



The Concept of *Ṣulḥ* and Mediation in Marriage Conflict Resolution in Religious Courts: A Comparative Study between Contemporary Indonesian Family Law and Classical Islamic Law

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Abstract

*Mediation as a dispute resolution process outside the courtroom has been used by the Religious Courts. Its juridical basis is based on Indonesian Supreme Court Regulations Number 2 of 2003 and Number 1 of 2008 concerning Mediation Procedures in Courts. Meanwhile, in the classical Islamic legal tradition, marital conflicts are resolved by a third party outside the courtroom which is referred to as *ṣulḥ*, namely efforts to reconcile through a process of *taḥkīm* or arbitration. Based on this, this study answers the question whether the Religious Courts in Indonesia fully use the concept of *ṣulḥ* as a process of resolving marital conflicts as depicted in the classical Islamic legal tradition. This study concludes that the Religious Courts in Indonesia do not fully use the concept of *ṣulḥ* as a process of resolving marital conflicts as depicted in the classical Islamic legal tradition. This is because the concept of *ṣulḥ* in Islamic law uses the *taḥkīm* (*ḥakam*) mechanism. The concept of *ḥakam* originating from the classical Islamic legal tradition and mediation originating from the contemporary national legal tradition actually both have substantial differences in terms of concept and implementation in the Religious Courts. The difference in concept is due to differences in sources, authorities, and procedures. However, there are similarities between the two, which lie in the involvement of someone who plays a role in resolving disputes and conflicts in court.*

Keywords: conflict resolution, mediation, *ṣulḥ*, *taḥkīm*, *ḥakam*, religious court

A. Introduction

The Religious Court is a court for Muslims in Indonesia who wish to seek justice in certain areas of civil law, namely marriage, inheritance, endowments, grants and matters related to the sharia economy. The Religious Courts in implementing certain civil laws are in accordance with Islamic rules and norms, apart from having to follow the rules of judicial procedural law that apply in Indonesia. The Religious Courts base their trial rules or procedural law on the rules that apply to the District Courts. This is in accordance with Article 54 of Law Number 7 of 1987 concerning the Religious Courts which states that “The procedural law that applies to courts within the religious courts is the civil procedural law that applies to courts within the district courts, except for what has been specifically regulated in this law.” Meanwhile, the procedural law that applies within the District Court is the procedural law inherited from the Dutch colonial government.¹ Thus, the Religious Courts in

¹ Based on Staatsblad No. 52/1847 and Staatsblad No. 63/1849, there are three civil procedural laws used in Indonesia, namely: 1. *Het Hirziene Indonesisch Reglement* (RR), 2. *Rechtsreglement voor De Buitengewesten* (RBg), 3. *Reglement op de Rechtsvordering* (Rv).

Indonesia do not follow judicial procedures as applicable in classical fiqh, especially in resolving marital conflicts.

In the Indonesian legal system, marital conflict resolution is carried out before a court session conducted by a panel of judges appointed to handle the case. Settlement of marital conflicts before a panel of judges is a trial stage that must be carried out by a panel of judges as part of the procedural law as stated in Article 65 of Law Number 7 of 1989, which states that “Divorce can only be carried out before a court hearing after the court concerned tried and failed to reconcile the two parties”. Thus, the efforts to reconcile by the panel of judges are an integral part of the trial process for the marital conflict case, after one of the parties, the wife or husband, files a divorce suit to the court.

Indonesian laws and regulations do not regulate the process of resolving marital conflicts outside of court. So that efforts to reconcile between the two parties seem to have been submitted by each without any interference from the State. This is different from the legal system in other countries, where courts will not accept cases related to marital conflict if both parties have not carried out the mediation steps outside the court by a marriage arbitration/mediation institution. The stages of reconciliation that have been carried out by the two parties are evidenced by a deed or certificate from the mediation institution.²

In Indonesia, because there is no law governing the mediation process for marital conflicts, it was to fill the legal void that the Supreme Court issued Regulation Number 1 of 2008 concerning Mediation Procedures in Courts. According to the Supreme Court regulation, all civil disputes other than trade and industrial relations issues that are submitted to the Court of First Instance, must be sought for settlement through reconciliation with the help of a mediator first.³

In addition, according to the Supreme Court Regulation No. 1 of 2008, the mediation stage is carried out outside the courtroom with a judge or professional mediator as the intermediary in the mediation process. However, in reality most of the disputing parties still choose to go through the judicial process rather than holding reconciliation in the mediation stage.

The mediation session is essentially conducted to reach a reconciliation agreement between the parties, but in reality, this is not the case. This mediation session is sometimes not considered important, so in the end this stage is not carried out seriously by the judge or the mediator with the parties concerned. However, this usually is only mentioned in the consideration of the panel of judges’ decisions as stated in Supreme Court Regulation No. 1 of 2008. So, this mediation session is considered a mere formality, because it is considered a condition only for obtaining convenience in the divorce process.

Meanwhile, in the classical Islamic legal tradition in the field of *munākaḥāt*, marital conflicts are resolved by a third party outside the courtroom called *ṣulḥ*, namely efforts to reconcile through a *taḥkīm* or arbitration process. The decision of this *taḥkīm* can reconcile the two conflicting parties or even dissolve it. Qur’an in Surah An-Nisā’ [4] verse 128 states that if there is a conflict related to the rights and obligations of husband and wife, it is necessary to make efforts to reconcile (*ṣulḥ*).

² For example, family court in Australia, based on Family Law Act 1975, requires that someone who is going to file a lawsuit related to child custody must first obtain a mediation certificate from an official mediation institution. See <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/Compulsory+Family+Dispute+Resolution>

³ Supreme Court Regulation Number 1 of 2008 Article 4.

In the classical Islamic legal tradition, the court will not handle a request for divorce except after attempts at reconciliation (*ṣulḥ*) through the *taḥkīm* (arbitration) process to resolve marital conflicts have been passed by both parties, and they failed to achieve such reconciliation.⁴ The third party in the *taḥkīm* process can be a community figure appointed by the husband and wife by mutual agreement, and can also be a judge (*qāḍī*) but outside the divorce court.⁵ Even in the Qur'an, if there is a conflict (*syiqāq*) in a marriage, each party (husband and wife) is required to first find a peacemaker (*ḥakam*) from the families of both parties. This is confirmed in the Qur'an Surah An-Nisā' [4] verse 35.

The reason behind *taḥkīm* as described in the Qur'an above is that according to Islamic teachings marriage is a very strong bond (*miṣāqan galīzan*) not only between husband and wife, but also strong bonds between two families from both sides. So according to the Islamic view, marriage is an important institution in society. If there is a conflict between husband and wife it can become a bigger family problem that must be resolved together. Thus, the use of a peacemaker (*ḥakam*) from the family is not intended to seek unfair advantage from one of the parties but rather a method of resolving marital conflicts while strengthening the bonds of brotherhood between the two families.

Thus, the resolution of marital conflicts in the tradition of Islamic marriage law (*munākaḥāt*) begins with bringing in a peacemaker from the family (*ḥakam*) to carry out a dispute settlement (mediation). If no agreement is reached through *ḥakam* mediation, both husband and wife can appoint another person as a peacemaker (*taḥkīm*) to settle marital disputes (arbitration). And if this last effort cannot reach an agreement, the husband and wife can submit a marriage dispute settlement to the judge through a trial court (adjudication).⁶

The settlement that is reached from the stages of reconciliation efforts (*ṣulḥ*) above develops from a mutual agreement between the two parties until a decision determined by the judge is permanent and binding. Conflict resolution by judges through courts is the most coercive way among other ways. Because the result of the court trial decision is coercive, it is certain that the defeated party will have a feeling of dissatisfaction, so that the court decision is still possible for the defeated party to try to change it through an appeal and cassation court. Of course, this cannot satisfy both parties. That is why the Qur'an recommends reconciliation (*ṣulḥ*) without going through a court decision, because reconciliation is better (*waṣ-ṣulḥ khair*).⁷ Based on these matters, this study answers the question whether the Religious Courts in Indonesia fully use the concept of *ṣulḥ* as a process of resolving marital conflicts as depicted in the classical Islamic legal tradition.

B. Literature Review

Mediation as a form of dispute resolution has the main scope in the form of private and civil areas. Civil disputes in the form of family disputes, inheritance, wealth, contracts, banking, business, environment and various other types of civil disputes can be resolved through mediation. Etymologically, the term mediation comes from the Latin *mediare*, which means to be in the middle. This meaning refers to the role played by third parties as mediators in carrying out their duties to mediate and resolve disputes between the parties. "Being in the middle" also means that the

⁴ Ratno Lukito, "Religious ADR: Mediation in Islamic Family Law Tradition", *Al-Jami'ah*, Vol. 44, No. 325, 2009, hlm. 337.

⁵ Abu Muhammad Mahmud Ibn Ahmad al-Ainaini, *al-Bidāyah fi Syarḥ al-Hidāyah*, Vol. 9 (Beirut: Dār al-Fikr, 1994), 30.

⁶ al-Ainaini, *al-Bidāyah fi Syarḥ al-Hidāyah*.

⁷ QS. An-Nisā' [4]: 128.

mediator must be in a neutral and impartial position in resolving disputes. He/she must be able to safeguard the interests of the disputing parties fairly and equally, so that he/she can foster the trust of the disputing parties.⁸

Mediation is a way of resolving disputes outside the court through negotiations involving third parties who are neutral (non-intervention) and impartial (impartial) to the disputing parties. A third party is called a mediator or intermediary whose job is only to assist the disputing parties in resolving their problems and does not have the authority to make decisions. In other words, the mediator here only acts as a facilitator, because with mediation it is hoped that a meeting point for resolving problems or disputes faced by the parties will be reached, which will then be set forth as a mutual agreement. In this case, decision making is not in the hands of the mediator, but in the hands of the disputing parties.⁹

In Black's Law Dictionary, the definition of mediation is "a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution".¹⁰ The definition of mediation in the Indonesian Legal Dictionary comes from the English mediation, which means a peaceful dispute resolution process that involves the assistance of a third party to provide a solution that is acceptable to the disputing parties.¹¹ Whereas in the Indonesian Civil Code (*KUHPerdata*), Article 1851 states that what is meant by reconciling is "an agreement in which both parties, by handing over, promising or withholding an item, end a case that is pending or prevent a case from arising"; and according to Supreme Court Regulation Number 1 of 2008 concerning Mediation Procedures in Courts, it is stated in Article 1 point 7 that mediation is a way of resolving disputes through a negotiation process to obtain an agreement of the parties assisted by a mediator.

Mediation is also better known as a dispute resolution process that involves third parties in an effort to bring the disputing parties closer so that they can negotiate directly. This third party takes an active role in the negotiations, the mediator can propose suggestions for dispute resolution and become the leader of the negotiations, but the parties are not bound to accept suggestions from the mediator.¹²

Mediation according to J.G. Merrills is an additional negotiation with the mediator or intermediary as an active party, has the authority, and is expected to present its own proposal and interpret, as well as submit, each party's proposal to the other party. The proposal referred to here is informal and based on information provided by parties, not based on self-investigation.¹³ Mediation is a way of resolving disputes outside of lawsuits between two people in civil matters. Therefore, according to Hazel Genn, mediation has challenged the purpose of the civil and family justice systems, the value of public courts, the relevance of judicial determination to modern disputes and the legal profession's commitment to representative advocacy.¹⁴

⁸ Syahrizal Abbas, *Mediasi: Dalam Perspektif Hukum Syari'ah, Hukum Adat, dan Hukum Nasional* (Jakarta: Kencana Prenada Media, 2009), 1-2.

⁹ Rachmadi Usman, *Pilihan Sengketa di Luar Pengadilan* (Bandung: Aditya Bakti, 2003), 82.

¹⁰ Bryan A. Garner (ed.), *Black's Law Dictionary*, 8th ed. (USA: West, 2004), 1003.

¹¹ B.N. Marbun, *Kamus Hukum Indonesia* (Jakarta: Sinar Harapan, 2006), 168.

¹² Sri Setianingsih Suwardi, *Penyelesaian Sengketa Internasional* (Jakarta: UI-Press, 2006), 17.

¹³ J. G. Merrills, *Penyelesaian Sengketa Internasional* (Bandung: Tarsito, 1986), 21.

¹⁴ Hazel Genn, "Civil mediation: a measured approach?", *Journal of Social Welfare and Family Law* 32(2), 2010: 195-205.

C. Mediation in Indonesian Positive Laws

Mediation as a form of dispute resolution has the main scope in the form of private/civil areas. Civil disputes in the form of family disputes (husband and wife), inheritance, assets, contracts, banking, business, environment and various other types of civil disputes can be resolved through mediation.¹⁵ Indonesian legislation emphasizes the scope of disputes that mediation can carry out. For example, in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Indonesian Supreme Court Circular Letter Number 1 of 2002 concerning Empowerment of Courts of First Instance Establishing Peaceful Institutions, and Supreme Court Regulation Number 2 of 2003 concerning Mediation Procedures in Courts. Law Number 30 of 1999 regulates two main matters, namely arbitration and alternative dispute resolution.¹⁶ Article 1 states:

Arbitration is a method of settling a civil dispute outside the district court which is based on an arbitration agreement made in writing by the parties to the dispute... Alternative dispute resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely settlements outside the court by way of consultation, negotiation, mediation, conciliation or expert judgment.

The provisions of Article 1 above emphasize that disputes that can be resolved through arbitration and alternative dispute resolution are civil disputes, not disputes that fall within the scope of public law. The position of mediation as a form of out-of-court dispute resolution in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolutions is under the umbrella of alternative out-of-court dispute resolution in the form of consultation, negotiation, mediation, conciliation and expert judgment. Arrangements regarding alternative dispute resolution are quite limited in this Law, only one article, namely Article 6 with nine paragraphs. The article does not contain requirements for mediators, appointment of mediators, authorities and duties of mediators, involvement of third parties, and other matters relating to the mediation process. Therefore, it is very appropriate if this law is referred to as an arbitration law and not a mediation law.¹⁷ However, Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution also states that disputes or differences of opinion in the civil field can be resolved by the parties through alternative dispute resolution based on good faith by excluding litigation in public courts and religious courts.¹⁸

Another matter regarding the provisions concerning the concept of mediation as an alternative to dispute resolution is also contained in the Supreme Court Circular Number 1 of 2002 on Empowerment of Courts of First Instance to Establish Peaceful Institutions. However, the two regulations above, namely Law Number 30 of 1999 and Supreme Court Circular Letter Number 1 of 2002 do not specifically regulate the mediation process in courts. Law Number 30 of 1999 does not provide detailed instructions on what the mediator must do in resolving the dispute given to him/her. Likewise, the Supreme Court Circular of the Republic of Indonesia Number 1 of 2002 does not explain the practice of mediation that must be carried out. This Circular Letter only emphasizes that all judges who hear cases in earnest must strive for reconciliation by applying the provisions

¹⁵ Syahrizal Abbas, *Mediasi: Dalam Perspektif Hukum Syari'ah, Hukum Adat, dan Hukum Nasional*, 21.

¹⁶ Suyud Margono, *Undang-Undang No. 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa* (Jakarta: Novindo Pustaka Mandiri, 2009), 79.

¹⁷ Syahrizal Abbas, *Mediasi: Dalam Perspektif Hukum Syari'ah, Hukum Adat, dan Hukum Nasional*, 297.

¹⁸ Syahrizal Abbas, 297.

of Article 130 of *Herziene Inlandsch Reglement (HIR)* as well as Article 154 of *Rechtsreglement Voor De Buitengewesten (R.Bg)*, not just a formality advocating reconciliation.¹⁹

The two articles introduce and require the settlement of disputes through peaceful means. Article 130 Paragraph (1) HIR reads: “If on that appointed day both parties come, the district court will try to reconcile them through the chairman’s intercession”. Furthermore, Paragraph (2) states: “If reconciliation occurs, then regarding that matter at the time of the session, a deed is made, in the names of both parties obligated to fulfill the agreement made; then the letter (deed) will be enforceable and will be carried out as an ordinary judge’s decision”.

The reconciliation effort referred to by Article 130 Paragraph (1) HIR is imperative. This means that the judge is obliged to reconcile the disputing parties before the start of the trial process. Judges must try to reconcile in good ways in order that there is a meeting point, so there is no need for a long and tiring trial process. Even so, the reconciliation efforts that are carried out continue to prioritize the interests of all parties to the dispute, so that all are satisfied and no one felt aggrieved.²⁰

The Supreme Court, as the highest judicial authority in Indonesia according to the mandate of the Constitution, sees the importance of integrating mediation in the justice system. Starting from the provisions of Article 130 HIR and Article 145 R.Bg, the Supreme Court modified it in a coercive direction. Departing from this understanding, the Supreme Court Circular Number 1 of 2002 was issued on January 30, 2002 concerning Empowerment of Courts of First Instance to Implement Reconciliation Institutions. Less than two years old, Circular Letter Number 1 of 2002, on September 11, 2003, The Supreme Court issued Regulation number 2 of 2003 concerning Mediation Procedures in Courts. The issuance of the Supreme Court Regulation was carried out because the Supreme Court Circular Letter Number 1 of 2002 was incomplete, on the grounds that this Circular Letter had not fully integrated mediation into the judicial system by force, but it was still voluntary which resulted in the inability of the Circular Letter to encourage the parties intensively to force settlement of cases through reconciliation.²¹

Because of this, for the first time, statutory provisions related to mediation in court are regulated in Supreme Court Regulation Number 2 of 2003 concerning Mediation Procedures in Court. The provisions contained in the Supreme Court Regulation Number 2 of 2003 position mediation as part of the process of settling cases in court, or commonly referred to as procedural law. The Supreme Court Regulation No. 2 of 2003 makes mediation a part of the court proceedings. It becomes an integral part in resolving disputes in courts.

Mediation in court strengthens peaceful efforts as stated in the civil procedural law Article 130 HIR or Article 154 R.Bg. This is confirmed in Article 2 of Supreme Court Regulation Number 2 of 2003, namely that all civil cases submitted to the court of first instance must first be settled through reconciliation with the help of a mediator.²²

The implementation of mediation procedures in court, which was carried out based on the Supreme Court Regulation Number 2 of 2003, turned out to be problematic so that the Supreme Court Regulation Number 2 of 2003 concerning Mediation Procedures in Courts needed to be revised with

¹⁹ Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama* (Jakarta: Yayasan Al-Hikmah, 2001), 177.

²⁰ M. Yahya Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, cet. 7 (Jakarta: Sinar Grafika, 2008), hlm. 229.

²¹ M. Yahya Harahap.

²² Syahrizal Abbas, *Mediasi: Dalam Perspektif Hukum Syari’ah, Hukum Adat, dan Hukum Nasional*. 306.

a view to making more efficient use of mediation related to the litigation process in courts. For this reason, Supreme Court Regulation Number 1 of 2008 concerning Mediation Procedures in Courts was issued after a review by a team formed by the Supreme Court.²³

Article 2 Supreme Court Regulation No. 1 of 2008 states that all civil cases submitted to the court of first instance must first be resolved through reconciliation with the help of a mediator. The provisions of this article illustrate that the scope of disputes that can be mediated are all civil cases, which are the authority of the district court and religious court at the first level. The authority of the Religious Courts includes cases of marriage, inheritance, wills, endowments, grants, alms, Islamic economics.

The Supreme Court Regulation Number 1 of 2008 is an element of legal substance. This element of substance can provide certainty to the disputing parties to find a way out of the dispute at hand. These mediation regulations at least contain substantive and procedural matters of mediation. Related to this legal culture, mediation in court is actually a product of the legal system in which the way it is used depends on the values and beliefs of the community as users of the mediation. Values and beliefs are part of the culture of society. If the community assesses and believes that mediation can play a role as a means of resolving disputes they face, then the goal of mediation will be achieved as a mechanism for resolving disputes that is fast and low cost. Also, the reputation of the parties is not compromised, and good relations are maintained.

D. The Concept of *Ṣulḥ* in Classical Islamic Law

Ṣulḥ is a form of reconciliation efforts carried out by people who are in dispute, which is carried out outside the court on the condition that there are people who are in dispute and something that is disputed. In Islamic law (*fiqh*), *ṣulḥ* is divided into several types, as stated by Sayyid Sabiq, namely: 1) *Ṣulḥ ikrār*, is when a person indicts another party for the existence of debt or goods or benefits; 2) *Ṣulḥ inkār*, is when someone sues another person about an item or debt or benefit then the defendant denies what is sued on him/her, then they make peace; 3) *Ṣulḥ sukūt*, is when someone sues another person about something, then the person being sued keeps silent, which means he/she does not admit and does not deny.²⁴

In *fiqh*, the concept of *ṣulḥ* is always associated with reconciliation efforts (*iṣlāḥ*) in all forms of disputes, whether in civil, criminal or political areas. From the reconciliation agreement a legal bond is born, which each party is obliged to implement. According to *fiqh*, the peace agreement that has been agreed cannot be canceled unilaterally. If any party disagrees with the contents of the agreement, then the cancellation of the agreement must be with the consent of both parties.²⁵

Executing reconciliation agreements can be carried out in two ways, namely outside a court session or through a court session. Outside the courtroom, dispute resolution can be carried out either by themselves without involving other parties, or by asking for the help of another person to become a mediator (referee), which is then called arbitration, or in Islamic law it is called *ḥakam*. The implementation of the reconciliation agreement through a court session is carried out when the case is being processed in a court session. If the judge succeeds in reconciling the disputing parties,

²³ Syahrizal Abbas.

²⁴ As-Sayyid Sabiq, *Fiqh al-Sunnah*, vol. 2 (Cairo: Dār al-Fatḥ, 1990), 186.

²⁵ As-Sayyid Sabiq.

then a conciliation decision is made. Both parties to the agreement are required to comply with the reconciliation they have agreed to.

Reconciliation agreements (*ṣulḥ*), which are carried out by the two disputing parties themselves, in practice in several Islamic countries, especially in the case of Islamic banking, are called *tafāwuḍ* and *taufiq* (negotiations and adjustments). The latter two are usually used in resolving disputes between internal banks, particularly banks and government financial institutions.²⁶ However, peace agreements (*ṣulḥ*) in general can be used as an alternative to dispute resolution both for family cases, trade economy, politics and so on.

E. Transformation of *Iṣlāḥ* and *Taḥkīm* to Mediation

Classical Islamic law offers a dispute resolution process in two ways, namely proving legal facts (adjudication) and settlement through reconciliation (*iṣlāḥ*). The process of resolving disputes through adjudication turns out to be unable to delve into the true nature of the facts of the dispute between the parties, because the judge is only able to understand and decide on a case to the extent of the evidence presented. Based on the conviction and evidence available, the judge decides on the law, even though in essence it is the parties to the dispute who know best.²⁷

The judiciary is one of the dispute resolution institutions that has played a role so far. However, the decision given by the court has not been able to create satisfaction and justice for both parties to the dispute. Court decisions tend to satisfy one party and not satisfy the other. Parties who are able to prove that they have the right to something, then that party will be won by the court. On the other hand, a party who is unable to submit evidence that he has the right to something, then that party will surely be defeated by the court, even though in essence the party has the right. In this context, dispute resolution through the courts demands “formal evidence”, regardless of the ability of the parties to submit evidence. Win-lose is the final result that will be reaped by the parties, if the dispute is resolved through the courts.²⁸

The dispute resolution process through adjudication cannot guarantee the satisfaction of the disputing parties, because there are parties who have limitations in submitting evidence. Therefore, a number of Qur’anic verses offer a dispute resolution process through reconciliation (*iṣlāḥ-ṣulḥ*) before the court. As explained above, *ṣulḥ* is a dispute resolution process in which the parties agree to end their case amicably. Reconciliation agreements (*iṣlāḥ*) are not only applied in court, but can also be used outside of court as an alternative form of dispute resolution.²⁹ The application of *ṣulḥ* outside the court cannot be separated from the role of *ḥakam* as a mediator, so that dispute resolution by reconciliation (*iṣlāḥ* or *ṣulḥ*) must be based on *taḥkīm* theory, which literally means appointing a person (third party) as a judge (*ḥakam*).

From a fiqh perspective, the term *taḥkīm* can be equated with the term arbitration. *Taḥkīm* itself comes from the word *ḥakkama*. In general, *taḥkīm* has the same meaning as arbitration which is known today, namely the appointment of a person as a referee by two or more disputing parties, in order to settle their dispute peacefully, the person who resolves is called *ḥakam*. Abu al-Ainain Fatah

²⁶ Asyur Abdul Jawad Abdul Hamid, *Al-Niẓām li al-Bunūk al-Islāmi* (Kairo: Al-Ma’had al-Alamy li al-Fikr al-Islamy, 1996), 230.

²⁷ Syahrizal Abbas, *Mediasi: Dalam Perspektif Hukum Syari’ah, Hukum Adat, dan Hukum Nasional*. 157.

²⁸ Syahrizal Abbas.

²⁹ Syahrizal Abbas.

Muhammad is of the opinion that the meaning of *taḥkīm* according to fiqh terms is the reliance of two people who are in conflict with someone whose decision they believe can resolve the dispute of the disputing parties.³⁰ Meanwhile, according to Said Agil Husein al-Munawar, the meaning of *taḥkīm* according to the Hanafite school of law is to separate disputes or establish laws between people with words that bind both parties. While the meaning of *taḥkīm* according to the Shafi'ite school of law is to separate disputes between parties in conflict with God's law or declare and determine sharia law for an event that must be carried out.³¹

The scope of arbitration (*taḥkīm*) is only related to issues concerning individual rights (*ḥuqūq al-'ibād*), namely legal rules governing individual rights relating to their property. For example, the obligation to compensate someone who has damaged other people's property, or the right of a pawn holder in maintaining it, or rights related to buying and selling, or leasing and debt.

According to Wahbah az-Zuhaili, Islamic jurists among the Hanabilah school of law are of the opinion that *taḥkīm* applies in matters of property, *qīṣāṣ*, *ḥudūd*, marriage, *li'ān* both concerning God's rights and human rights. On the other hand, jurists from the Hanafiyah school argue that *taḥkīm* is justified in all respects except in the areas of *ḥudūd* and *qīṣāṣ*, while in the field of private law it is only justified in the areas of muamalah (economics), marriage and divorce. Islamic jurists among the Malikiyah school of law say that *taḥkīm* is justified in Islamic law only in the area of property but is not justified in the field of *ḥudūd*, *qīṣāṣ* and *li'ān*, because this matter is a judicial matter.³² The latter is an opinion that is often used by Islamic jurists to resolve cases that arise in people's lives, including in the field of sharia economics.³³

Islamic jurists among the Hanafites, Maliki, Syafiites and Hanbali schools agree that all what becomes a *ḥakam* (arbitration) decision is directly binding on the parties to the dispute, without first seeking approval from both parties. Their reasons for this are based on the hadith of the Prophet, which states that if they have agreed to appoint a *ḥakam* to settle a dispute, they do not comply with the *ḥakam's* decision, so those who do not comply will receive punishment from God. In addition, whoever is allowed by the Shariah to decide on a case, then the decision is valid, therefore the decision is binding, just like a judge in a court who has been authorized by the authorities to try a case.³⁴

In Indonesia, mediation has been implemented as a procedure for settling civil cases, both in the general court and religious courts. For religious courts, mediators are not seen as something new. Law No. 7 of 1989, which has been amended by Law No. 3 of 2006 and Law No. 50 of 2009, Article 76 stipulates the *ḥakam* in divorce whose existence is the same as that of a mediator. However, this can cause a problem with the implementation of mediation in divorce cases which is legalized by Supreme Court Regulation Number 1 of 2008, while *ḥakam* as part of procedural law has been legitimized before mediation. The mediation based on Supreme Court Regulation Number 1 of 2008 must still be carried out, in addition to imposing *ḥakam* which is based on the Law on Religious Courts. However,

³⁰ Abu al-Ainain Fatah Muhammad, *Al-Qaḍā wa al-Isbāt fi al-Fiqh al-Islāmi* (Cairo: Dār al-Fikr, 1976), 84.

³¹ Said Agil Husein al-Munawar, "Pelaksanaan Arbitrase di Dunia Islam", dalam BAMUI & BMI, *Arbitrase Islam di Indonesia* (Jakarta: BAMUI & BMI, 1994), 48-49.

³² Wahbah al-Zuhaili, *Al-Fiqh al-Islām wa Adillatuhu*, vol. 4 (Damascus: Dār al-Fikr, 2005), 752.

³³ Zaidah Nur Rosidah, "Limitation of Application of Sharia Principles in Sharia Economic Dispute Resolution in Religious Courts", *Journal of Morality and Legal Culture* 1(1), 2020, 24-31.

³⁴ Dinara Abdunayimova, "Alternative Dispute Resolution Clause: A Way of Solving Case", *The International Journal of Social Science World* 2(2), 2020: 1-5.

it is possible that the implementation of mediation itself must still be carried out by abandoning the concept of *ḥakam* which was actually born from a law.

The Religious Court is one of the executors of judicial power, which practices mediation in dispute resolution. Historically juridical, the practice of mediation in court institutions has been going on for a long time. In the history of justice in Indonesia, settlement of disputes through peaceful means or known as *dading* has been regulated in Article 130 HIR and Article 154 RBG and several other regulations. However, the reconciliation effort in these regulations is different from mediation as it is currently developing.³⁵

The concept of *tahkīm* (*ḥakam*) in Islam is different from the concept of mediation in Indonesian laws and regulations. The scope of *tahkīm* (*ḥakam*) is related to issues concerning *ḥuqūq al-‘ibād* (individual rights), namely legal rules governing individual rights.³⁶ According to Wahbah al-Zuhaili, *ḥakam* is a man who is fair and firm in resolving disputed matters, and he puts forward peaceful efforts.³⁷

In the Qur’an, *ḥakam* comes from the families of both husband and wife. The statement that *ḥakam* comes from the family as mentioned in the verses of the Qur’an has spawned various interpretations as if *ḥakam* was required to come from the husband and wife’s family. Syihabudin al-Alusi (1217-1270) said that a third party may come from outside the family of both parties if it is considered more beneficial and brings household harmony. Kinship is not a legal requirement to become a *ḥakam* in resolving household disputes. The purpose of sending a third party is to find a way out of the domestic crisis faced by the husband and wife, and this can be achieved even if the *ḥakam* is not from the families of both parties.³⁸

The basis for the family to become a *ḥakam* is that they know more about the ins and outs of the household and the personality of each husband and wife, so sending a *ḥakam* from both sides is preferred. The families of both sides have a mission to reconcile the disputes that occur between the two, so that the husband and wife have the opportunity to convey their problems without many obstacles. However, according to Wahbah al-Zuhaili that a *ḥakam* must be professional in the sense that for certain cases he must maintain secrecy over the problems faced by people in dispute. In Zuhaili’s view, it would be better if the *ḥakam* came from the family of the disputing parties.³⁹

Mediation places more emphasis on the existence of a third party that bridges the disputing parties to resolve their disputes. This explanation is very important to distinguish the dispute resolution process from other forms of settlement such as arbitration, adjudication and others. The mediator is in a middle and neutral position between the disputing parties and seeks to find a number of agreements to achieve satisfactory results for the disputing parties. The mediator can develop and offer dispute resolution options, and the parties can also consider the mediator’s offer as an alternative to an agreement in dispute resolution.

The alternative settlement offered by the mediator is expected to be able to accommodate the interests of the disputing parties. In practice, dispute resolution by mediation is a non-litigation

³⁵ Nunung Rodliah, “The Mediation Process in Sharia Economic Dispute Resolution Through the Religious Court in Indonesia”, *IOSR: Journal of Humanities and Social Science* 24(5), 2019: 39-47.

³⁶ Wahbah al-Zuhaili, *Al-Fiqh al-Islāmi wa Adillatuhu*, vol. 4 (Damascus: Dār al-Fikr, 2005), 752.

³⁷ Wahbah al-Zuhaili, *Al-Fiqh al-Islāmi wa Adillatuhu*, 257.

³⁸ Syihabuddin Mahmud al-Alusi, *Ruh al-Ma’ani fi Tafsir al-Qur’an al-Azim wa as-Sab’i al-Masani*, vol. 3 (Beirut: Dar al-Kutub al-‘Ilmiyah, 1994), 102.

³⁹ Wahbah al-Zuhaili, *Al-Tafsir al-Munir fi al-‘Aqidah wa al-Syari’ah wa al-Manhaj* (Beirut: Dar al-Fikr, 1991), hlm. 58-59

route. This mediation practice has been carried out in the judiciary in Indonesia. The main essence of the mediation process is the greater role of the disputing parties, which is based on good faith and voluntarily in the mediation process until a dispute resolution is reached, which is the result of the agreement of the parties. Dispute resolution through non-litigation channels in the form of mediation is indeed not a way that can resolve all disputes, however, by using this route there are several advantages that can be obtained.⁴⁰

Taking into account the description above regarding *ḥakam* and mediation, it is clear that there are substantial differences between the two in terms of concept and implementation in the Religious Courts. The difference in concept is due to differences in sources, authorities, and procedures. But there are similarities, namely the involvement of someone who plays a role in resolving disputes and conflicts outside the court.

Differences in sources are the main thing, because the concept of *taḥkīm* (*ḥakam*) originates from classical Islamic law based on the Koran and hadith, which is also applied in Article 76 of Law no. 7 of 1989 concerning the Religious Courts; while the concept of mediation is based on Dutch legal traditions and is also stipulated through Indonesian Supreme Court Regulation No. 1 of 2008. As far as the authority is concerned, the difference between the concept of *taḥkīm* (*ḥakam*) and mediation is that in *taḥkīm*, a *ḥakam* participates in encouraging and helping to resolve disputes within the scope of marriage, especially *syiqāq* (disputes leading to divorce); while mediation apart from meaning arbitration also includes all civil disputes submitted to the Religious Courts. Settlement in court must first seek reconciliation with the help of a mediator.

In terms of procedures, the two concepts are also different. The concept of *taḥkīm* (*ḥakam*) in the Religious Courts is carried out in the trial process entering the evidentiary stage after hearing statements from witnesses, namely the appointment of a *ḥakam* is carried out on the basis of the judge's consideration and comes from the family of the husband or wife as well as other parties, and the appointment of *ḥakam* is stated in an interlocutory decision. While the mediation procedure is related to the reconciliation process outside the courtroom. Prior to examining the case, the judge requires the parties to mediate, and the mediation process lasts no later than 40 (forty) working days from the time the mediator is selected by the parties or appointed by the chairman of the panel of judges and can be extended no later than 14 (fourteen) working days from end of the 40 (forty) day period. In addition, the mediator is obliged to declare the mediation has failed if one or both parties have failed to attend the mediation meeting twice in a row. Mediation that achieves reconciliation is formulated in writing and signed by the disputing parties; and the parties are obliged to return to the judge on the appointed hearing day to notify the reconciliation agreement.

F. Conclusion

The settlement of marital conflicts in the tradition of Islamic marriage law (*munākaḥāt*) begins with bringing in a peacemaker from the family (*ḥakam*) to carry out a dispute settlement (mediation). If no agreement is reached through the mediation of the *ḥakam*, then both husband and wife can appoint another person as a peacemaker (*taḥkīm*) to settle marital disputes (arbitration). If this last

⁴⁰ I Made Wahyu Chandra Satriana, and Ni Made Liana Dewi, "Non Litigation Dispute Resolution in Settlement of Civil Disputes", *Legal Brief* 10 (2), 2021: 214–220.

effort cannot reach an agreement, the husband and wife can submit a marriage dispute settlement to the judge through a trial court (adjudication).

Religious courts in Indonesia do not fully use the concept of *ṣulḥ* as a process of resolving marital conflicts as depicted in the classical Islamic legal tradition. This is due to the concept of *ṣulḥ* in classical Islamic law using the *taḥkīm* (*ḥakam*) mechanism. The concept of *ḥakam*, which originates from the Islamic legal tradition, and mediation, which originates from the national legal tradition, actually both have substantial differences in terms of concept and implementation in the Religious Courts. The difference in concept is due to differences in sources, authorities, and procedures. However, between the two there are similarities, which lies in the involvement of someone who plays a role in resolving disputes and conflicts.

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