explore the actual process of tahkim/hakam in Syari'ah courts. Among the activities engaged in to obtain data and information on the stated objectives were interviews with Shariah officials such as The Syariah Subordinate Court's Judge, Hakam and, revision of the Shariah courts case files. The research however faced some limitation. Due to confidentiality of the process, the researcher was not granted permission to attend and observe the majlis Tahkim or tahkim session. In this case therefore, the intended observation method was not carried out due to such restriction. Data such as the approach of the hakam in mediating dispute between the spouses (if there were joint meetings/caucus), how the hakam dealt with evidence presented, clients' reaction to the hakam's approach, characteristics and qualities, and suggestions/recommendations made by the hakam were not able to be accessed.

- i. *Semi-structured and open-ended interviews.* These types of interviews were adopted and designed to allow for a diverse perspective of information and more constructive two ways communication and transparent discussion between the interviewees and the researcher. By this, the interviewees were not restricted in sharing their opinions or disclosing any irregularities in the practice. The interviews were conducted with Shariah Court judges, Hakam and management staff. Interviews and small meetings were also carried out with prominent legal practitioners in the field who were fully aware of the *Tahkim* procedure.

Analysing Data

The data and information collected in this study is analysed using content analysis method. The historical approach was applied to examine the progression of hakam in the Malaysian Syariah court practice. Meanwhile, philosophical and theoretical approaches were used to understand the essence of hakam and the qualities and attributes of hakam discussed in Islamic law as well as in Hakam Rules 2014 of Selangor and, to analyse the interview transcription. A comparative method was applied to analyse divergent views of Muslim scholars on arbitration and mediation, the similarities and differences in the principles of arbitration and mediation in Islamic law and Malaysian law. The process of analysing data in this study is subject to several limitations, namely, the sources and materials at hand, the quality of the data and information collected, and the questions this study seeks to answer based on the aims and the objectives.

Roles of Hakam in Islamic Law and Hakam (State of Selangor) Rules 2014

A preeminent description of the hakam and its role(s) and function(s) were put forth in the Qur'an in surah an-Nisa, verse 35. In this verse which deals specifically with marital disputes, the hakam was highlighted as an important peace agent to help remove ill feeling between the two disputing parties and facilitate communication while resolving their disputes. Apart from principal sources from the Quran referred to as guideline on the roles and procedure of hakam, legal and procedural framework of Hakam can be found in the specific enactment. The Selangor Syariah Judiciary Department (JAKESS) introduced, under section 48 of the Enactment 2003, another set of Hakam Rules known as Hakam (State of Selangor) Rules 2014 implementable within all the Syariah Courts in the State of Selangor. Part III of the Rules briefs on the role and function of Hakam. A hakam is responsible and must endeavour to put to a stop to a discord or dissension (shiqaq) between spouses by way of reconciliation or, dissolution i.e. talaq (unilateral divorce) or khulu` (divorce by redemption). A hakam also, while arbitrating, must receive and execute orders of the Courts from time to time and, explain to the parties ground rules that they must abide by throughout Majlis Tahkim.

In order to summarise the duties of the hakam and at the same time explain the procedure of *tahkim*, three essential steps in the table below must be observed.

Table 2: Steps Of Tahkim

First step: reconciliation	Second step: sulh settlement	Third step
<ul style="list-style-type: none"> • remove ill feeling between the two disputing parties • facilitate communication while resolving their disputes • inducing common grounds between disputing spouses and trying to reconcile their relationship. 	<ul style="list-style-type: none"> • If the hakam fail to reconcile the parties, and in their view separation or divorce (<i>talaq</i>) is the best solution divorce must be granted in the best and safest way possible. At this point, all claims and financial or property issues must be sorted out mutually between both parties with the help of hakam. 	<ul style="list-style-type: none"> • in the event of failure of the first two steps, the hakam may respond and act accordingly based on their capacity as arbitrators. At this stage they may award a decision after considering all the evidence (Raihanah Azahari: 73-74).
<ul style="list-style-type: none"> • The Hanafi, Maliki, Shafi'i and Hanbali • The Maliki School expressly makes it an obligation on the hakam to firstly reconcile between the spouses through any ways possible ways towards harmony (agreement) and 		

<p>peaceful conjugal life (Al-Mawsu'ah al-Fiqhiyyah: 315).</p> <ul style="list-style-type: none"> • The Hanafi School opines that hakam were sent/appointed to reconcile disputing spouses (Al-Jassas, 1992: 193). • The Shafi'i School stipulate the early duty of the hakam is to reconcile the spouses even though this was not expressly emphasised. 		
<ul style="list-style-type: none"> • Hanbali School. Al-Bahuti (1997: 186) suggests that the hakam are required to have good intention or must intend for reconciliation in accordance with the second part of the verse '<i>in yurida islahah</i>', use soft word (be softly spoken), use fair treatment (to treat fairly/with justice), be interested or passionate about their work or in what they are doing, show concern, and not favour one party over the other, for example, there must be no bias in their approach. 		

Hence, from the table above, it is fair to submit that mediating and reconciling disputing spouses is more crucial in a *tahkim* process and thus requires more attention and efforts by the hakam. This is because if such efforts fail, there is nothing left for the third party to do to help saving the relationship – only to dissolve it. The nature of the hakam’s task in a med-arb process (the first stage of *tahkim*) does not require them to exercise power or to issue decisions. Instead, the hakam uses his skills and knowledge in the disputed area while assisting the negotiation between the disputing parties. Meanwhile, the role or function of Hakam outlined in Selangor’s 2014 Hakam Rules are very specific on tackling the issue of *shiqaq*. Further elaboration on how this would be achieved can be found in the discussion below on the qualifications, attributes, and ethics of hakam.

Qualifications and Attributes of Hakam under Hakam (State of Selangor) Rules 2014

Rafidah (2013) demonstrates that attributes include both the personal qualities and qualifications of a mediator deemed essential to help mediators carry out their roles and functions. The attributes of a good mediator were interestingly expounded upon in Goethe’s description of Mittler.¹⁰ The Mittler character describes a good mediator as someone who possesses ‘knowledge relating to the matter in dispute, skills in analysis and problem solving, awareness of the moral dimension to the problem, and wisdom and compassion in his relations with people’. This means that a mediator has to be a dynamic and multi-tasking person in all aspects. However, a mediator’s personal qualities are argued to be ‘indefinable and idiosyncratic’ (Roberts, 2008) as they are not easily accessible to analysis.

Kaedah 8 of The Hakam Rules 2014 also categories and differentiate qualifications of the hakam according to the types of appointment i.e. between appointing close relatives of the spouses as hakam (8(1)), appointing Syariah legal counsel as hakam (8(2)) and, appointing a person to be on the Hakam Panel (8(3)).

Table 3: Qualification of Hakam

Close relative 8(1)	Legal counsel 8(2)	Other persons 8(3)
qualified and eligible to be appointed as hakam provided that he is a Muslim; male; of sound mind and reached the age of puberty (mukallaf); fair, just and trusted and; has basic knowledge in matters relating to family and Islamic law (hukum syarak) (8(1) (a)(b)(c)(d)(e)).	Any legal counsel representing the parties in the proceedings cannot be appointed as hakam unless otherwise instructed by the Courts.	For a person to be qualified to sit on the Hakam Panel, he must be a Muslim; Malaysian nationality; male; of sound mind and reached the age of puberty (mukallaf); fair, just and trusted; well-mannered and has never been convicted to any criminal offences in Malaysia or elsewhere; competent in family matters and Islamic law (hukum syarak); has never been terminated from appointment under Kaedah 29; not a bankrupt; hold a minimum academic certificate of Sijil Thanawi or equivalent or higher from any

¹⁰ Extract from JW Von Goethe, *Elective Affinities* (1809 RJ Hollingdale tr, Penguin Classic 1971, copyright RJ Hollingdale, 1971 31-4, reproduced by permission of Penguin Books Ltd).

		education institution or higher education institution recognised by the Government of Malaysia in Islamic Studies; and, pass the evaluation process by the Committee.
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Source: Hakam (State of Selangor) Rules 2014

Based on the data collected, it is learned that these qualifications and attributes serve as guideline for the appointment and during the conduct of the duties of the hakam. The approach of the court will differ depending on who are the hakam; the relative of the spouses or, the court-annexed hakam. This would mean that in practice, the court would be a little lenient and open when dealing and appointing relatives as hakam as compared to the court-annexed hakam. This also mean that the judge will use their own creativity to examine the 'competency' of the representative brought by the spouses as their hakam. Similarly, if these qualifications and conditions are cross-checked against the opinions of Muslim jurists, there will be areas of agreement and disagreement in terms of realization of the text into context.

Ethics of Hakam

Part VI of the Rules details out the ethics of Hakam when conducting majlis Tahkim. A hakam must endeavour to execute majlis Tahkim and not delaying it without proper reason. Hakam must also abide by the procedure and time frame provided for majlis Tahkim. To further safeguard majlis Tahkim, the hakam conducting Tahkim must also ensure that these requirements are duly observed throughout the session:

Table 4: Ethics of Hakam

Procedural/behaviorial ethics		
<p>Not conducting majlis tahkim in the state of discomposed, angry, hungry, thirsty, sleepy, exhausted or physically unfit or, unwell.</p> <p>Not leaving majlis Tahkim without reasonable reason.</p> <p>Strict, fair and just and not being influenced by the surrounding or audiences;</p> <p>Open, friendly and patient when</p>	<p>Hakam must be non partisan; neutral; without prejudice;</p> <p>Treat all matters with strict confidential unless otherwise ordered by the Courts during trial.</p> <p>Avoid conflict of interest; competent, skilled and well-versed in the area of disputes and,</p> <p>Not supporting in any trial as witness or advisor to parties to Majlis Tahkim he had conducted.</p>	<p>Hakam must not:</p> <p>Behave in a way that would trigger reasonable suspicion that he (i) allow personal interest in conflict with his task as Hakam; (ii) prioritise his position for personal benefit;</p> <p>Behave improperly or in a way that would cause damage of reputation to the Court and the Majlis Tahkim conducted.</p> <p>Priorities personal interest over his duty and responsibility; and</p> <p>Behave in a way that would trigger suspicion over his</p>

conducting majlis Tahkim; encourage disputing parties to resolve their disputes and reach mutual agreement; and give equal treatment and attention to disputing parties.		competency as fair and just third party.
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Source: Hakam (State of Selangor) Rules 2014

Conclusion

It could be gathered from the findings and discussion in this paper that the Ethics of hakam stipulated in Hakam Rules 2014 of Selangor manifest the importance of all aspects aimed in this paper which includes the qualifications, conditions and the appointment required of a hakam for him to be eligible as hakam, and the roles, duties, attributes and characteristic that must be maintained throughout the tahkim session. All these is to safeguard and ensure successfulness of tahkim as one of the effective ADR methods to assist the courts resolving cases efficiently. This study also contributes significantly to the development of the law and practice relating to hakam in this country. It is hope that other states will follow the example of Selangor and amend the existing law to include a specific Hakam Rules. The formal implementation of Hakam in all Syariah courts to help speeding resolution of divorce cases would be the better way forward.

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