

CHAPTER 3

THE CURRENT PRACTICE IN SYARIAH COURTS IN MALAYSIA REGARDING LEGAL PROCEDURES FOR CIVIL CASES INVOLVING PERSONS WITH DISABILITIES (PWDs)

3.1 Introduction

This chapter will address the second research objective. Before the study moves on to the stated objective, the researcher will first explain the general concept of Syariah law and legal procedure for Civil cases in Malaysia's Syariah Court. This section will briefly explain the general principles and jurisdictions related to Syariah law in Malaysia, general concepts of legal procedure for Civil cases in Malaysian Syariah Court including the procedure of case registration, handling case and its management, as well as matters related to it. Then, the researcher will analyze the current practice in Syariah Courts in Malaysia regarding legal procedures for Civil cases involving PWDs. The data was gathered through field research, which included in-depth interviews conducted by the researcher and observations. The respondents or participants in this interview and observation phase are listed in Table 3.1 below. They are among the Syariah Judges, Syariah Officers, and Syarie Lawyers who are skilled and experienced in handling Civil cases involving PWDs. Then, each respondent was given an individual code to address their statement in providing an opinion. Inductive and deductive descriptive analysis was used to analyze the data obtained. All of this explanation will be presented in the study's subsections 3.2, 3.3 and 3.4 discussion.

Table 3.1: Respondents Involved in the Interview and Observation Phases

NO.	CODE	NAME	POSITION
1.	SJ1	YAA Prof Adjung Dato' Setia Dr. Hj. Mohd Na'im Bin Hj. Mokhtar	Chief Director/Chief Syarie Judge of JKSM
2.	SJ2	YAA Datuk Mohd Nadzri Abdul Rahman	Chief Syarie Judge of Melaka State's Syariah Court
3.	SO1	Y.Bhg. Tuan Abu Suffian Bin Abu Yaziz	Director of Registration, Secretariat, and Records Division of JKSM
4.	SO2	Y.Bhg. Puan Norazita Mohd Ali	Chief Sulh of Melaka State's Syariah Court
5.	SL1	Y.Bhg. Puan Noor Afiqah Che Mustapa	Syarie Lawyer and Sign Language Interpreter

3.2 Syariah Law in Malaysia: General Principles and Jurisdiction

It is undeniable that Malaysia has a dual legal system comprised of civil law and Syariah Law of Malaysia. Both civil and Syariah laws have their own jurisdictions and it also has three separations of powers (legislative, executive and judicial), as prescribed by the Malaysian Constitution. Everyone in Malaysia must respect and acknowledge its jurisdiction power (Mohamed Ali, 2000). However, the Federal Constitution is the Supreme Law of the Federation, and any matter that is inconsistent with it is null and void. This has been stated in Section 4(1) of the Federal Constitution as follows:

4. Supreme Law of Federation

(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

As a result, all laws, civil and Syariah, must be consistent with Malaysia's Federal Constitution. No law should be passed to give legislation authority that exceeds the authority stated in the Federal Constitution. Under the Federal Constitution, both Civil and Syariah Law have their own provisions for exercising their respective powers and jurisdictions. This is demonstrated by Sections 74(1) and 74(2) of the Federal Constitution, which interpret as follows:

Section 74. Subject matter of federal and State laws

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

Following that, Islamic law or Syariah law in Malaysia is a law that only governs Muslim society and matters specified in a State List or Concurrent List. Each state in Malaysia has its own Islamic law Act or Enactment or Ordinance because it falls under

the jurisdiction of the states. The authority to implement the aforementioned law is also subject to its own state law, which governs the implementation of all matters under its jurisdiction and that fall under the State List. That matters is stated in List II of the Ninth Schedule of the Federal Constitution (Mohamed Ali, 2000), which read as follows:

"Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, **Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to** succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, ..."

According to the provisions provided, it can be understood that Syariah law in Malaysia only has jurisdiction over the Muslim society and is limited to matters such as Islamic family law, matrimonial, and Malay customs. Therefore, the State Legislature has the authority to enact Islamic law, as specified in the Ninth Schedule, List II - List of States. This matter hence includes the authority to establish Syariah Courts with sole

jurisdiction over Muslims. The Syariah Court system is one of two separate court systems in Malaysia's general legal system.

The power to establish Syariah courts in Malaysia can be seen in each representative state's Act or Enactment or Ordinance. Part IV of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), for example, has stated all matters related to Syariah courts, such as the power to establish Syariah Courts, to appoint Chief Syariah Judges, the duties and powers of Judges at all levels of Syariah courts, Syariah Court jurisdictions at all levels, and others. Moreover, Section 40 of Act 505 states that the Yang di-Pertuan Agong (YDPA) has the authority, with the advice of the Minister, to establish Syariah courts.

40. Constitution of Syariah Courts

(1) The Yang di-Pertuan Agong, on the advice of the Minister, may by notification in the Gazette constitute Syariah Subordinate Courts for the Federal Territories at such places as he considers fit.

(2) The Yang di-Pertuan Agong, on the advice of the Minister, may by notification in the Gazette, constitute a Syariah High Court for the Federal Territories.

(3) The Yang di-Pertuan Agong, on the advice of the Minister, may by notification in the Gazette constitute a Syariah Appeal Court for the Federal Territories.

According to the statute mentioned above, the Syariah Court in Malaysia has three levels or tiers of courts (Syariah Subordinate Courts, Syariah High Court and Syariah Appeal Court). Each Court has its own jurisdiction in exercising its authority

to handle the cases that have occurred. For example, in its civil jurisdiction, Syariah Subordinate Court has the authority to hear and decide cases that Syariah High Court is authorised to hear and decide. The amount or value of the subject matter in dispute does not exceed MYR50,000 or cannot be estimated in terms of money. The Syariah Subordinate Court should also have jurisdiction over all federal territories and be led by a Syariah Subordinate Court judge. It is stated in Section 47(1)(2)(b) of Act 505 as follows:

47. Jurisdiction of Syariah Subordinate Court.

(1) A Syariah Subordinate Court shall have jurisdiction throughout the Federal Territories and shall be presided over by a Judge of the Syariah Subordinate Court.

(2) The Syariah Subordinate Court shall –

(b) in its civil jurisdiction, hear and determine all such actions and proceedings as the Syariah High Court is authorized to hear and determine in which the amount or value of the subject-matter in dispute does not exceed fifty thousand ringgit or is not capable of estimation in terms of money.

Although there is a provision clearly stated in the law regarding Syariah law's jurisdiction over the state, there are many other Federal laws that limit state jurisdiction. Among them are Probate and Administration, Letter of Administration, and Small Estate matters (Distribution). Even the civil courts and land officers have authority over matters pertaining to estate administration. While the Syariah Court is only authorised to verify the portions of the deceased's estate that should be distributed to the heirs

under Islamic law (matters related to *Faraid*) (Ibrahim & Joned, 1995). Therefore, even though the matter involves the inheritance or estate of a deceased Muslim, Syariah law does not have the authority to handle it. The issue is under the civil court's jurisdiction, as underlined by the Probate and Administration Act 1959 and Small Estate (Distribution) Act 1955.

However, as stated in List II (Ninth Schedule – State List) of the Federal Constitution, Syariah courts have the authority to hear all the matters as mentioned under List II. Thus, civil courts shall have no authority to interfere with the jurisdiction of Syariah courts. This can be seen through amendment of provisions made in Section 121 of Federal Constitution in 1988 by inserting clause (1A). This is when the Syariah Court and the Civil Court have a conflict of jurisdiction or an intervention. Section 121(1A) outlines an exclusive provision for Syariah courts to handle all cases or matters within their jurisdiction.

121. Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal

registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed).

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

Finally, Mohd Sabree (2018) stated that the Syariah criminal law jurisdictions in Malaysia are subject to offences against the orders of the Islamic religion and are only carried out on Muslim societies. The type or form of offence under the jurisdiction of the Syariah Court is as specified in Federal Constitution List II (State List). In terms of punishment, the Syariah Court has jurisdiction only to the extent determined by Federal Law, as established in the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). The Syariah Court can impose a prison sentence of not more than three years, a fine of not more than RM 5,000.00, whipping with a maximum of six canes, or a combination of all of these punishments. This is mentioned in Section 2 of Act 355 as follows:

2. Criminal Jurisdiction of Syariah Courts.

A Syariah Court which is perfectly established under any law in a State and is given jurisdiction over persons who profess the religion of Islam and in respect of any of the matters mentioned one by one in List II of the List of States in the Ninth Schedule to the Federal

Constitution is hereby given jurisdiction over offenses against the tenets of the Islamic religion by persons who profess that religion which may be prescribed under any written law:

Provided that such jurisdiction shall not be exercised in respect of any offense punishable by imprisonment for a term exceeding three years or a fine exceeding five thousand ringgit or whipping exceeding six times or any combination of such punishments.

3.3 Legal Procedure for Civil Cases in Malaysian Syariah Court

In Malaysia, there are two sets of laws that apply in personal matters such as intestacy, marriage, divorce, custody of children, and asset division upon the breakdown of a marriage: non-Muslim laws and Muslim laws. They have completely separate and distinct jurisdictions. The law that governs non-Muslims is applied in Civil Courts, whereas the law that governs Muslims (Islamic Syariah Law) is applied in Syariah Courts (Yet & Dhaliwal, 2020). It has been mentioned from the earliest discussion on the subtopic 3.2 above. In this section, the researcher would bring the reader's attention to know the understanding of Civil procedure in Malaysian Syariah Court. Before understanding what the current practice of Malaysian Syariah Courts regarding Civil cases involving PWDs is, it is critical to first fully comprehend the general concepts of Syariah Court Civil Procedure in Malaysian Syariah Courts. Therefore, the researcher will begin the discussion by providing relevant details and information about it.

3.3.1 A General Overview of Syariah Court Procedure in Malaysian Syariah Courts

In Malaysia, there are two basic types of matters heard in Syariah Courts: Civil (*Mal*) cases and Criminal cases (JKSM, 2011). Each category has its own Substantive Law, whereas procedural law is the law that is very important in providing methods to the course and application of Substantive Law, whether Civil law or Criminal law. For example, the importance of procedural law in Syariah Court Criminal Procedure directs the course of law enforcement, controls fair prosecution, and mandates that the trial process in a criminal case be fair. The Syariah Criminal Procedure Act or state legislation is the primary source of these rules and methods (Ismail, 2016). For States in the Federal Territories, for instance, the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) and its related Act is the Substantive Law for the Syariah Criminal law in Malaysian Syariah Court.

On the other hand, the term '*Mal*' actually refers to property but in a legal context, it refers to non-criminal cases. According to *Jabatan Kehakiman Syariah Negeri Sabah*, the *Mal* or Civil jurisdiction of the Syariah Court also applies to all Muslims who are residents of the states. In fact, the Syariah Court has nearly complete jurisdiction and encompasses many aspects of the Islamic family in Malaysia (Sabah, 2022). The role of procedural law in Syariah Court Civil Procedure is similar to that of Syariah Criminal law procedure in Syariah courts. It also plays a role and is important in Civil law in the Syariah Court. Syariah Court Civil Procedure is very important in assisting legal practitioners in handling Civil cases by following its procedural as stated in each state's procedure Acts or Enactments. For example, the Syariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585) governs Civil procedure or cases in the Federal Territories. This Act 585, which provides methods for the course and

application of Substantive Law, such as the Islamic Family Law (Federal Territory) Act 1984 (Act 303) and its related law. Zakiyy & Hashim (2018) stated that civil procedure in general consists of court rules designed to allow the court to process a civil case efficiently and expeditiously from the time it is filed to the time it is resolved.

Furthermore, Civil cases in Malaysian Syariah Court are conducting cases related to marriage such as breaking up an engagement, applying for permission to marry, and applying for polygamy, cases related to questions during marriage such as an application to confirm a marriage, an application to annul an invalid marriage, an application for self-support, child support, and so on, and cases related to the question of dissolution of marriage such as divorce *khulu'* application, *li'an*, *fasakh*, *talaq*, and so on. Aside from that, the Syariah Court handles Civil cases pertaining to any application in an ongoing case (interlocutory order).

For instance, a temporary alimony application for both self and child, a gift, a restraining order against property, and harassment. It is not uncommon for a single trial case to take a long time because there are too many issues to resolve. Many issues arise throughout the period that must be resolved by the court. If not resolved, it will result in injustice to all parties involved. As a result, the law allows the parties involved to make a temporary application while the trial is ongoing while waiting for a clear decision from the court.

Following that, Civil cases in Syariah courts also involving issues arising from divorce. These issues can be addressed in the court with jurisdiction after the divorce is finalized or takes place. For example, after-divorce consolation (*mut'ah*), matrimonial property, *iddah* maintenance, child support, maintenance arrears, and the *hadanah* issue (child care). It also includes applications for wills, endowments, and inheritance, as well

as applications for court order enforcement. This occurs when the responsible party disregards the issued decision. As a result, the other parties can request that the court enforce the issued orders.

3.3.2 Civil Case Classification and Flow Chart

According to official portal of Department of Syariah Judiciary Malaysia (JKSM), there are two types of Civil cases that can be registered in the Syariah Court (Malaysia, 2011):

- 1) Claim Case (*Kes Tuntutan*);
- 2) Application Case (*Kes Permohonan*).

A Claim Case is any action or proceeding in a Civil or *Mal* case that begins with a summons and a statement of claim. Every action or proceeding in a *Mal* case that begins with a Notice of application and an affidavit of support is referred to as an Application Case. Besides that, the Sabah State Department of Syariah Judiciary added that an Inheritance Division Case (*Faraid*) (*Kes Pembahagian Harta Pusaka*) is an action that begins with a notice of application and an affidavit of support (Sabah, 2022). This is because *Faraid* cases were classified as application cases. On the other hand, it can be seen through the following method of initiating civil proceedings under Section 7 of Act 585:

7. Mode of beginning civil proceedings.

(1) Subject to subsection (2) or any other written law, every civil proceedings in a Court shall be begun by summons.

(2) All proceedings in respect of any of the matters specified in the Second Schedule shall be begun by application.

All Civil cases in Syariah Court are classified differently, depending on whether they are summons cases or application cases. Cases that fall under summons include, for example, an application for divorce by *talaq*, *khulu'*, *li'an*, *fasakh*, *hadanah*, or custody of children. It should start with summons and a statement of claim. In the meantime, cases such as marriage confirmation, *wali* Raja, notice to show cause, and injunction are fall under application. It should start with a notice of application and an affidavit of support.

According to the official portal of the Syariah Court State of Malacca, once a case is registered, certain types of cases will be distributed to the Majlis Sulh (Sulh services and mediation cases) at the stage of case registration, while others will be referred to the Judge (Melaka, 2016). The order or command to refer the case to Majlis Sulh is based on Practice Direction No.3 Year 2002. The registered case can be brought to Sulh session for a peaceful settlement out of the Court before being tried in Court if the parties cannot agree with the settlement. Meanwhile, as stated in Practice Direction No. 1 Year 2010, examples of cases that can be brought to the Majlis Sulh include post-divorce consolation (*mut'ah*), iddah maintenance, child support, and *hadanah* (child care).



جباتن كحاكيمان شرعية مليسيا
JABATAN KEHAKIMAN SYARIAH MALAYSIA (JKSM)

Ruj. Tuan :
Ruj. Kami : JKSM/100-24/5 (14)
Takwim : 14 Jamadil Akhir 1423
Tarikh : 23 Ogos 2002

Y.A.A. Ketua-Ketua Hakim Syarie,
Mahkamah-mahkamah Syariah Negeri-negeri

Arahan Amalan No. 3 Tahun 2002

Pemakaian Sulh

Saya ingin menarik perhatian Y.A.A kepada keputusan Mesyuarat Arahan Amalan Mahkamah Syariah seluruh Malaysia Bil. 3 Tahun 2002 pada 7 Mei 2002 di Johor Bahru bersamaan 25 Safar 1423 telah bersetuju dan mengesahkan untuk menerima pakai arahan amalan berhubung semua kes-kes selepas didaftarkan, hendaklah dengan seberapa segera tidak melebihi 21 hari dirujuk kepada Pengerusi Majlis Sulh dengan memanggil pihak-pihak yang terlibat untuk sesi Sulh / penyelesaian damai, sebarang persetujuan yang dicapai hendaklah dicatatkan dan dibacakan semula di hadapan pihak-pihak dan terus dipanjangkan kepada Hakim untuk direkodkan Perintah Persetujuan Bersama.

2. Bagi kes yang gagal di peringkat ini hendaklah terus ditetapkan tarikh perbicaraan setelah semua prosiding kes dipenuhi. Bagi maksud pemakaian sistem Sulh ini ianya tidak terpakai ke atas kes-kes Pembubaran Perkahwinan dan Nasab.

Arahan amalan ini berkuatkuasa serta merta.

(Dato' Sheikh Ghazali Bin Hj. Ab. Rahman)
Ketua Pengarah/Ketua Hakim Syarie
Jabatan Kehakiman Syariah Malaysia.

PUTRAJAYA
2002

Figure 3.1: Practice Direction No. 3 Year 2002 namely the Use of Sulh

 <p> كاتب كحامين شرعية ماليسيا KETUA PENGARAH/KETUA HAKIM SYARIE Jabatan Kehakiman Syariah Malaysia Arah 2 & 3, Blok D7, Parcel D, Pusat Pentadbiran Kerajaan Persekutuan, 62677 PUTRAJAYA </p>	Tel: 03-8886 4800 8886 4828 Faks: 03-8889 1621 email: adafin@syariah.gov.my Laman Web: www.pjsh.gov.my
<p>Ruj. Kami : JKSM.BPKR/100-5/5/2 Jld. 2 (9)</p> <p>Tarikh : 16 Sya'ban 1431H/ 28 Julai 2010M</p> <p>Y.A.A Ketua -Ketua Hakim Syarie, Mahkamah-mahkamah Syariah Negeri-negeri.</p> <p style="text-align: center;">ARAHAN AMALAN NO. 1 TAHUN 2010</p> <p style="text-align: center;">Penentuan Kes Yang Perlu Dirujuk Ke Majlis Sulh Pada Peringkat Pendaftaran Kes</p> <p>Saya ingin menarik perhatian Y.A.A kepada keputusan Mesyuarat Jawatankuasa Induk Arahkan Amalan Mahkamah Syariah Bil. 1 Tahun 2010 pada 14 Sya'ban, 1431H bersamaan 26hb, Julai 2010 telah berseluju dan mengesahkan bahawa kes-kes yang dinyatakan di bawah ini perlu dirujuk ke Majlis Sulh semasa peringkat pendaftaran kes di Mahkamah Syariah.</p> <ul style="list-style-type: none"> 009 - Tuntutan Gantirugi Pertunangan 016 - Tuntutan Muta'ah 017 - Tuntutan Harta Sepencarian 018 - Tuntutan Nafkah Isteri 019 - Tuntutan Nafkah Kepada Pihak Tak Upaya 020 - Tuntutan Cagaran Nafkah 021 - Tuntutan Nafkah Eddah 022 - Tuntutan Mengubah Perintah Nafkah 023 - Tuntutan Tunggakan Nafkah 024 - Tuntutan Nafkah Anak 025 - Tuntutan Mengubah Perintah Hak Jagaan Anak/Nafkah Anak 026 - Tuntutan Mengubah Perjanjian Hak Jagaan Anak/Nafkah Anak 028 - Tuntutan Hadhanah 049 - Tuntutan Gantirugi Perkahwinan 059 - Tuntutan Hak Tempat Tinggal 060 - Tuntutan Perintah Supaya Suami Tinggal Bersama Semula 062 - Tuntutan Isteri Kembali Taat 063 - Tuntutan Mas Kahwin 	
<ul style="list-style-type: none"> 2. Bagi kes-kes ex-parte (interim) tidak perlu melalui proses Sulh. 3. Bagi kes-kes yang telah melalui proses pengantaraan di Jabatan Bantuan Guaman Malaysia tidak perlu dirujuk ke Majlis Sulh pada peringkat pendaftaran 4. Arahkan Amalan No. 1 Tahun 2000, No. 9 Tahun 2003, No. 14 Tahun 2004 dan No. 14 Tahun 2005 adalah berkuatkuasa. <p>Arahkan ini berkuatkuasa mulai 30 Julai 2010.</p> <p style="text-align: center;">  (Tan Sri Ibrahim Lembang) Ketua Pengarah/Ketua Hakim Syarie Jabatan Kehakiman Syariah Malaysia, PUTRAJAYA </p>	

Figure 3.2: Examples of Civil or Mal Cases That Can Be Brought to Sulh Session under Practice Direction No. 1 for the Year 2010.

Aside from that, each case has a case registration code to determine the state where the case was registered, the court's hierarchy such as state, district, and level, and a code for each type of case. Selangor State Department of Syariah Judiciary (JAKESS) stated that for Civil cases, the code begins at 001-099 (Selangor, 2019). Prior to this, the data can be accessed via Practice Direction No. 1 Year 2000. However, the most recent data can be found in Practice Direction No. 12 Year 2019, which has yet to be implemented because the e-Syariah system will be upgraded to e-Syariah Version 3 (ESV3). A Research Participant (RP) SO1 (2022) stated that the most recent guideline was an improvement of the previous Practice Direction, into which all cases that did not yet have a case code were inserted and other improvements. In addition, cases from Perak's Syariah Main Court were also included and given a case code. The new system, which will be used with "go lives ESV3" system, is expected to be released in 2023. The figures below show some details from Practice Instruction No. 12 for 2019:



جابتن كحاكيمن شرعية مليسيا

KETUA PENGARAH/KETUA HAKIM SYARIE
Jabatan Kehakiman Syariah Malaysia
Department Of Syariah Judiciary Malaysia
Aras 7, Blok C, Kompleks Islam Putrajaya
No. 20, Jalan Tunku Abdul Rahman, Presint 3
62100 PUTRAJAYA
MALAYSIA

PRA PERBICARAAN

Tel : 603-8870 9300
Faks : 603-8870 9316
Portal Rasmi : www.jksm.gov.my
E-mel : naim1@esyariah.gov.my

Ruj. Kami : JKSM.600-1/2/4 JLD 5 (53)
Takwim : 25 Rabi'ul Akhir 1441H
Tarikh : 23 Disember 2019

Y.A.A. Ketua-Ketua Hakim Syarie,
Mahkamah-mahkamah Syariah Negeri-negeri

ARAHAN AMALAN NO. 12 TAHUN 2019

Pindaan Kod Pendaftaran Kes Mal Dan Jenayah Untuk Sistem E-Syariah Versi Tiga (3) Bagi Kod Dewan, Kod Kes, Kod Status Kes, Kes Sulh, Kes Bahagian Sokongan Keluarga, Kod Kes Naziran, Kod Kes Semakan Dan Kod Pendaftaran Rayuan Di Jabatan Kehakiman Syariah Malaysia (JKSM)

Saya ingin menarik perhatian Y.A.A. kepada keputusan Mesyuarat Jawatankuasa Induk Arahkan Amalan Mahkamah Syariah Seluruh Malaysia pada 2 hingga 3 Rabi'ul Awwal 1441H bersamaan 30 hingga 31 Oktober 2019 di Jabatan Kehakiman Syariah Negeri Terengganu telah bersetuju dan mengesahkan untuk menerima pakai Arahkan Amalan berhubung dengan Pindaan Kod Pendaftaran Kes Mal Dan Jenayah Untuk Sistem E-Syariah Versi Tiga (3) Bagi Kod Dewan, Kod Kes, Kod Status Kes, Kes Sulh, Kes Bahagian Sokongan Keluarga, Kod Kes Naziran, Kes Semakan Dan Kod Pendaftaran Rayuan Di JKSM adalah seperti di lampiran.

2. Arahkan Amalan No. 1 Tahun 2000, Arahkan Amalan No. 7 Tahun 2007, Arahkan Amalan No. 3 Tahun 2013, Arahkan Amalan No. 1 Tahun 2015, Arahkan Amalan No. 1 Tahun 2016 dan Arahkan Amalan No. 12 Tahun 2018 dibatalkan mulai

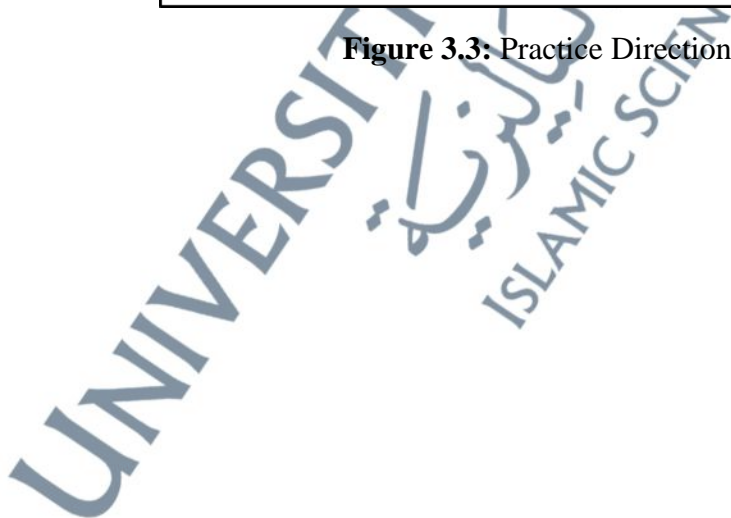
Arahkan Amalan ini berkuat kuasa

(DATO' DR. MOHD NA'IM BIN MOKHTAR)
Ketua Pengarah/Ketua Hakim Syarie
Jabatan Kehakiman Syariah Malaysia
PUTRAJAYA

SYARIAH ASAS KEADILAN

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Figure 3.3: Practice Direction No. 12 Year 2019



1.0 PENDAHULUAN

Sistem kod kes berfungsi membantu pengawalan pewujudan rekod yang mana dapat digunakan sebagai bahan bukti yang sah kerana dapat menunjukkan kandungan, struktur dan konteks pewujudan terutama dalam persediaan kepada persekitaran elektronik.

Semasa pewujudan kod kes pada tahun 2000, kod kes Mal (099) & Jenayah (299) diwujudkan sebagai fungsi pelbagai. Hal ini menyebabkan banyak tajuk kes-kes baharu dimasukkan di bawah kod 099 & 299 tersebut. Oleh yang demikian, adalah perlu untuk menyemak semula kod kes sedia ada supaya pertambahan tajuk kes-kes baharu dapat diselaraskan di dalam fungsi yang sepatutnya.

Berdasarkan keputusan Mesyuarat Jawatankuasa Penyenggaraan Kod Kes Bil. 2/2017 yang bersidang pada 23 Oktober 2017, satu jawatankuasa kajian semula kod kes Rayuan, Mal, Jenayah, Sulh dan Bahagian Sokongan Keluarga (BSK) akan diwujudkan. Jawatankuasa ini bertanggungjawab mengkaji semula sistem klasifikasi bagi kod kes yang telah diwujudkan sejak tahun 2000. Ia juga berperanan memastikan keutuhan sistem klasifikasi bagi fail-fail kes di JKSN/MSN di seluruh Malaysia.

Mesyuarat Jawatankuasa Kajian Semua Kod Kes Bil.1/2018 yang bersidang pada 30 Oktober 2018 telah bersetuju dengan kaedah penetapan semula kod kes E-Syariah yang **menepati struktur hireaki klasifikasi fail Arkib Negara Malaysia** yang mengandungi Fungsi/Aktiviti/Sub-aktiviti dan Transaksi dan **menghapuskan penggunaan kod kes transit 099 & 299.**

Selain daripada itu, kod kes Mal dan Jenayah sedia ada tidak dipecahkan mengikut fungsi, aktiviti dan transaksi menyebabkan ia menjadi punca penggunaan kod 099 & 299 secara berleluasa. Kod kes Sulh dan kod kes Bahagian Sokongan Keluarga (BSK) yang sedia ada juga perlu dikaji semula untuk disesuaikan dengan persekitaran sistem E-Syariah versi baharu. Tambahan pula, dua kod baharu diwujudkan iaitu kod naziran dan kod pendaftaran kes rayuan bagi memastikan pengurusan rekod di Mahkamah Syariah lebih dinamik dan mapan.

Figure 3.4: Explanation of the Implementation of Practice Direction No. 12 for the year 2019

8.1.3 Kod Kes akan dijana oleh Sistem E-Syariah Versi 3 dengan format berikut:

a) Kes Mal 2001-L0110-153-0002

Huraian:

20 = Tahun 2020

01 = Bulan Januari

L01 = Dewan 1, Mahkamah Rendah Syariah Shah Alam

10 = Negeri Selangor

153 = Tuntutan Pengesahan Cerai Taklik

0002 = Kes bilangan ke-2 didaftarkan di Dewan 1, Mahkamah Rendah Syariah Shah Alam

Figure 3.5: Practice Direction No. 12 Year 2019 - Guide to the Use of Case Codes for Mal Cases in Syariah Courts

7.0 CARTA PERBANDINGAN SISTEM PENOMBORAN SEDIA ADA DENGAN KOD BAHARU

Versi Lama	Perbandingan	Versi Baharu
16	Aksara	16-18
10000-003-0123-2018	Susunan	2001-H0110-153-0002.01
<ul style="list-style-type: none"> • kod negeri • hiraki mahkamah (MRS / MTS / MRyS) • kod dewan/daerah (Dewan 1 / MRS Daerah 1,2,3) • kod kes (kes jenayah & kes mal) • Bilangan kes / Tahun 	Kandungan	<ul style="list-style-type: none"> • Tahun dan bulan semasa - 2001 • Kod Dewan & Hiraki mahkamah (MRS / MTS / MRyS)/daerah (Dewan 1 / MRS Daerah 1,2,3) - MTS Negeri Selangor (Dewan 1-Shah Alam) • Kod Negeri - Selangor • kod kes (kes jenayah & kes mal) - Mal (Tuntutan Cerai Taklik) • Bilangan kes ke 02 bagi dewan ini pada tahun semasa • Status kes (sama ada pra perkahwinan/ sulh/ perbicaraan/ pasca bicara/ rayuan/ semakan/ bsk) - Permohonan Saman Gantian
099 & 299	Kes Transit	Tiada

Figure 3.6: Chart Comparing the Existing Numbering System to the New Code as Stated under Practice Direction No. 12 Year 2019

KLASIFIKASI KOD KES MAL

100 PERKAHWINAN DAN PERCERAIAN**110 KEBENARAN BERNIKAH**

- 111 Permohonan Kebenaran Nikah Bawah Umur
- 112 Permohonan Kebenaran Bernikah Perempuan Yang Bercerai Tanpa Eddah / Janda Berhias
- 113 Permohonan / Tuntutan Kebenaran Poligami

120 WALI HAKIM / WALI RAJA

- 121 Permohonan Nikah Berwali Hakim Disebabkan Anak Tak Sah Taraf
- 122 Permohonan Nikah Berwali Hakim Disebabkan Wali Ghaib / Tiada Wali Nasab
- 123 Permohonan Nikah Berwali Hakim Disebabkan Muallaf
- 124 Tuntutan Wali Enggan/Engkar

130 PERMOHONAN PENGESAHAN NIKAH

- 131 Permohonan Pengesahan Nikah Tanpa Kebenaran di Luar Negara
- 132 Permohonan Pengesahan Nikah Tanpa Kebenaran di Dalam Negara
- 133 Permohonan Pengesahan Nikah Poligami Tanpa Kebenaran di Luar Negara
- 134 Permohonan Pengesahan Nikah Poligami Tanpa Kebenaran di Dalam Negara

140 HAK-HAK SEBELUM / SEMASA / SELEPAS PERKAHWINAN

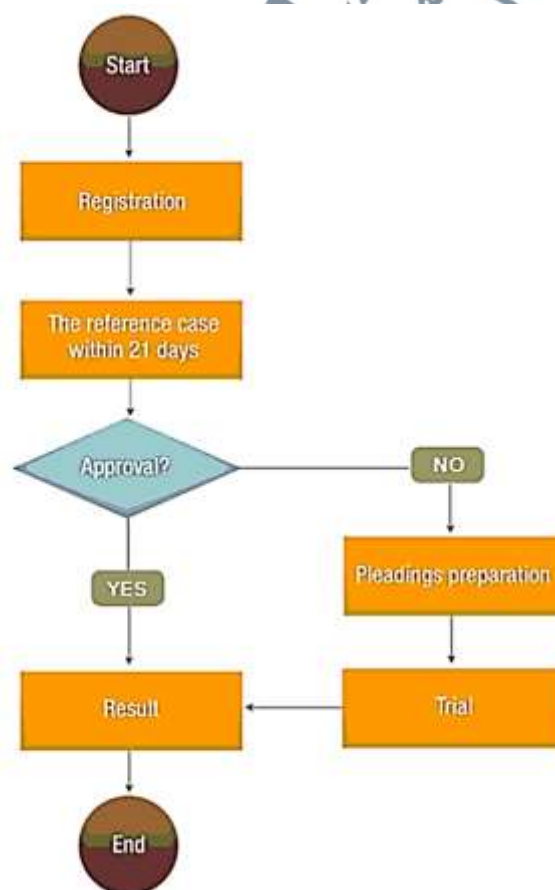
- 141 Tuntutan Gantirugi Pertunangan
- 142 Tuntutan Hak Tempat Tinggal
- 143 Tuntutan Sabitan Nusyuz
- 144 Tuntutan Perintah Supaya Suami Tinggal Bersama / Berlaku Adil
- 145 Tuntutan Isteri Kembali Taat
- 146 Tuntutan Mas Kahwin
- 147 Tuntutan Gantirugi Perkahwinan
- 148 Tuntutan Hutang Dalam Perkahwinan

150 PENCERAIAN / RUJUK / EDDAH

- 151 Tuntutan / Permohonan Perceraian
- 152 Tuntutan Pengesahan Lafaz Cerai

Figure 3.7: Several Civil Case Classification Examples from Appendix 1 of the Practice Direction No. 12 Year 2019

The case will then be registered by the court officer after all of the cases have been identified, including their type of classification, case code, court to which the case will be referred, and so on. If the case is classified as a Sulh case, it will be referred to the Sulh session within 21 days, otherwise it will be brought to the Court for the first mention as approval. If the Sulh session or case mention is successful, the judge will issue a judgement and order to the parties, and the case will be concluded. If the case is not approved because the Sulh session was unsuccessful or the defendant does not agree with the statement of claims, it will be brought to trial by preparing a pleading or cause paper for the trial. The flow chart below depicts the flow of the Civil Case in the Malaysian Syariah Court.



Sources: E-Syariah Official Portal of JKSM

Figure 3.8: Civil Cases Flow Chart

3.3.3 Civil Case Procedure in The Syariah Court

Whereas, according to JKSM (2011), the Syariah Court's Civil case procedure is divided into three stages: civil case registration, civil case handling, and civil case management. These three levels of procedure have their own operating procedures based on state acts or enactments, Practice Direction as well as their own divisions or units under Malaysia's Shariah judicial institutions. The researcher would like to emphasize that the discussion on this subtopic is a detailed discussion of the flow chart process of the *Mal* case, which has already been discussed on the previous subtopic. However, this subtopic will specifically explain the processes of registration, case handling, and case management in the Syariah Court for *Mal* cases. In general, the information related to the three stages as mentioned above can be summarized as follows:

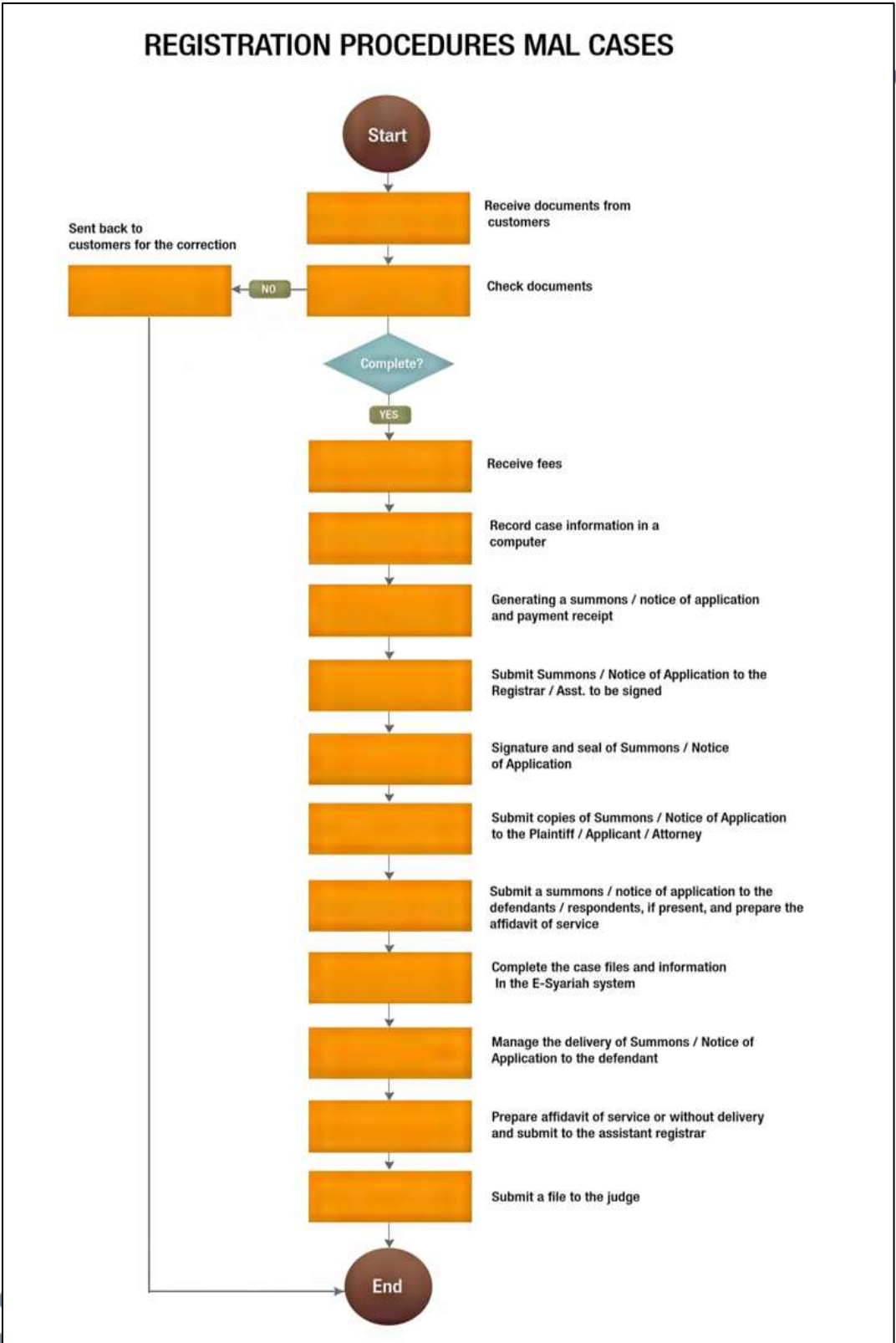
3.3.3.1 Civil Case Registration

The registration procedures for Civil cases in Malaysian Syariah Court begins with the receipt of documents (claim or application form) by clients at the Court's counter. The documents will be reviewed by a Court officer to determine whether all of the data entered is complete and correct. The client must prepare three copies of the document, one for the Court, one for the Plaintiff or Applicant, and one for the Defendant or Respondent. If the document was incomplete, the officer will return it to the client for corrections as directed. The client is advised to return to the Court once all of the documents have been completed. If the data entered is complete and correct, the case will then be registered by generating the fees through the system, and the client will receive the amount of fees that must be paid to register the case. The case

information will be recorded and saved in a computer system, and the system will generate the Summons or Notice of Application. The receipt will also be provided to the client as part of the case registration fee payment.

Following that, the Summons or Notice of Application will be signed and sealed by the Registrar of the Court or his Assistant for verification. The client (Plaintiff or Applicant) or attorney will be given a copy of the Summons or Notice of Application. It will also be submitted to the defendants or respondents if they attended the registration process together, and an affidavit of service will be prepared as an exhibit of receiving of the document. Depending on the type of Civil case registered, the client will be given a date to appear in Court for the case mention or *Sulh* session.

When the submission of a copy of the summons document or notice of application has been done to the client, the officer will complete the case files and enter the information into the E-Syariah system. The file would include an information such as case types, case codes, name of the Plaintiff or Applicant, one copy of the summons document or notice of application, and other information. The officer will also prepare the affidavit of service or without delivery and submit it to the assistant registrar. After all stages have been completed, the file will be submitted to the judge for review before the case will be heard in court.



Sources: E-Syariah Official Portal - Department of Syariah Judiciary Malaysia (JKSM)

Figure 3.9: Registration Procedures Mal Cases Flow Chart

3.3.3.2 Civil Case Handling

Civil cases in Syariah Court are handled differently at each level of the Courts. It can be referred to by virtue of its authority or jurisdiction to hear the case. Sections 46(2)(b), 47(2)(b) and 52(1) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), for example, stated that:

Section 46. Jurisdiction of Syariah High Court.

(2) A Syariah High Court shall -

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to-

(i) betrothal, marriage, *ruju'*, divorce, nullity of marriage (*fasakh*), *nusyuz*, or judicial separation (*faraq*) or other matters relating to the relationship between husband and wife;

(ii) any disposition of, or claim to, property arising out of any of the matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (*hadhanah*) of infants;

(iv) the division of, or claims to, *harta sepencarian*;

(v) wills or death-bed gifts (*marad-al-maut*) of a deceased Muslim;

(vi) gifts inter vivos, or settlements made without adequate consideration in money or money's worth, by a Muslim;

(vii) *wakaf* or *nazr*;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled; or

(x) other matters in respect of which jurisdiction is conferred by any written law.

Section 47. Jurisdiction of Syariah Subordinate Court.

2) The Syariah Subordinate Court shall -

(b) in its civil jurisdiction, hear and determine all such actions and proceedings as the Syariah High Court is authorized to hear and determine in which the amount or value of the subject-matter in dispute does not exceed fifty thousand ringgit or is not capable of estimation in terms of money.

Section 52. Jurisdiction of Syariah Appeal Court.

(1) The Syariah Appeal Court shall have jurisdiction to hear and determine any appeal against any decision made by the Syariah High Court in the exercise of its original jurisdiction.

Every Syariah Courts in Malaysia have their own level and jurisdiction that can be refer from each Act, Enactments and Ordinance of the states. The party who files the Summons and Statement of Claim is referred to as the Plaintiff in summons cases, while the person accused is referred to as the Defendant. In the case of an Application, the

party who files the Notice of Application and Affidavit is known as the Applicant, while the person who is being sued/requested is known as the Respondent. Section 17 of Act 585 also stated that:

Section 17. Interpretation.

In this Part, “plaintiff” includes an applicant and “defendant” includes a respondent.

According to *Jabatan Kehakiman Syariah Negeri Pulau Pinang*, in Syariah High Court and Syariah Subordinate Court States, the method of dealing with *Mal* or Civil cases is usually a trial or hearing process that begins with a mention (the beginning of the case trial), a trial process (current trial), and ends with a judgement (post-trial) (Pinang, t.t). If the parties are dissatisfied with the Court’s decision, they have the option of filing an appeal with the Syariah High Court or Syariah Court of Appeal in each state, as specified in the Act, Enactment and Ordinance. For example, Section 48(1)(b)(c)(2)(b) of Act 505 allows parties in Civil cases to appeal to the Syariah High Court if they are dissatisfied with the judge’s decision and meet the Act’s conditions.

Section 48. Appeal to Syariah High Court.

(1) An appeal shall lie to the Syariah High Court from any decision of a Syariah Subordinate Court –

(b) in its civil jurisdiction –

(i) by any person aggrieved by the decision, if the amount claimed is not less than one thousand ringgit;

(ii) in all cases involving any decision as to personal status, by any person aggrieved by the decision;

(iii) in all cases relating to maintenance of dependants, by any person aggrieved by the decision; and

(c) in any other case, if the Syariah High Court gives leave to appeal.

(2) On any appeal, the Syariah High Court may –

(b) in a civil matter, confirm, reverse or vary the decision of the trial Court, exercise any such powers as the trial Court could have exercised, make such order as the trial Court ought to have made, or order a retrial.

Practice Direction No. 10 Year 2016 - Workflow for *Mal* Appeal of Syariah Court can be used to follow its process or procedure. The Practice Directions also include the procedure or work process for making case appeals from the Syariah Subordinate Court to the Syariah High Court and from the Syariah High Court to the Syariah Court of Appeal. All of these can be found or referred to in the Practice Direction's Appendices A through D.



Figure 3.10: Practice Direction No. 10 Year 2016 - Workflow for *Mal* Appeal of Syariah Court

Aside from that, Civil cases in Syariah Courts follow a different procedure depending on the type of case filed, whether Claim case (summons and statement of claim) or Application case (notice of application and affidavit). This is demonstrated by Practice Direction No. 7 Year 2016 - Civil Case Management Procedure in Syariah Court: Application Case Management and Practice Direction No. 8 Year 2016 - Civil Case Management Procedure in Syariah Court: Summons Case Management. The work

process of registration of application cases, delivery of application notices, mention of applications, and registration and mention of ex parte applications is explained in the appendix of Practice Direction No. 7 of 2016. Meanwhile, the appendix to Practice Direction No. 8 Year 2016 describes the work process of summon case registration, summons service, first mention and second mention.

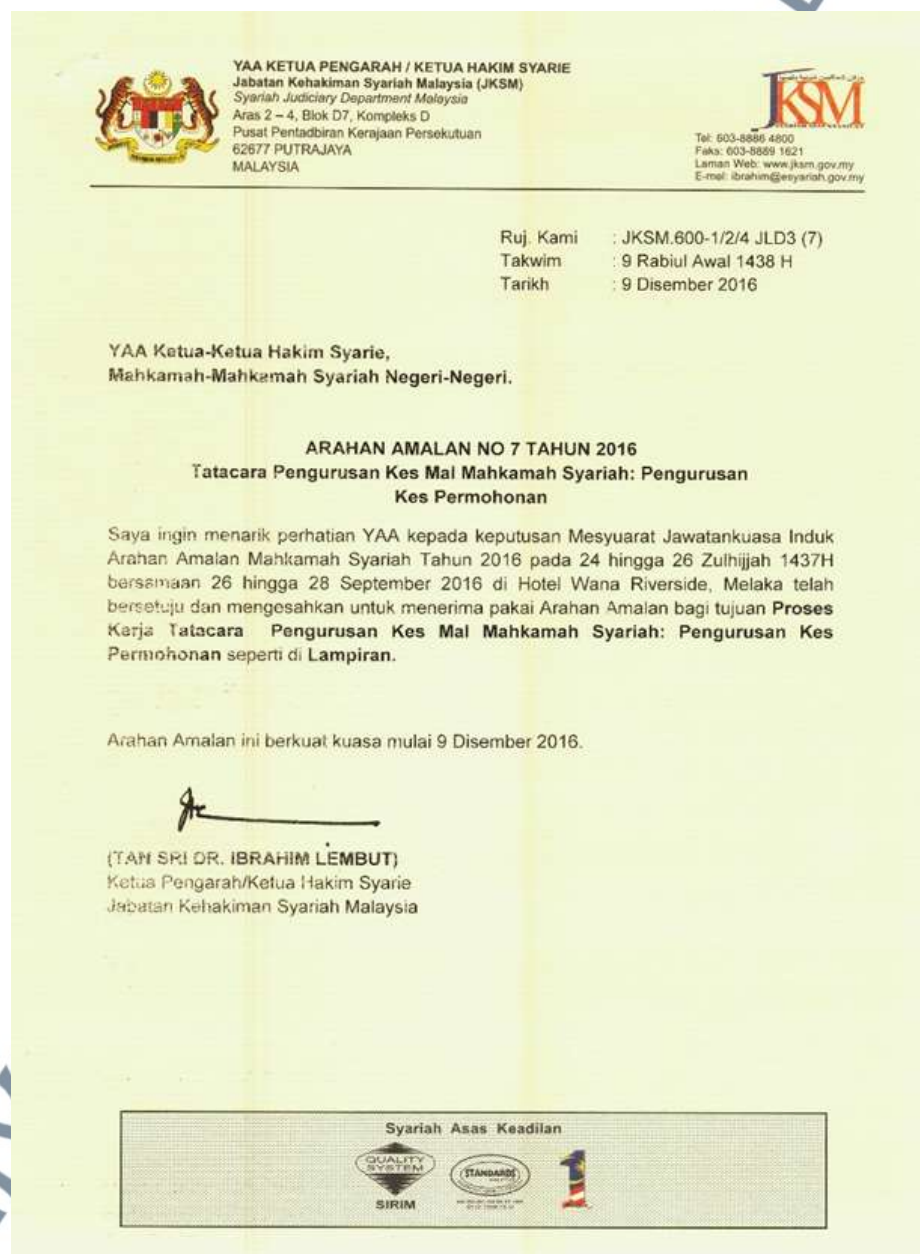


Figure 3.11: Practice Direction No. 7 Year 2016 - Civil Case Management Procedure in Syariah Court: Application Case Management



Figure 3.12: Practice Direction No. 8 Year 2016 - Civil Case Management Procedure in Syariah Court: Summons Case Management

Finally, the JKSM also issued proper guidelines in handling Civil cases in Syariah Courts, whether summons or application case, as a reference to the Court's Officer, Practitioner, and society's information. The procedure for handling or dealing with Civil cases can also be divided into several steps depending on the circumstances or situations (JKSM, 2011), and all workflows are depicted in the figures below:

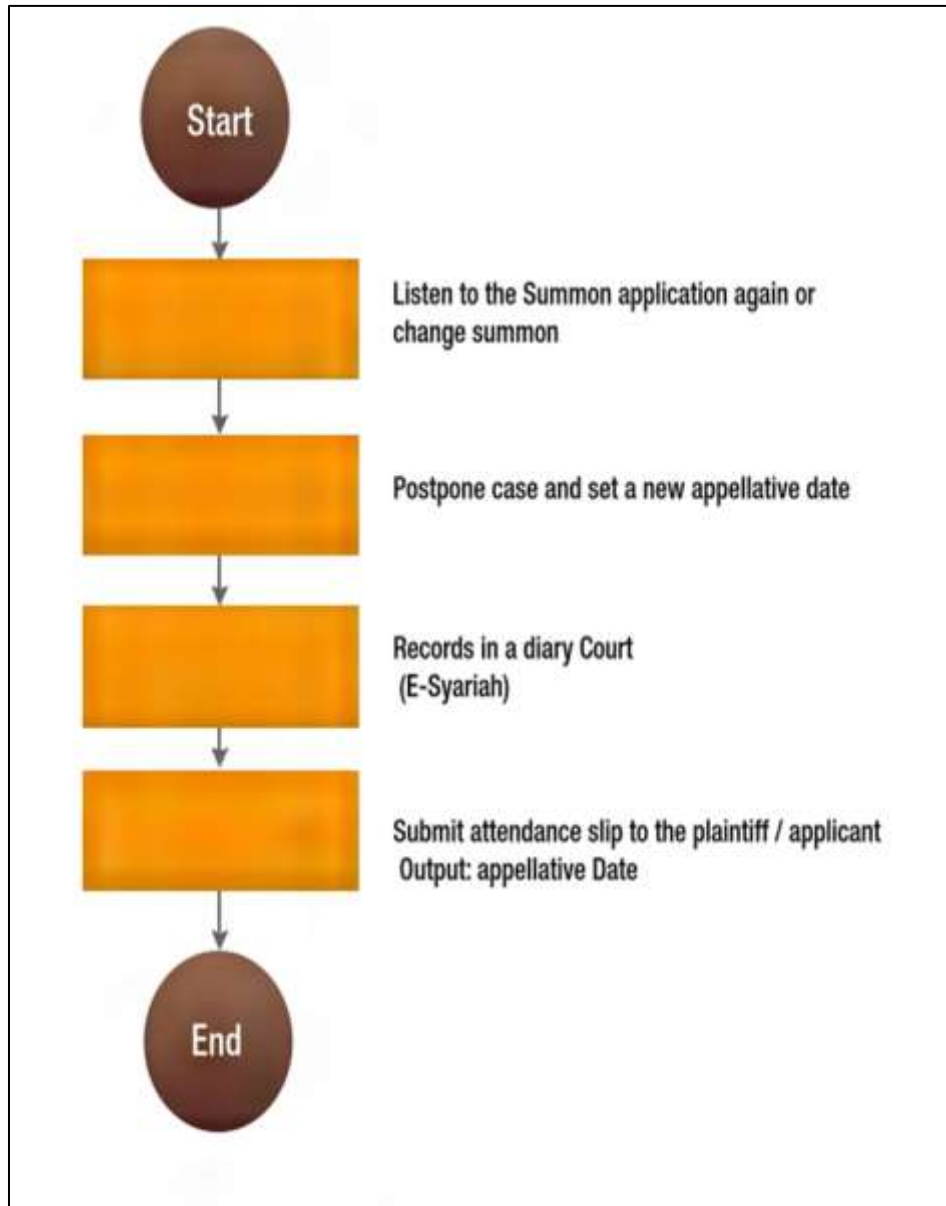


Figure 3.13: The Procedure for Handling Civil Cases if the Summons/Notice of Application failed to be executed

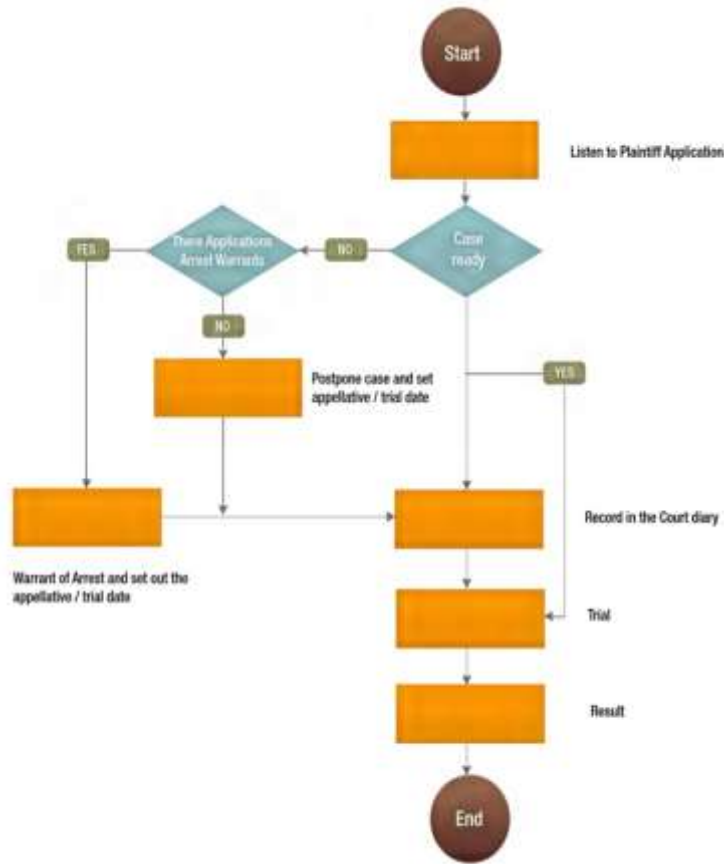


Figure 3.14: The Procedure for Handling Civil Cases if the Summons/Notice of Application is perfect, the absence of Defendant/Respondent, the present of Plaintiff/Applicant

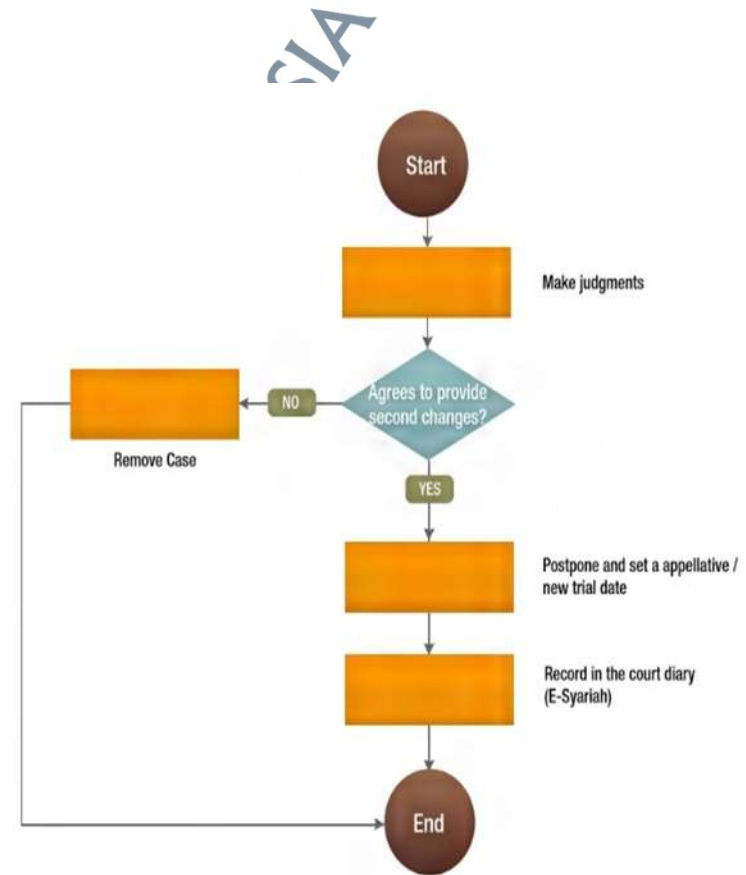


Figure 3.15: The Procedure for Handling Civil Cases if the Summons/Notice of Application perfect, Plaintiff/Defendant is not present

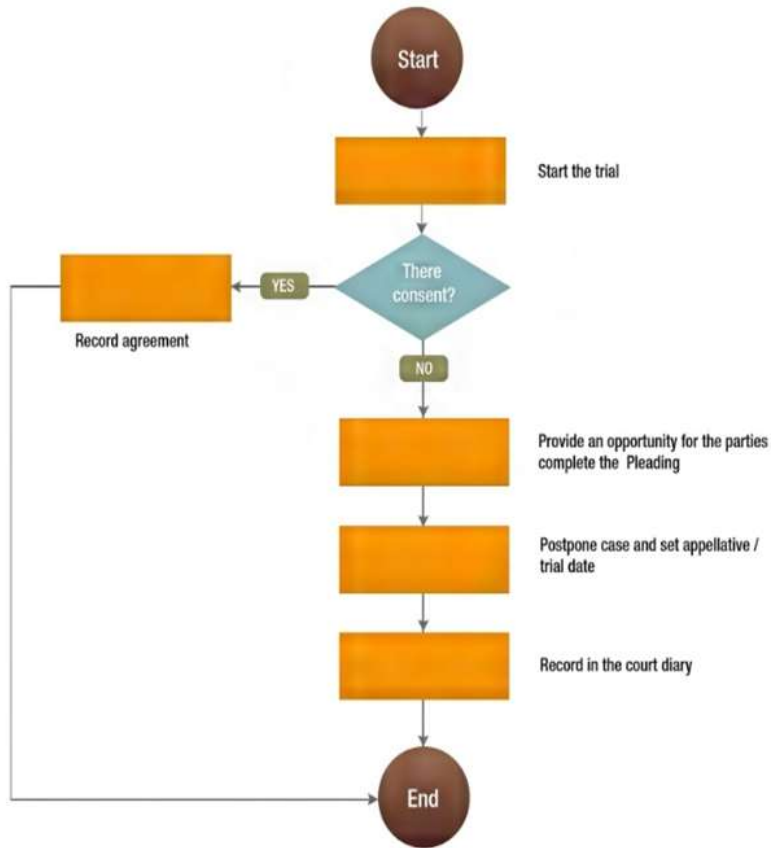


Figure 3.16: The Procedure for Handling Civil Cases if the Summons/Notice of Application Perfect, parties to attend

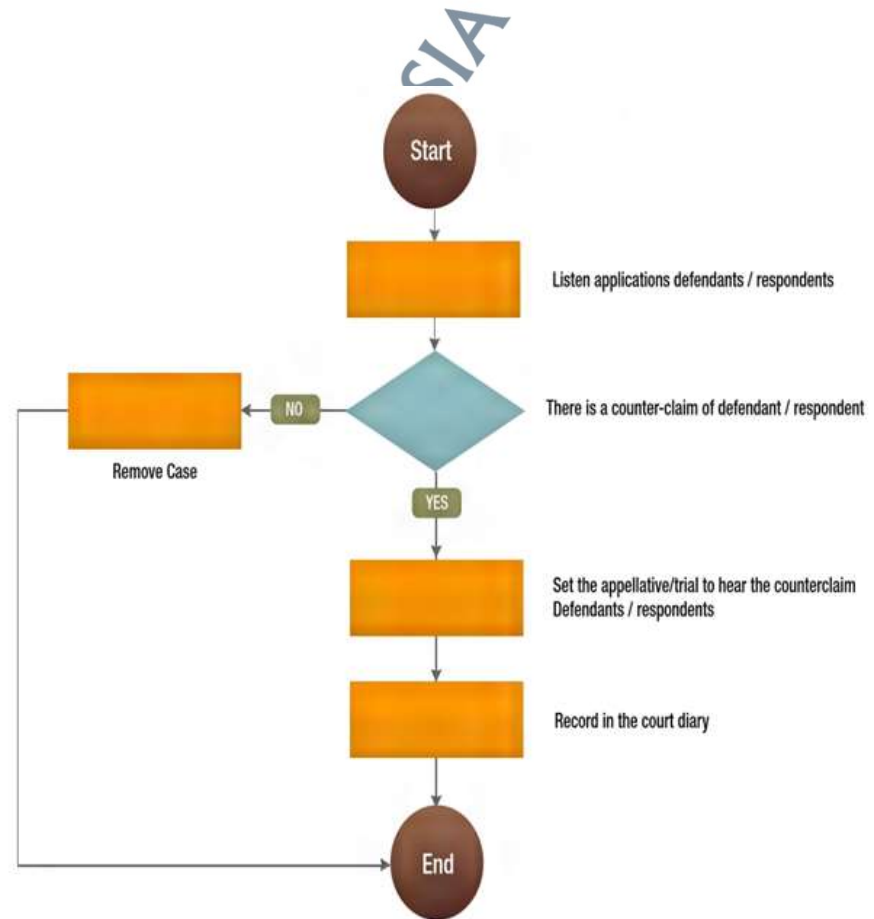


Figure 3.17: The Procedure for Handling Civil Cases if the Summons/Notice of Application Perfect, absents Plaintiffs, present Defendants

It can be concluded that the procedure for handling Civil cases in Syariah Court can be handled through the results of service of Summons or Notice of Application, whether successful or unsuccessful, as well as whether the Plaintiff/Defendant and Applicant/Respondent are absent or present, as follows:

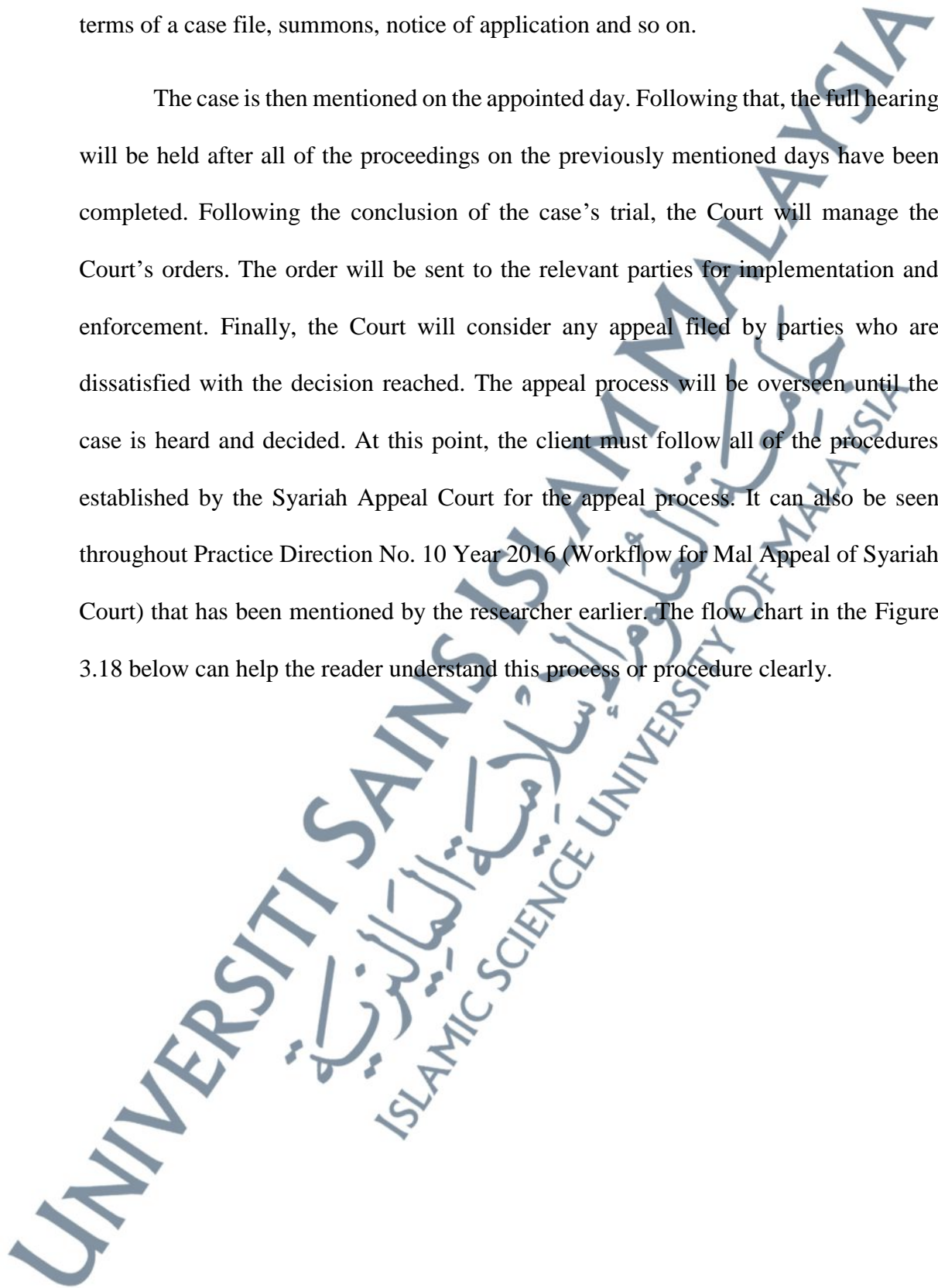
- 1) If the Summons/Notice of Application was not properly executed (failed).
- 2) If the Summons/Notice of Application is Perfect, but the Defendant or Respondent is not present and the Plaintiff or Applicant present.
- 3) Summons/Notice of Application perfect, but neither Plaintiff nor Defendant is present.
- 4) The Summons/Notice of Application is perfect, and both parties attend.
- 5) Summons/Notice of Application perfect, but the Plaintiff is absent and the Defendant is present.

3.3.3.3 Management of Civil Cases

Mainly, the management of Civil cases in Malaysian Syariah Courts is what has been mentioned or explained throughout the earlier discussion on the procedure of registration and handling Civil cases. Management of Civil cases in Syariah courts of Malaysia cover related matters started from the cases been registered, mentioned before the court, trial or hearing and until the judgments and court orders issued by the Judge. It describes the procedures of the Syariah Court's Civil cases in general. According to Perak's Department of Syariah Judiciary Official Website, when a client comes to the Syariah Subordinate Court or the Syariah High Court to register a case, the main process of Civil case management begins (Perak, 2021). The case will be scheduled

concurrently with the acceptance of the registration. The case will then be prepared in terms of a case file, summons, notice of application and so on.

The case is then mentioned on the appointed day. Following that, the full hearing will be held after all of the proceedings on the previously mentioned days have been completed. Following the conclusion of the case's trial, the Court will manage the Court's orders. The order will be sent to the relevant parties for implementation and enforcement. Finally, the Court will consider any appeal filed by parties who are dissatisfied with the decision reached. The appeal process will be overseen until the case is heard and decided. At this point, the client must follow all of the procedures established by the Syariah Appeal Court for the appeal process. It can also be seen throughout Practice Direction No. 10 Year 2016 (Workflow for Mal Appeal of Syariah Court) that has been mentioned by the researcher earlier. The flow chart in the Figure 3.18 below can help the reader understand this process or procedure clearly.



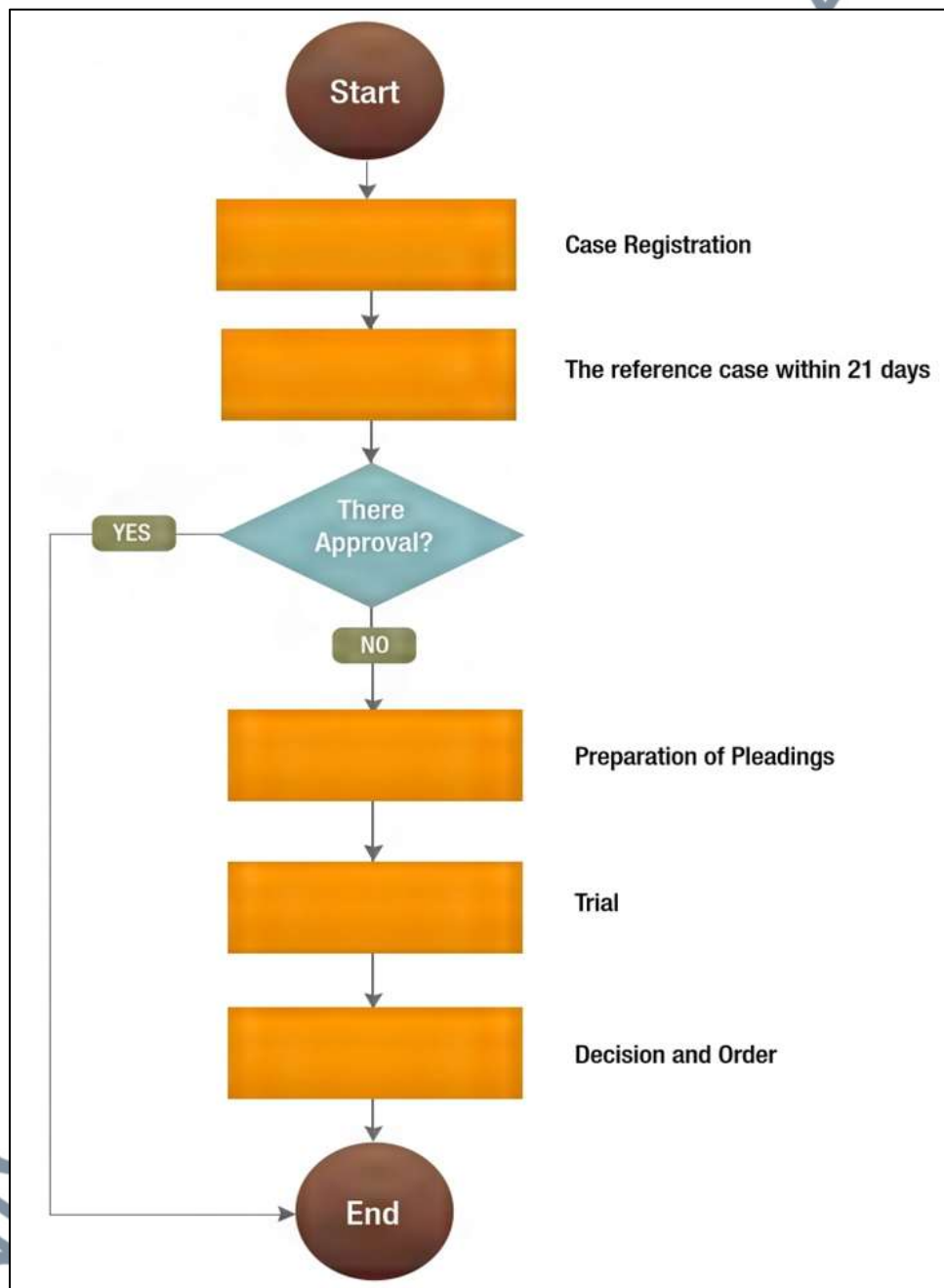


Source: Perak's Department of Syariah Judiciary Official Website

Figure 3.18: The Main Process of Mal Case Management

In addition, the official JKSM portal E-Syariah, which can be found at <http://www.esyariah.gov.my>, has also highlighted the procedure for managing with Civil or *Mal* cases in general. After the Civil case been registered, the reference case will be prepared by the Court within 21 days. This is due to the fact that each Syariah Court in Malaysia has a specific policy or Client Charter to follow in order to comply with the management period of a case. JKSM has mandated that Syariah courts in Malaysia should mention or try a Civil and Criminal case within 21 days of its registration (Perak, 2021). The case will then proceed through the judgement process

without going through the trial process if there is no dispute and both parties agree. If there is a dispute between the two parties, the trial will take place before the Court renders its decision. Overall, the flow chart depicting the step-by-step management of Civil cases in Malaysian Syariah Courts is as follows (JKSM, 2011):



Source: E-Syariah Official Portal - Department of Syariah Judiciary Malaysia (JKSM)

Figure 3.19: *Mal* Case Management Procedures

It can be concluded that the legal procedures for Civil cases in Malaysian Syariah Court has provided a systematic procedure for registration, case handling, and management of Civil cases in Syariah courts that all practitioners, administrators, and societies can follow. However, the researcher observed and opined that Malaysia's current Syariah Court Civil procedures are too general and do not provide a clear guideline for Civil cases involving PWDs. PWDs in Malaysia must follow and face the same procedures as the rest of society in terms of registration, court hearings, and so on, as outlined in legal procedures of Civil cases on each state.

Through that matter, issues and challenges must arise for the PWDs community because they have their own uniqueness and disabilities that differ from other typical people and require a proper procedure for them. There are also issues and problems for the Court and practitioners when dealing with Civil cases involving PWDs because there are no proper or specific guidelines that may be followed to conduct such cases. Court procedures should emphasize inclusive features that can be followed by all parties, including people with disabilities.

A Syarie Lawyer, RP SL1 (2022), stated that the PWDs community is offended when they read information about Civil case procedure in the Court. This is due to the fact that the official website of the Syariah Court in Malaysia is less comprehensive. For example, the information on the website does not advertise the Syariah Court's services, such as sign interpreters for the hearing and speech impaired or braille document services for the visually impaired. Only the Melaka State Syariah Justice Department provides Syariah legislation information for the Syariah Court of Melaka through their video montage and active in receiving cases from the disabled community especially people with hearing disabilities. As a result, the disabled community,

particularly the visually and hearing impaired, is hesitant to attend Court because they fear their needs will not be fulfilled.



Source: Melaka State Syariah Justice Department Official Portal

Figure 3.20: A sign language-based information column on Syariah legislation in Melaka

The researcher believes that developing or preparing a clear guideline for conducting Civil cases in Malaysian Syariah courts can benefit and improve our current practices and Malaysia's Syariah legal system. It can provide clear information to the Malaysian PWDs community as well as a reference for Malaysian Syariah Court administrators, Syariah Officers, Judges, and practitioners on how to register, handle, and manage a Civil case involving PWDs at Syariah courts. This does not imply dividing society into typical and disabled people, but rather providing justice and proper rights to all societies based on their needs.

3.4 Current Practice of Legal Procedures for Civil Cases Involving PWDs in Malaysian Syariah Courts

The previous section's investigation and conclusions revealed that Malaysia's current legal procedures for Civil cases are quite general, as they apply to all clients regardless of whether they are normal or people with disabilities. As a result, the PWD community in Malaysia must follow the same registration, trial, and other procedures as the general public. The principle of basic justice, according to Romli, Md Dahlan & Ahmad (2012), is a minimum requirement in making fair and equitable decisions imposed by law on people or bodies on duty, especially those acting judicially, such as tribunals and any Departmental Disciplinary Board. This includes the Syariah Court as one of the judicial institutions in Malaysia. Therefore, the researcher was able to conduct an interview with some respondents, which included Syarie Judges and Syarie Lawyers, as well as an observation to analyze the current practice of Syariah courts in dealing with Civil cases involving PWDs while maintaining the principle of basic justice at the end.

According to RP **SJ1** (2022), for the time being, there are no Practice Directions or specific guidelines related to the handling procedures of Civil or *Mal* cases involving the disabled in the Malaysian Syariah Court. PWDs must go through the same registration, trial, and even the Court takes it own initiative to deal with such matters and try to manage them effectively. **SJ1**, on the other hand, believes that there are Syariah Court administrations that issue administrative rules or directives in writing or verbally, such as giving priority to the disabled during the case registration process and trial queues in the Court, follow the Court administration's discretion in giving priority to the disabled in obtaining services and treatment in the Syariah Court and providing facilities for the disabled. The Judge will also judge the trial based on the justice that

PWDs must receive. This is based on the Syarie Judges' Code of Ethics as stated under Practice Direction No.1 Year 2001 or *Adabul Qadi*, which should be followed and practiced by all Syarie judges in Malaysia during conducting any trial or cases.



جباتن كحاكيمان شرعية هليسيا
JABATAN KEHAKIMAN SYARIAH MALAYSIA (JKSM)

Ruj. Tuan :
Ruj. Kami : JKSM/100-24/5
Takwim : 5 Zulkaedah 1421
Tarikh : 29 Januari 2001

Y.A.A. Ketua-Ketua Hakim Syarie,
Mahkamah-mahkamah Syariah Negeri-negeri

Arahan Amalan No. 1 Tahun 2001

Kod Etika Hakim Syarie

Saya ingin menarik perhatian Y.A.A kepada keputusan Mesyuarat Arahan Amalan Mahkamah Syariah seluruh Malaysia Bil.2/2000 pada 9 – 11 Oktober 2000 di Melaka dan keputusan Mesyuarat Ketua-ketua Hakim Syarie kali ke 17 di Labuan 27 Oktober 2000 bersamaan dengan 26 Rejab 1421 telah bersetuju dan mengesahkan untuk menerimapakai arahan berhubung Kod Etika Hakim Syarie. Mulai 1 Mac 2001 Kod Etika Hakim Syarie akan terpakai ke atas semua Hakim-Hakim Syarie.

2. Bersama-sama ini disertakan Kod Etika Hakim Syarie untuk tindakan bagi pemakaian di negeri-negeri dan ianya hendaklah mula berkuatkuasa pada 2 Mei 2001.

(Dato' Sheikh Ghazali Bin Hj. Ab. Rahman)
Ketua Pengarah/Ketua Hakim Syarie
Jabatan Kehakiman Syariah Malaysia.

Kuala Lumpur
2 Februari 2001

KOD ETIKA HAKIM SYARIE

Ketua Hakim Syarie menetapkan kod etika yang berikut:-

Nama

1. Kod etika ini bolehlah dinamakan Kod Etika Hakim Syarie.

Pemakafan

2. (1) Kod Etika ini hendaklah terpakai kepada seseorang Hakim Syarie sepanjang tempoh perkhidmatannya.

(2) Pelanggaran mana-mana peruntukan Kod Etika ini boleh menjadi suatu alasan bagi tindakan diambil di bawah Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993. [P.U.(A)395/93]

Kod Etika di luar mahkamah

3. Seseorang Hakim Syarie tidak boleh –

(a) berkelakuan dengan sedemikian cara yang mungkin menyebabkan syak munasabah bahawa –

(i) dia telah membiarkan kepentingan persendirianya bercanggah dengan tugas kehakimannya hingga menjejaskan kedudukannya sebagai seorang Hakim Syarie; atau

(ii) dia telah menggunakan kedudukan kehakimannya bagi faedahnya sendiri;

(b) berkelakuan dengan cara tidak jujur atau dengan sedemikian cara hingga memburukkan atau boleh memburukkan atau mencemarkan nama Mahkamah Syariah;

(c) membelakangkan tugas kehakimannya demi kepentingan persendirianya;

(d) bergaul bebas dengan orang ramai dengan cara yang boleh menimbulkan syak tentang keupayaannya untuk berlaku adil dalam tugas kehakiman;

(e) menerima apa-apa hadiah, apabila hadiah tersebut dengan apa-apa cara berkaitan dengan pelaksanaan tugas kehakimannya;

(f) mengusahakan bagi mendapatkan upah apa-apa kerja bagi mana-mana institusi, syarikat, firma atau individu tanpa di beri keizinan atau kebenaran yang nyata oleh Ketua Hakim Syarie;

(g) memberi pendapat mengenai sesuatu perkara atau keadaan yang ianya sedang dibicarakan atau berkemungkinan akan menjadi suatu isu dalam mana-mana perbicaraan di hadapannya, kerana pendapatnya itu boleh kemudiannya digunakan oleh sesuatu pihak untuk menyokong hujahnya;

(h) meminjam wang daripada mana-mana orang atau menjadi penjamin kepada mana-mana peminjam, atau dengan apa-apa cara meletakkan dirinya di bawah suatu obligasi kewangan kepada mana-mana orang –

(i) yang secara langsung atau tidak langsung tertakluk kepada kuasa kehakimannya; atau

(ii) yang dengannya dia ada atau mungkin ada urusan rasmi ;

(i) mengambil bahagian dalam aktiviti parti politik.

Kod Etika dalam Mahkamah

4. Apabila seseorang Hakim Syarie berada dalam Mahkamah dan mendengar sesuatu kes, dia hendaklah -

(a) melaksanakan keadilan sebagaimana yang dikehendaki oleh Hukum Syarak;

(b) menjalankan tugas mengikut Hukum Syarak dan memberi penghakimannya berdasarkan undang-undang berkaitan;

- (c) tidak mendengar sesuatu kes apabila dia berkeadaan tidak tenang seumpama dia berkeadaan marah, lapar, haus, mengantuk, letih dan tidak sihat;
- (d) tidak boleh meninggalkan Mahkamahnya pada waktu pejabat tanpa alasan yang munasabah atau tanpa terlebih dahulu mendapat keizinan daripada Ketua Hakim Syarie;
- (e) memberi penghakimannya apabila dia berkeadaan tenang;
- (f) tidak membicarakan apa-apa kes di mana pihak yang terlibat itu ialah musuhnya atau orang lain yang berkemungkinan akan mempengaruhi tugas kehakimannya sebagai seorang Hakim Syarie;
- (g) bertindak tegas dan adil dan tidak dipengaruhi oleh keadaan atau orang yang hadir di hadapannya;
- (h) bersifat terbuka dan sabar semasa mendengar keterangan dan hujah-hujah dari pihak-pihak.;
- (i) memastikan prosiding di Mahkamah dijalankan dengan teratur menurut peraturan Mahkamah dan mengawal keadaan supaya perbicaraan itu dapat berjalan dengan lancar;
- (j) menggalakkan pihak-pihak menyelesaikan pertelingkahan mereka dan mencapai persetujuan secara sulh dalam kes-kes mal di mana-mana peringkat sebelum dia memberi penghakiman;
- (k) memuliakan saksi-saksi;
- (l) memberi layanan sama rata kepada pihak-pihak dan peguam-peguam;
- (m) mengadakan perbicaraan dalam Mahkamah terbuka kecuali di dalam keadaan khas yang dibenarkan oleh undang-undang;

Penyegeraan penyelesaian kes

5. Hakim hendaklah bersungguh-sungguh dan tidak melengah-lengah tanpa alasan yang munasabah menyelesaikan kes-kes, memberi keputusan, menulis alasan penghakiman dan mematuhi arahan-arahan yang dikeluarkan oleh Ketua Hakim Syarie dari masa ke semasa;

Waktu pejabat

6. Bagi maksud subperenggan 4(d) "waktu pejabat" ertinya waktu pejabat yang ditetapkan oleh negeri-negeri berkenaan.

Pengisytiharan harta

7. Seseorang hakim syarie hendaklah pada masa pelantikannya atau pada bila-bila masa selepas itu mengisytiharkan harta kepada Ketua Hakim Syarie mengikut peraturan-peraturan yang terpakai.

Dibuat pada hb. 2000

DATO' SHEIKH GHAZALI B IJ ABDUL RAHMAN
Ketua Hakim Syarie JKSM

Source: Official Website Department of Syariah Judiciary Malaysia (JKSM)

Figure 3.21: Practice Direction No.1 Year 2001 namely Syarie Judges' Code of Ethics

The above-mentioned Practice Direction consists of Syarie Judges' Code of Ethics when Syarie Judges are both outside and inside the Court. Among the contents of the Syarie judge's code of ethics during in the Court is to ensure that the proceedings in the Court are carried out in an orderly manner in accordance with the rules of the Court and to control the situation so that the trial can proceed smoothly, glorifying the witnesses, and treating the parties and lawyers equally. It is the judge's responsibility, as seen, to always honour the parties, regardless of whether the parties are disabled and the Court must provide for their needs. Thus, the Court's administration will be ready to assist disabled clients in the hearing, such as obtaining a Sign Language Interpreter for the hearing impaired and ensuring that the disabled have equal access to all services as other people.

Furthermore, when it comes to the procedure for presenting evidence in court, PWDs parties are not exempted by law from the process. Section 84 of Act 561, for example, allows witnesses among mute people (people with speech disabilities) to give evidence in an understandable manner, such as in writing or through sign language. This means that people with disabilities are not exempt from giving evidence, and the Court accepts their witness statements. As a result, it is the responsibility of Court officers to assist disabled clients in giving clear and perfect testimony or evidence, either directly or through an intermediary, and to provide support equipment appropriate to their disability.

SJ1 (2022) also added that, there are *Mal* cases that are heard and decided by the Court, such as divorce, involving the deaf, dumb, and blind disabled, which can be resolved in an orderly manner according to the law. In terms of information access, the Melaka State Syariah Court has provided a more PWD-friendly portal, such as a video

with a sign interpreter, and has even provided officers and sign interpreters who are skilled in handling PWD cases.

Next, the researcher was also able to obtain information directly from the Melaka State Syariah Court by interviewing the Chief Syarie Judge, as their Court has direct experience handling Civil cases involving PWDs. RP **SJ2** (2022) said that although there are no practice instructions, circulars and so on related to the procedure for handling Civil cases involving the disabled in the Syariah Court, discussions in that direction are always held from time to time for example involving the deaf, mute and visually impaired. The Court intends to improve the matter in the future.

For now, when dealing with Civil cases involving PWDs, the Court follows or refers to the provisions of the existing law as stated in Chapter 2 - *Persons Under Disability* in Syariah Court Civil Procedure Enactment (State of Melaka) 2002 (Enactment 13) (Sections 24 - 30). **SJ2** opined that all of the provisions in Chapter 2 of Enactment 13 are literally about parties who are mentioned in Section 3 - Interpretation of the same Enactment, which are an infant, a person of unsound mind, and a person prohibited from administering his property. The parties from the category of "*persons under disability*" can be represented by guardian *ad litem* to handle their case before the Court.

In fact, **SJ2** added that it is not only the three categories that belong below "*persons under disability*" in Malaysian Shariah legal system, but it more than that. This is because according to him, the interpretation of Section 3 of Enactment 13 on the definition of "*persons under disability*" is similar, as in the interpretation that refers to the definition of PWDs under Section 2 – Interpretation of Act 685. That is, the PWDs

mentioned in Section 2 of Act 685 are also considered "*persons under disability*" under the Shariah legal system.

SJ2 clarify that in the context of the Syariah Court, a "*persons under disability*" is an individual, male or female, who has a mental or physical deficiency (not limited to people with limb and sensory disabilities) or a child who is unable to determine what is good or bad, preventing him from acting alone on his behalf whether prosecuting or being sued. As a result, he viewed that, the definition of "*persons under disability*" in Syariah Court practise is even broader, and includes children who have not reached puberty (*mukallaf*) or *baligh*. For that reason, the three categories that mentioned under interpretation of "*persons under disability*" (Section 3 of Enactment 13) are included in the category of PWDs according to the interpretation of PWDs under Section 2 of Act 685.

Aside from that, the Melaka State Syariah Court refers to Section 84 of the Syariah Court Evidence (State of Melaka) Enactment 2002 (Enactment 8) when dealing with cases involving witnesses with a speech disability (dumb). A witness who is unable to speak may give his *bayyinah* in any way he can make it understandable, such as through writing or signs as indicated in the provision below:

84. Dumb witnesses.

(1) A witness who is unable to speak may give his *bayyinah* in any manner in which he can make it intelligible such as by writing or by signs.

(2) The *bayyinah* referred to in subsection (1) shall be given in open Court.

All of the related provisions in dealing with Civil cases involving PWDs according to the current practice of the Melaka State Syariah Court are listed in the table below:

Table 3.2: Legal provisions that are referred to when dealing with civil cases involving PWDs in the Melaka State Syariah Court

No.	Provisions	Sections	Descriptions
1.	Syariah Court Civil Procedure Enactment (State of Melaka) 2002 [Enactment 13]	24	Person Under Disability
2.		25	Consent on Behalf of Person Under Disability
3.		26	General Provisions as To Disability
4.		27	Irregular Proceedings
5.		28	Removal of Guardian Ad Litem
6.		29	Minor Plaintiff Attaining Majority
7.		30	Minor Defendant Attaining Majority
8.	Syariah Court Evidence (State of Melaka) Enactment 2002 [Enactment 8]	84	Dumb Witnesses

Moreover, **SJ2** also added that in terms of office space or Melaka State Syariah Court Complex facilities, it also provides a very inclusive environment by offering sign language services, disabled parking spaces, disabled toilets, wheelchairs, and disabled ramps around the Syariah Court. Although there are constraints such as the lack of sign language interpreters that are skilled enough to handle the case and the constraints of disabled parties who do not understand sign language and the law, the Court will make

every effort to meet the needs of the disabled who come to the Court and provide the best treatment for them. All of these services are provided by the Syariah Court State of Melaka to clients who are PWDs. This is due to Syariah law emphasizes fairness and equality in its legal system, the Court is also obligated to pay attention to matters affecting the disabled, even if they are minority cases in the Syariah Court.

Furthermore, according to the researcher's observations on the Sulh case simulation regarding the plaintiff's claim for child support where both parties are people with hearing disabilities, the parties must follow the same Sulh procedure as other typical parties did because there is no longer a specific method related to the Sulh process for the Hearing Impaired. The Sulh session also was only distinguished by the presence of a third-party sign language interpreter if the Sulh officer was unable to use the sign language form. On a normal Sulh procedure, the process only took between the Sulh Officer and the conflicting parties, plaintiff and defendant, unless the Sulh Officer is proficient enough in sign language to lead the session.

Due to a lack of Sulh officers who are skillful in sign language, the Sulh process involving hearing impaired parties has necessitated the services of sign language interpreters among skilled persons, and indirectly requires the involvement of third parties in the Sulh procedure. In some cases, however, the Court will directly invite sign language interpreters from outside the Court who are familiar with the Court procedure, such as lawyers who are skilled sign language interpreters. RP SO2 (2022) said that if only one party is deaf, consent must be obtained before bringing in a sign interpreter. This is critical to ensuring that the case proceeds smoothly and that the Sulh session is completed in accordance with the agreed-upon objectives. More than other ordinary or typical parties, the Sulh Officers also must gain the parties' trust and lead them through

the Sulh Session step by step. The figures below depict how the Sulh session was run, with the Sulh Officer or sign language interpreter first giving a brief explanation of Sulh and its rules to the parties.



Figure 3.22: The Sign Language Interpreter Opens the Sulh Session with the Hearing-Impaired Parties



Figure 3.23: The Sign Language Interpreter Explains the Sulh Session Process to the Parties



Figure 3.24: The Sign Language Interpreter Explains the Sulh Session Rules to the Parties

What is really interesting is that this Sulh session with the hearing impaired should consider not only sign language skills or communication, but also the parties' acceptance of the facts, the understanding provided by the sign interpreter, and how these parties think. This is because not many people with disabilities literate about the law and not all legal words or terms have a specific sign language. For example, the term 'SULH' itself, because there is no sign language form for the term 'SULH,' the sign language interpreter must spell each of those words one by one (S-U-L-H). The sign language interpreter must also explain Syariah law that applies to the parties regarding issues that arise, such as this child support case. It becomes difficult for sign interpreters to explain it to the parties in sign form. This is one of the challenges that the Sulh Officer

or sign language interpreter faces when conducting the Sulh session with people who have hearing disabilities and controlling the parties to remain calm throughout the Sulh session. If the joint session is not successful, a caucus session will be held, with space provided for the plaintiff and defendant to discuss in person (one-to-one) with a sign interpreter or Sulh Officer.

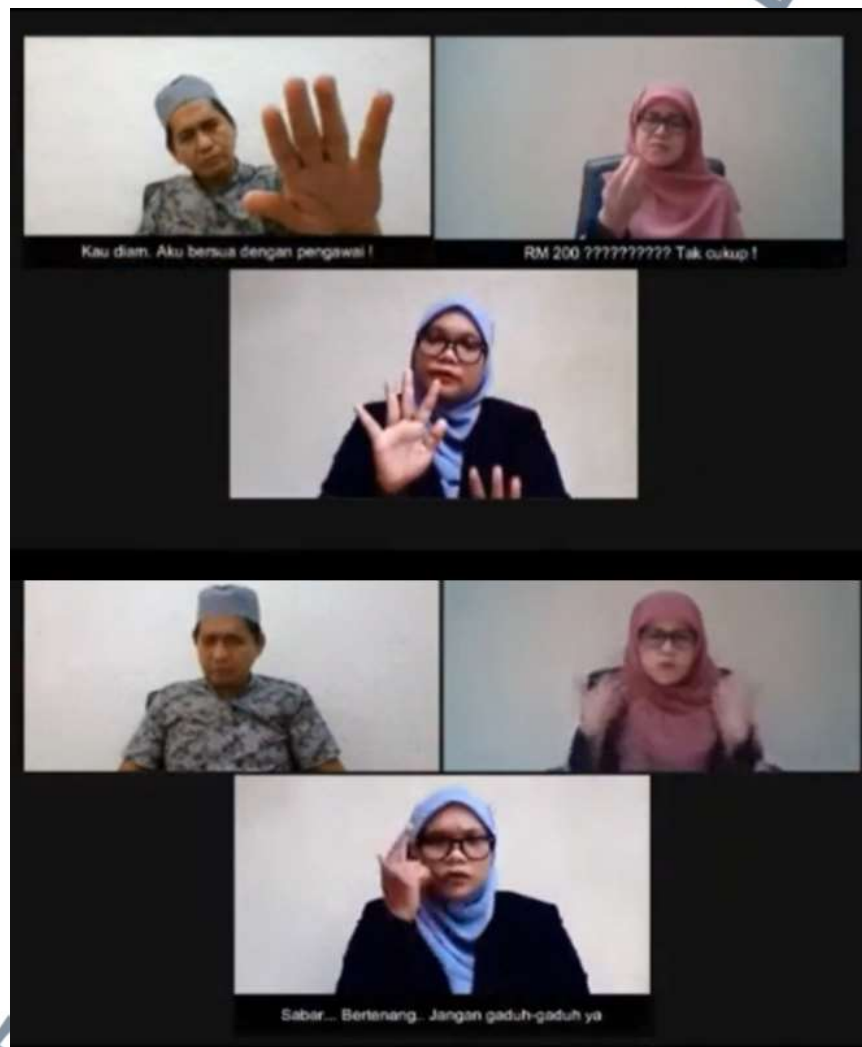


Figure 3.25: The Sign Language Interpreter Tries to Help the Parties to Stay Calm and Relax



Figure 3.26: A Discussion Between the Parties

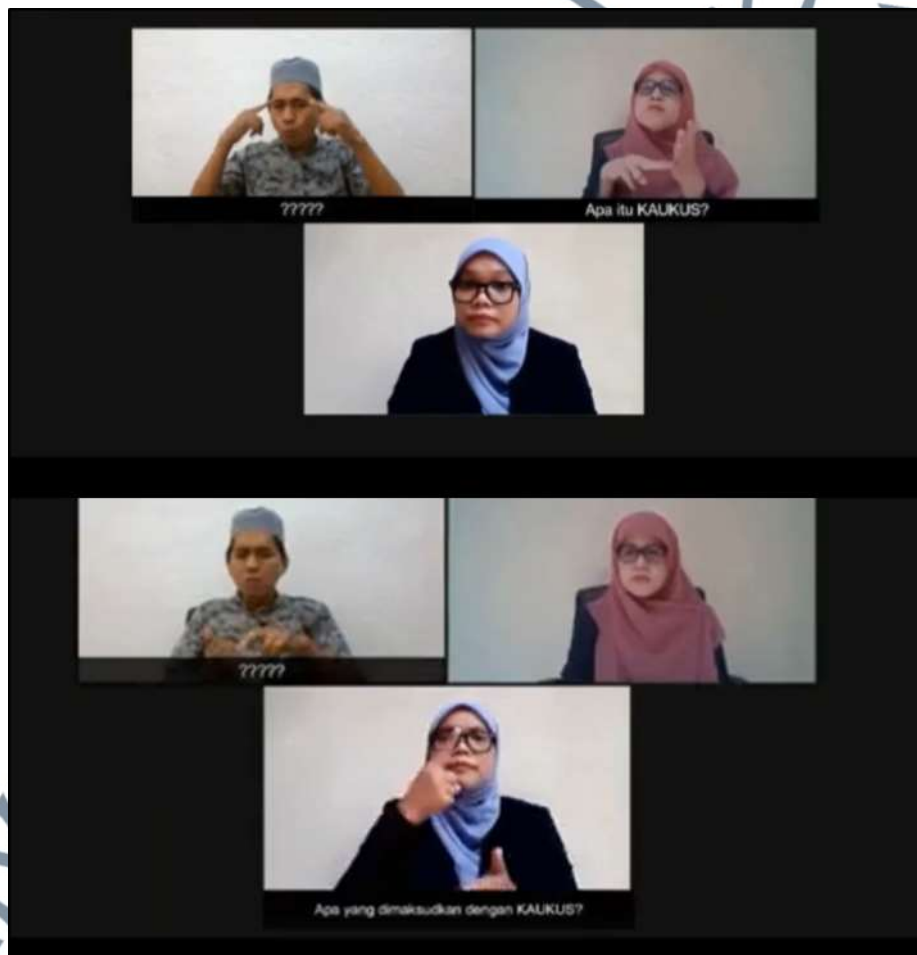


Figure 3.27: The Sign Language Interpreter Tries to Help the Parties Understand and Define the Term "KAUKUS" In the Form of Sign Language

In order to reach a consensus, the Court will also reexamine the situation and justice at the Sulh level. Conducting Sulh sessions requires the use of many different techniques, including body language. According to observational studies as well, Sulh officers or sign language interpreters are seen to offer suggestions to the parties in order to reach an agreement. The Sulh Officer is not permitted to make any suggestions to the parties under usual conditions (real Sulh procedure). **SO2** (2021), however, asserts that this issue is crucial for people with disabilities. However, must first ask for a mandate from the parties, and the authority of the parties will ultimately determine the outcome. This is to avoid the situation in which the Sulh Officer forces the parties to sign agreements without their understanding or discussion.

Obtaining an agreement from the parties is undoubtedly difficult due to their lack of understanding of the legal language. Thus, it is the Sulh Officer's responsibility to translate into an understandable sign language form. Despite the fact that some procedures do not always adhere to the actual Sulh procedure, the Sulh Officer must ensure that the Sulh session remains focused on the concept and purpose of the real Sulh, such as explaining the grounded rules of the Sulh procedure and ensuring that the parties follow the rules.

The researcher saw that the Sulh Officer worked extremely hard to explain to the parties what the criteria and concerns were for the Sulh session in order to reach a settlement during the Caucus session. For instance, only necessities or basic items, such as food, drink, clothing, and shelter, may be claimed in a child support claim. Additionally, factors including the defendant's financial capacity also will be considered. It is crucial to get an understanding on this issue with both parties so that justice can be served equally. Then, **RP SL1** stated that the Sulh Officer also is in charge

of taking the initiative to develop trust and obtain consent from the parties by participating in Neuro Linguistic Programming (NLP) courses, learn sign languages and other programs. After the caucus session, the parties will reconvene, and the Sulh Officer will re-list the settlement agreement that was discussed during the caucus stage earlier. Finally, after an agreement has been reached, the Court will seal it and orders will be issued to the parties.



Figure 3.28: Caucus Session with the Plaintiff



Figure 3.29: Caucus Session with the Defendant

In conclusion, based on the interviews and observations made by the researcher, it can be understood that there is no specific procedure, guidelines or even Practice Directions in legal procedure for Civil cases involving PWDs in Malaysian Syariah Court. The PWDs parties need to undergo the same Civil procedure like other normal parties without disability. Just the Court try to suit the current procedure by fulfilling the needs of PWDs such as providing the sign language interpreter for people with hearing disabilities, prioritizing the parties among the disabled during the registration process and providing facilities for the disabled for instances parking spaces and toilets for the disabled.

Like the Sulh case simulation observed by the researcher, the Court bring in the Sulh Officer or practitioners who are skilled enough to use a sign language throughout the session and well knowledge with the Court procedure to conduct the Sulh session. In some circumstances, the Sulh Officer need to be helped by the sign language interpreter so indirectly the procedure needs an involvement by the third-party person. This is very different like normal Sulh procedure where only take the involvement of Sulh Officer and the disputed parties. But, because it is a necessity for the Hearing-Impaired parties, the Court needs to provide a sign interpreter for them.

The study also shows that the judges take an appropriate self action such as by fulfilling the basic principles of the Syarie judge's code of ethics as mentioned under the Practice Directions No. 1 Year 2001 when handling hearings involving the disabled. It is a natural responsibility that should be practiced by judges in emphasizing ethics as a judge while outside and inside the Court as well as when the trial is underway. When the Court received cases from PWDs, it also took the necessary actions. They conducted

the cases using their own expertise and wisdom. Yet, due to the lack of a standard guideline, practice differs from court to court.

Even the current practice of Syariah Court State of Melaka had used the provision under Chapter 2 of Enactment 13 (*Persons Under Disability*) (Section 24 until Section 30) as a reference when dealing the Civil cases involving the PWDs. However, in order to adapt it to current Syariah law practice, the actual interpretation of the clause must be evaluated and clarified. So that all practitioners throughout the Malaysian Syariah Court can adhere to the same understanding and practices.

3.5 Conclusion

This chapter has briefly explained to readers the current practice in Syariah Courts in Malaysia regarding legal procedures for Civil cases involving PWDs. Overall, it was a crystal clear that the action taken is based on discretion of the Court Officer, judges or practitioners to handle the case with their own methods and initiatives as long as it is not far from the true legal principles and justices. This is due to the absence of specific guidelines in the registration process, the handling of Civil cases and the management of Civil cases involving the PWDs in the Syariah Court, so the Court need to take its own initiative by providing services and appropriate needs for the parties among the disabled. As a result, the researcher discovered that there are a few issues and challenges that the Court or legal practitioners, as well as PWDs, encounter regarding the existing practice of the legal procedure of Civil cases involving the disabled in the Syariah Court. These issues and challenges will be addressed in the next chapter.