

## Effectiveness of *Tahkim* in Selangor Shariah Courts Based on Organizational Effectiveness Goal Approach

### *Keberkesanan Tahkim di Mahkamah-mahkamah Syariah di Selangor Berdasarkan Pendekatan Pencapaian Matlamat dalam Keberkesanan Organisasi*

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#### ABSTRACT

*In general, tahkim (arbitration) is initiated by Shariah courts when marital disputes between parties have reached a severe phase, known as 'shiqaq'. Through tahkim, the Hakam Keluarga or Hakam Panel are given absolute powers to pronounce the divorce to settle the disputes. In view of these, past literature has deemed tahkim to be an effective marital dispute resolution. However, empirical evidences to support this are still lacking. Despite the lack of past literature on tahkim, previous studies on the effectiveness of marital dispute resolutions, were conducted descriptively and without associating them with related conceptual frameworks on effectiveness. Considering this gap in the literature, this study aims to assess the effectiveness of tahkim based on the organizational effectiveness goal approach. Using thematic analysis on relevant laws on tahkim in Selangor and interviews, it was found that only some of the objectives of tahkim have been attained. In addition, it was found that the effectiveness of tahkim was perceived differently among the interviewees. As a result, it is plausible that the effectiveness of tahkim cannot be concluded. These findings also suggested that, assessing tahkim's effectiveness using the goal approach may not be an accurate approach. In reference to the problems identified within the practices of tahkim, tahkim's effectiveness may be well-assessed using other organizational effectiveness approaches. With these, the findings have provided alternatives to Islamic law scholars in interpreting organizational effectiveness within Syariah courts as well as providing alternative paradigms in perceiving effectiveness of a marital dispute resolution to help improve its quality towards the benefits of the disputing parties.*

**Keywords:** Arbitration; mediation; Shariah court; Islamic family laws; organizational effectiveness.

#### ABSTRAK

*Secara umumnya, tahkim (arbitrasi) adalah dimulakan oleh Mahkamah Syariah apabila konflik perkahwinan di antara pihak-pihak mencapai tahap yang kritikal, atau dikenali sebagai 'shiqaq'. Melalui tahkim, Hakam Keluarga atau Hakam Panel diberikan kuasa mutlak untuk melafazkan talak bagi menyelesaikan konflik perkahwinan tersebut. Berdasarkan kepada keadaan ini, kajian-kajian lampau telah menganggap bahawa tahkim adalah sebuah resolusi konflik perkahwinan yang berkesan. Namun begitu, bukti empirikal bagi menyokong keadaan (anggapan) ini adalah masih kurang. Selain kurangnya kajian lampau berkenaan tahkim, kajian-kajian lampau berkenaan keberkesanan resolusi konflik perkahwinan adalah tertumpu kepada analisa diskriptif dan kurang mengambilkira tentang kerangka konsep yang bersesuaian berkenaan keberkesanan. Berdasarkan kepada kelompongan dalam kajian lampau ini, kajian ini adalah bertujuan untuk menilai keberkesanan tahkim menggunakan pendekatan pencapaian matlamat dalam keberkesanan organisasi. Menggunakan analisa tematik terhadap perundangan yang berkaitan di Selangor dan temubual, kajian ini mendapati bahawa tidak semua matlamat tahkim telah dicapai. Tambahan pula, didapati bahawa keberkesanan tahkim telah ditanggap secara berbeza dalam kalangan informan yang ditemubual. Oleh itu, ia adalah jelas bahawa keberkesanan tahkim tidak dapat disimpulkan. Dapatan-dapatan kajian ini juga menunjukkan bahawa penggunaan pendekatan pencapaian matlamat untuk menilai keberkesanan tahkim adalah kurang sesuai. Berdasarkan kepada dapatan-dapatan berkenaan masalah-masalah dalam amalan tahkim, keberkesanan tahkim adalah lebih baik dinilai dengan menggunakan pendekatan-pendekatan keberkesanan organisasi yang lain. Dengan ini, dapatan kajian ini telah menyediakan alternatif-alternatif kepada pengkaji perundangan Syariah dalam mentafsirkan keberkesanan dalam konteks Mahkamah Syariah serta menyediakan paradigma alternatif kepada pemikiran keberkesanan dalam*

resolusi penyelesaian konflik perkahwinan untuk menambahbaik kualiti resolusi tersebut dalam memberi manfaat kepada pihak-pihak yang berkonflik.

*Kata kunci:* arbitrase; mediasi; Mahkamah Syariah; undang-undang keluarga Islam; keberkesanan organisasi.

## INTRODUCTION

*Tahkim* was an old customary practice, founded even before the inception of Islam (Sakik, 2007). The *tahkim* practice during those times was not embedded within a formal judicial system because it was the norms of the Arabs before Islam to refer their disputes (*niza'*) to certain people whose judgments can be trusted (Sakik, 2007). With the inception of Islam, the practice of *tahkim* as a dispute resolution was acknowledged in the Quran through various verses and Sunnah (Prophetic narrations) (Noor, 2012). One of the verses is the Quran 4:35, on the function of *tahkim* to resolve marital disputes, the permissibility for *hakam* to reject invitation etc. Some of the *tahkim* implemented in the past was the appointment of the Prophet PBUH by the Medina people to resolve disputes between dominant tribes, *al-Auz* and *al-Khazraj* and three Jewish clans, the appointment of *Saad bin Muadh* as *hakam* to resolve disputes relating to the acts of *Bani Quraizah* in the battle of *al-Ahzab* etc. (Mahdi & Hak, 2006; Mohd Sabri & Ab Hamid, 2021).

In most countries nowadays, *tahkim* is managed within specific organization, i.e. the court system (Al-Atawi 2004; Noor 2012; Sakik 2007). In Malaysia, it is a formal forum established within Alternative Dispute Resolution (ADR) unit under the Islamic Judiciary Department in every states. Currently, there are two formal units established to fulfill the alternative dispute resolution needs, i.e. mediation (*sulh*) and arbitration (*tahkim/ hakam*). Historically, mediation (*sulh*) was supplemented in the Shariah courts due to time consuming process, costs and technical defects associated with court litigation (Abdullah, 2009; Ahmad, 2015). It was officially initiated in 2002 for several states (Wan Mohd Fadzli, 2018). Besides its successes for the past 19 years of operation (Ahmad 2015; Bakar 2011; Huzaimah 2019; Khalidah et al. 2017), parties in *sulh* may still be vulnerable under certain circumstances,

e.g. the changeability of the agreement prior to the judicial enforcement (Dahalan & Mohamad Azhan, 2016), ineffective *sulh* due to inadequate facilities and inadequately trained *sulh* officers etc. (Azzis & Azhar 2018). On the other hand, *tahkim* was included within the court system to provide more alternatives to the parties, but only on divorce cases when the disputes of the spouses have reached severe phase, termed as '*shiqaq*' as provided in s 47 and 48 of the Islamic Family Law Enactment of Selangor. Unlike *sulh*, full function of an arbitrator (*hakam*) has resulted in speedy and absolute resolution over the disputes (Mohamad Dahalan & Yahya 2017). However, empirical evidence is still lacking.

Despite the lack of past literature on *tahkim*, it was also found that most studies on the effectiveness of marital dispute resolutions (Abdullah 2009; Ahmad 2015; Dahalan 2014) especially *sulh*, was studied descriptively and without adequate conceptual frameworks related to effectiveness. Only a few studies have conducted empirical analysis on the effectiveness of the marital dispute resolutions, e.g. in Mohd Ali & Hasan (2002) who have conducted their analysis using reported number of cases duly registered and settled through *sulh* (Mohd Ali & Hasan 2002) and in Ahmad (2015) who employed satisfaction survey on the *sulh* parties/ stakeholders. In the case of *tahkim*, there were only two empirical studies found, i.e. Mohamad Dahalan & Yahya (2017) and Abdul Hak (2008). These studies analysed the practice of *tahkim* based on the legal provisions and selected case reports. In Abdul Hak (2008), the practice of *tahkim* and its legal provisions within the Islamic Family Law Act (Federal Territories) 1984 have been analysed using interviews and review on selected case reports. Nonetheless, the study was not intended to determine the effectiveness of *tahkim*, except for a few significant reviews of the author on the problems surrounding the *tahkim* in order to act as amicable solutions to the litigants, i.e. lack of understanding of the parties on the purpose of

*tahkim* that causes the original function of *hakam* to reconcile to be diverted into defending the party he represented, and problems surrounding the appointment of *Hakam Keluarga* due to inadequate qualifications prescribed by the laws. However, this study was confined to laws and cases filed in the Federal Territory Shariah courts.

In Mohamad Dahalan & Yahya (2017), the practice of *tahkim* under the Islamic Family Law Enactment (Selangor) 1993 was analysed. However, the study did not adequately address on how the practice of *tahkim* was done and in which jurisdiction/ court system. For instance, while the cases were obtained from secondary sources where limited details of the cases were found, e.g. it was not adequately addressed on which Shariah courts the cases were dealt in, the legal analysis was only confined to few provisions in the Islamic Family Law Enactment of Selangor 2003 with limited and general analysis on the Kaedah-Kaedah Hakam 2014 or the Hakam Rules of Selangor 2014 (HRS 2014). Apart from these, the study has successfully highlighted few significant problems that are beneficial to this current study. Among the problems were, inadequate and unstandardized procedures on *tahkim* in term of the determination of '*syiqaq*' and reporting of *tahkim* sessions. Based on these studies, there were some issues, i.e. problems in the practice of *tahkim* that may imply on the ineffectiveness of *tahkim*.

In addition, it was also found that past studies on the effectiveness of marital dispute resolutions are still insignificant in numbers. While studies on the effectiveness of *tahkim* is still limited, the existing studies on effectiveness of *sulh* were only limited to descriptive analysis using the reported cases, pure legal doctrinal approach as indicated above. Only one study has employed a quantitative approach but limited only to the satisfaction survey (Ahmad 2015). In the survey, it was indicated that the rates of satisfaction of the parties towards the *sulh* are 87% highly satisfied and 13% moderately satisfied. The findings of the study also showed that the 'advantages' of *sulh* are, expedition of case settlement, reduction in backlogged cases as well

as reduction in costs to be borne by the parties. Later, these findings were concluded to indicate the effectiveness of *sulh* as amicable solution.

In view of inadequate frameworks to assess the effectiveness of *tahkim*, it is posited that application of certain effectiveness model may be able to provide richer findings. As to do this preliminarily, this study will determine the effectiveness of *tahkim* using the goal approach as one of the established effectiveness approaches in organizational effectiveness model (Hall, 1980). Although there are other approaches, this approach is selected since it is in line with the past literature which have been assessing the effectiveness based on expedition of case settlement and rate of case settlement outside of court (Ahmad 2015; Mohd Ali & Hasan 2002) as among the goals of *sulh*.

Thus, the objectives of this study are to: 1) identify the objectives of *tahkim* in Selangor Shariah courts, 2) determine the attainment of objectives of *tahkim* in Selangor Shariah Courts, and 3) assessing the *tahkim* effectiveness in Selangor Shariah courts based on organizational effectiveness goal approach.

## METHODOLOGY

This is a preliminary study relating to the effectiveness of *tahkim* based on organizational effectiveness approach. Data were collected from relevant laws and regulations on *tahkim*, i.e. Islamic Family Law Enactment of Selangor 2003 and HRS 2014 and interviews. This study employs purposive sampling to select the informants, i.e. Director of Islamic Judiciary Department of Malaysia (JKSM) (I1), Selangor Shariah court Head Judge, (I2), Head of Alternative Dispute Resolution Unit, Department of Islamic Judiciary of Selangor (JAKESS)(I3) and a Syariah subordinate court judge (I4). While I1 involve in the policy making relating to *tahkim*, I2, I3 and I4 involve directly in the *tahkim* process. Semi structured interviews were conducted. The interview data was analysed using a thematic analysis to answer

the research objectives. The themes employed are: *tahkim* objectives, attainment of *tahkim* objectives and problems. For the purpose of this study, the effectiveness of *tahkim* is analysed using a goal approach within organizational effectiveness. As a preliminary study, the goal approach effectiveness was studied based on the attainment of objectives of *tahkim* as provided by the relevant laws and

objectives of *tahkim* as perceived by the informants. To understand better on the effectiveness of *tahkim*, the organizational paradigm of *tahkim* within JAKESS was also elaborated. The inclusion of the organizational paradigm is to delineate the structure of Hakam Unit within the court system and procedures attached to *tahkim*. Thus, the conceptual framework of this study is depicted as follow:

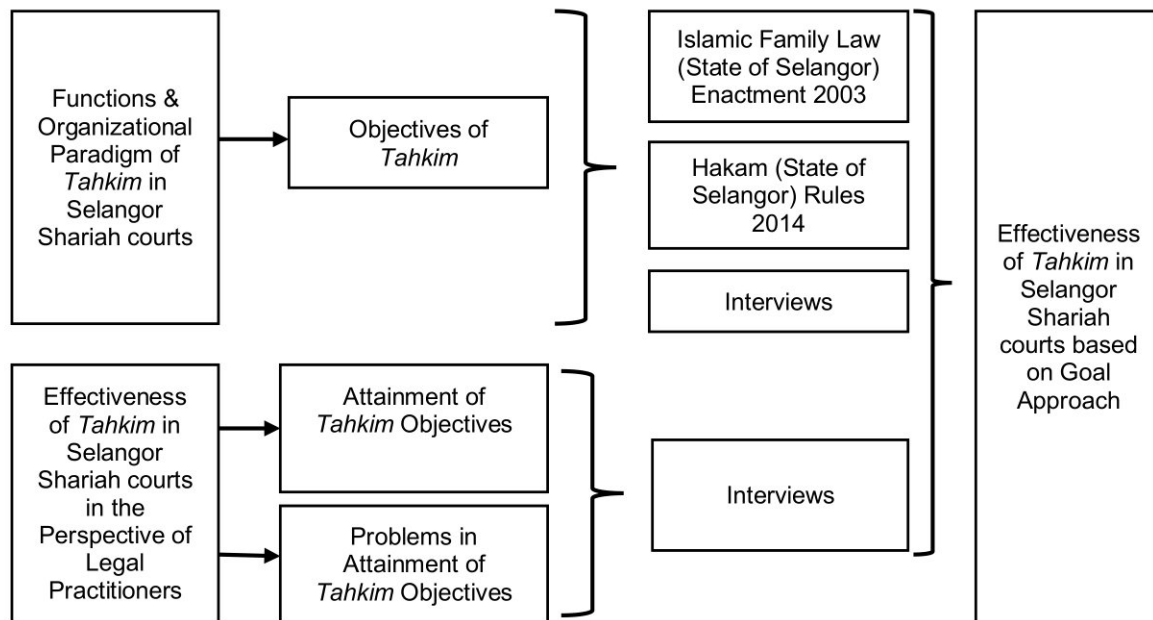


FIGURE 1. Conceptual Framework of Effectiveness of *Tahkim* in Selangor Shariah courts

## RESULTS & DISCUSSION

### THE ORGANIZATIONAL PARADIGM OF *TAHKIM* IN SELANGOR SHARIAH COURTS

The functions and objectives of *tahkim* may be further apprehended from its organizational paradigm or structure. This is due to the fact that, the structure of *tahkim*, including its procedures may be useful to understand how the objectives of *tahkim* may be

attained. *Tahkim* as a unit is managed under Office of the Chief Registrar (“Pejabat Ketua Pendaftar”) under the Alternative Resolution Department (ARD) (“Bahagian Penyelesaian Alternatif”) (JAKESS 2021). The following are the procedures in the practice of *tahkim* in Shariah Selangor courts as provided in the HRS, i.e. Rules 11-20. Even though Hakam Unit is positioned under the Office of Registrar, the proceedings of *tahkim* commences after the appointment of *hakam* by the Court.

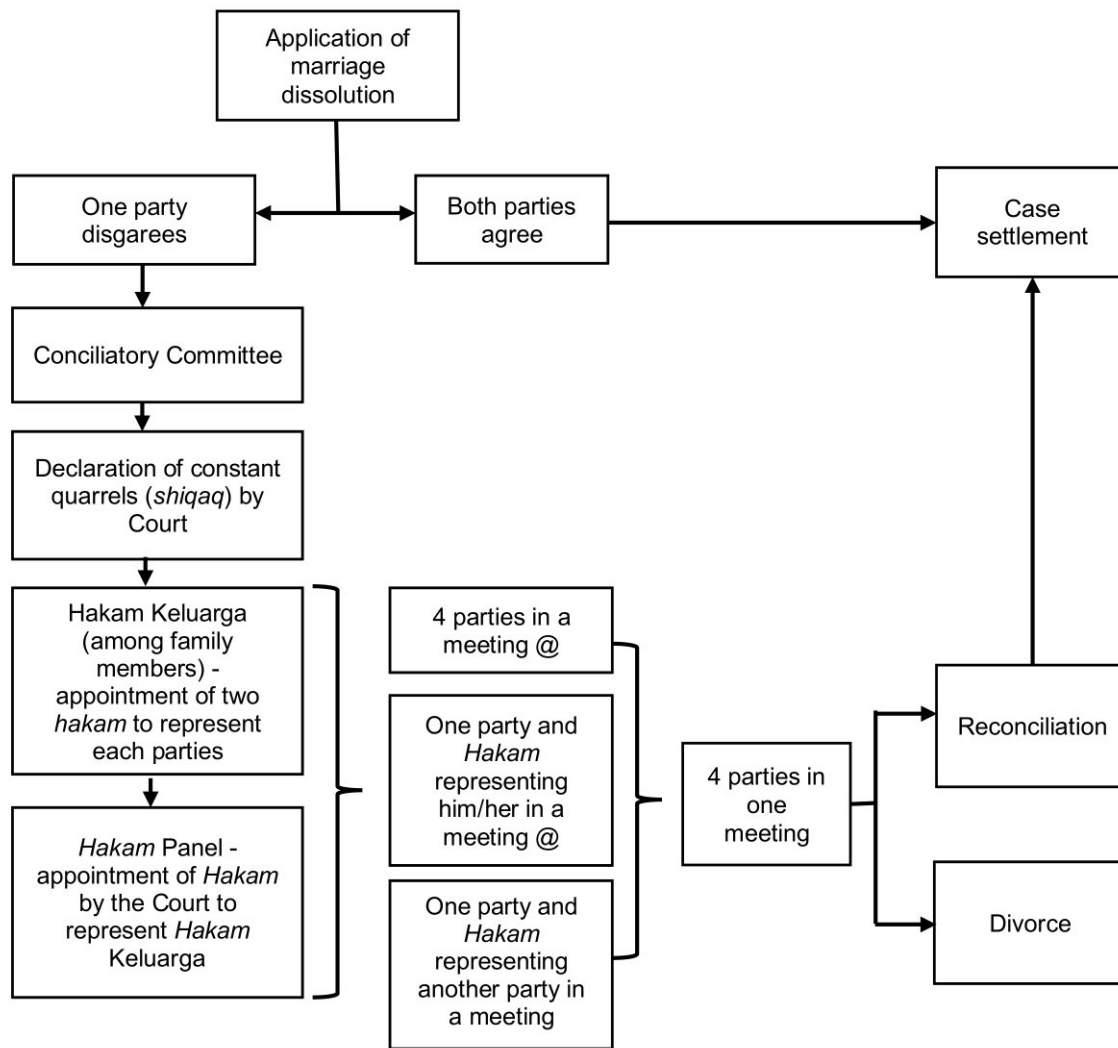


FIGURE 2. Author's Own based on the *Hakam* Rules (State of Selangor) 2014 and interviews data.

Based on s 47(1) of Islamic Family Law Enactment 2003, if any of the spouses within a marriage desires to apply for a divorce, the divorce application can be made through the section. If another spouse has agreed with the divorce, the Court may advise the husband to pronounce one *talaq*, s 47(3). However, if the spouse does not consent to the divorce and the Court is of the view that there is a potential of reconciliation between the spouses/parties, the Court may direct them to a conciliatory committee (*Jawatankuasa Pendamai- JKP*), s 47(5). If the conciliatory committee is unable to effect

reconciliation or persuade the parties to resume their conjugal relationship, and the husband is absent, the Court shall refer the disputes to *Hakam*, s. 47(14) as prescribed in s 48 of the Enactment. At this point, the Court will declare that there is a constant quarrel (*shiqaq*) between the parties, thus enabling the use of *tahkim*. Upon the declaration, guidelines and procedures in s 48 of the Enactment and HRS 2014 apply. R 3 of the HRS 2014 stipulates that the appointment of *Hakam Keluarga* will be directed by the court, but failure of the parties to appoint the *hakam*, will result in the appointment of *Hakam Panel*



by the court. The appointment of *Hakam Keluarga* by the court is prescribed in s 48(2), i.e. where preference will be given to *hakam* who is a close relative and has knowledge in regards to the dispute. The appointment of *Hakam Panel* is provided in s 48(6), i.e. when the *Hakam Keluarga* has reached the decision that divorce should take effect, but he is unable to order the divorce, due to, e.g. inability to gain the delegate power to pronounce *talaq* from the husband. Similarly, reference can be made to the HRS 2014, i.e. when the Court has declared the constant quarrels (*shiqaq*) between the parties under r5 of the HRS 2014, the parties are required to appoint a *hakam* from among their close relatives, i.e. “any man who is related by consanguinity, affinity or fosterage and having knowledge of the circumstances of the case” to represent each of the parties (r 4 of the HRS 2014). The appointment of the *hakam* among the close relatives, i.e. *Hakam Keluarga* must be made within 14 days from the date the *shiqaq* was declared by the Court. If the parties fail to appoint, or the appointed *Hakam Keluarga* is not able to resolve the disputes, appointment of *Hakam Panel* will be made by the Court as provided under r 6. In the beginning of *tahkim*, the Alternative Dispute Resolution Unit representative will explain the purpose of *tahkim*. In the first session of *tahkim*, the appointed *hakam* will introduce themselves to the other party and *hakam*. The frequency of *tahkim* depends on the discretion of *hakam*. However, within 30 days of the commencement of the *tahkim* or after the appointment of the *hakam*, the disputes of the parties must be resolved (r 16), either by way of *talaq*, or reconciliation (r 9). If the disputes are to be resolved through *talaq*, it falls under the discretionary power of *hakam* to decide on the types of *talaq*, as guided by r 12 of the HRS 2014. The decision of the *hakam* is final and no appeal is allowed. This is provided in Rule 18 of the HRS 2014. However, the decisions may be revised by the Upper Court subject to certain justifications.

In r 14, the appointed *hakam* is under the duty to issue a report to the court on each *hakam* proceedings. In fact, some aspects of *tahkim* and *hakam* are subject to the control of the court (r 26-29). At the same time, *hakam* is also given several discretionary powers, e.g. to withdraw (r 7(b), 17(c)), to decide the types of divorce (r 12), to decide on the frequency and execution of meetings/ *hakam* proceedings etc. Based on these, it can be implied from the structure and general procedures of *tahkim* that its effectiveness may be subject to the many

aspects, i.e. parties in the disputes, the appointed *hakam*, the court and the conciliatory committee’s decision in the acknowledgement of *shiqaq*. The facts that *tahkim* is subject to the court system, make its effectiveness subject to the court system as well, e.g. facilities, appointment of *Panel Hakam* etc.

## THE OBJECTIVES OF *TAHKIM* IN SELANGOR SHARIAH COURTS

In order to analyse the effectiveness of *tahkim* in Selangor Shariah courts using the goal approach, the goals of *tahkim* must first be determined. In this study, the objectives of *tahkim* will be employed as the goals of *tahkim*.

### Objectives of *Tahkim* Based on the Shariah and Relevant Legislation

The objectives of *tahkim* in the Quran can be apprehended through the Quran 4:34 and 4:35. It was observed that when the marital dispute originated from the acts of the wife, the resolutions are to be found in the Quran 4:34, i.e. to advise, to separate the wife from bed and finally to cause educative and non-harmful hit on the wife subject to certain conditions (Ibn Kathir, 2012). In Quran 4:35, it was explained that when the marital dispute originated from the acts of both parties, husband and wife, or it is unknown of whose causes the dispute, the resolution recommended in the verse is to appoint two *hakam*, to represent each parties (Ibn Kathir, 2012). It was also noted that the outcome of the *tahkim* is to act as an amicable solution (*islah*) (Ibn Kathir, 2012). Thus, it can be concluded that there are two main objectives of *tahkim*, i.e. to resolve marital disputes particularly when the cause of the disputes is unknown, uncertain or cannot be agreed upon and to construe *islah* between the parties, the husband and the wife.

*Tahkim* is provided under s.48 of Islamic Family Law (State of Selangor) Enactment 2003 (Enactment No. 2 Year 2003) (‘the Enactment’ hereinafter). It was stated that in s48(1), if the court is satisfied that there are constant quarrels (*shiqaq*) between the husband, appointment of two arbitrators or *hakam* to act on behalf of each parties can be initiated.

Functions of *tahkim* are stipulated in HRS 2014 as:

“*Hakam shall terminate the shiqaq between husband and wife by way of reconciliation or by separating both of them by talak or khuluk*” (Rule 9)

Based on these, the function of *tahkim* is to resolve constant quarrels (*shiqaq*) between parties, either reconciliation or separation by way of *talaq* or *khulu'*. This function, which is construed as *tahkim* objectives for the purpose of this study, is parallel with its original objectives as indicated in the Quran 4:35, except for the emphasis on the *islah* is not apparent. Alternatively, it can be understood that the resolution of *shiqaq* by way of reconciliation or separation by way of *talaq* or *khulu'* is in itself, the

construe of *islah*. To comprehend better on these, objectives of *tahkim* within the Selangor Shariah courts from the interviews will be presented in following section.

#### Objectives of *Tahkim* Based on the Interviews

Using *atlas.ti* 9, the thematic analysis on the objectives of *tahkim* is presented below:

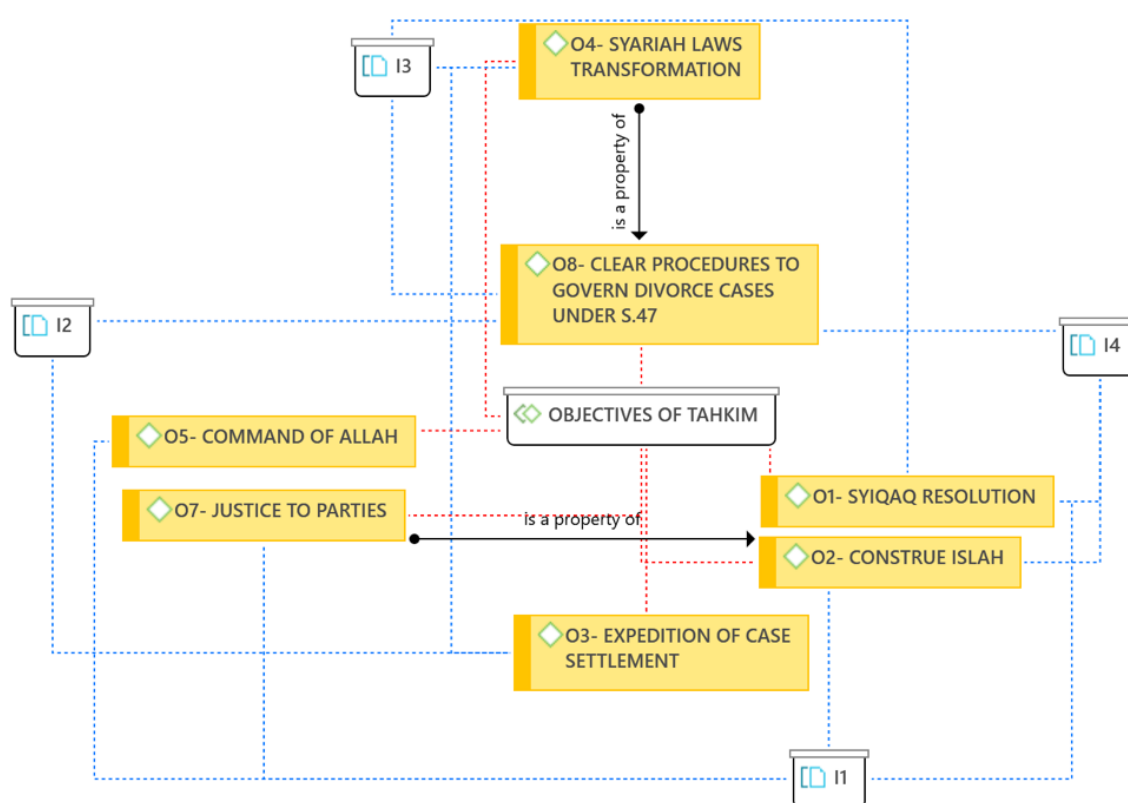


FIGURE 3. Network on interview data on the objectives of *tahkim*.

In reference to the objectives of *tahkim* as presented based on the Shariah and the legislation, i.e. to resolve the *shiqaq* and to construe *islah*, the interview data showed that I1 and I4 have agreed with the same objectives as evident in O1 and O2.

In delineating this point, I1 has noted that *tahkim* is useful in securing a mutually agreed decision so that the 'final verdict' will be more agreeable, preferable and justified in the perspectives of the parties in dispute, unlike a court judgment. In other words, the *tahkim* should function as amicable solution to the parties. I1 further added that the main objectives of the *tahkim* is also to fulfill the command of Allah S.W.T, O4, as prescribed in Surah al-Nisa' (4:35) and to give justice to the parties, O5. I3 in his interview has noted only the *syiqaq* resolution. On the other hand, O3 has noted only on O1.

Besides these, there are also other objectives of the *tahkim*, i.e. to expedite divorce case settlement, O1, and to strengthen the position of the Shariah courts through the law transformation in Selangor. These form part of transformation effort by the JAKESS, O4. I2 stated,

"Originally we initiated the Hakam Rules, as in the 80's and 90's, was to resolve the issues of prolonged case settlement and the tarnished reputation of Shariah courts.. affected by the perceptions of public and the prolonged divorce cases' settlement..."

However, these latter objectives were perceived differently by I1 and I4. They are of the opinion that the expedition of divorce case settlement is only the by-products of the *tahkim*, or the indirect objectives. This is because they perceived that the resolution

*shiqaq* and construe of *islah* as the main objectives of *tahkim*. For instance, I4 noted that,

“Personally, I do not think that expedition of divorce case settlement is the objective of *tahkim*. This is because, what matters is not how fast the cases been resolved, but it is about how the disputes are being resolved through the *tahkim*, i.e. to resume in marriage or to divorce... the objectives of *tahkim* is not meant to make divorce process easier, but it is meant to resolve the conflicts between the parties”

On the technicality side, it was noted by I2, I3 and I4 that the objective of *tahkim*, or specifically HRS 2014 is to enable the optimal use of s 48 of the Islamic Family Law Enactment 2003, in pursuant to divorce application in s 47 of the Enactment as evident in O8. Based on these, it was identified that the objectives of *tahkim* within Selangor Shariah courts can be outlined as follow, i.e. to:

1. resolve constant quarrels (*shiqaq*) between parties.
2. construe *islah*, i.e. by gaining mutual understanding of the parties to resolve their disputes, by way of either reconciliation or separation by way of *talaq* or *khulu'*,

While the indirect objectives may be summarized as, to:

1. expedite the divorce cases, particularly cases arising from s. 47 of the Enactment (Divorce by way of *talaq*) and s. 53 of the Enactment (Order for dissolution of marriage or *fasakh*).
2. constitute part of Shariah laws transformation agenda in Selangor.
3. restore confidence of the people towards Selangor Shariah courts.

In addition to these, it was found one of the interviewees was of the opinion that the objectives of the *tahkim* is similar to the objectives of the HRS 2014. As a result, another objective can be supplemented, i.e. the HRS 2014 has provides clear directives and procedures for the divorce application as stated in s47 and s 48 of the Islamic Family Law Enactment 2003.

In sum, the functions and objectives of *tahkim* as found in the legislation and the interviews data are consistent. However, additional objectives, or indirect objectives of the *tahkim* were observed. In addition to these, it is also noteworthy that views on the objectives of *tahkim*, between the interviewees vary.

Attainment of the Objectives of *Tahkim* from the Perspectives of Legal Practitioners

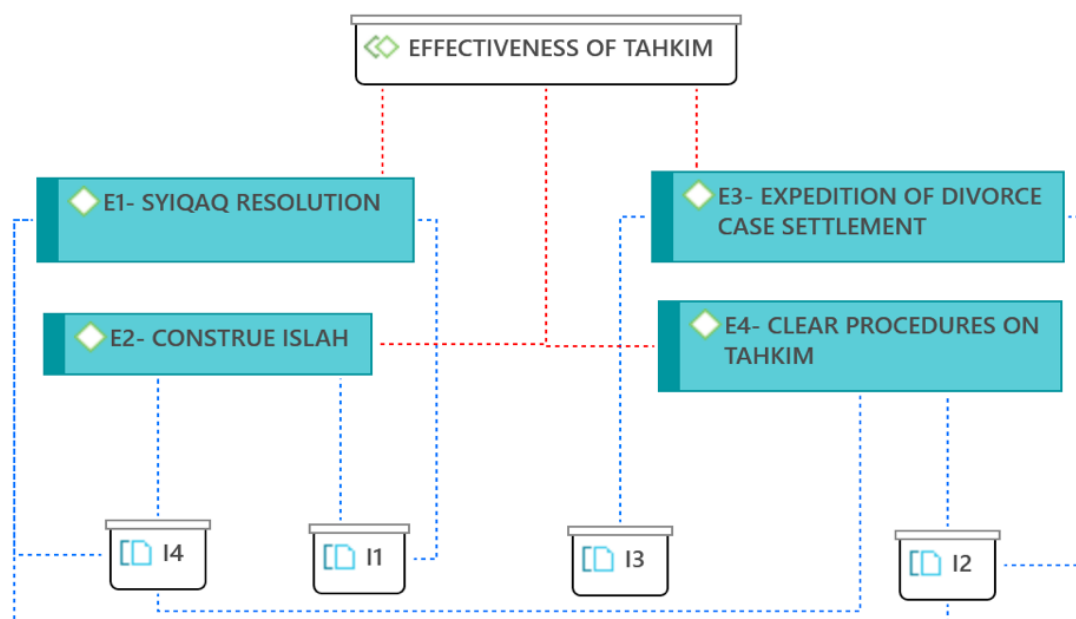


FIGURE 4. Atlas.ti Network of Attainment of *Tahkim* Objectives



In general, it was found that all interviewees have agreed on the attainment of the objectives of *tahkim* in Selangor Shariah courts. However, the attainment of the objectives is confined to the perceived objectives of each interviewee as depicted in Figure 3.3.

I2 and I4 have observed that the objective of HRS 2014 is to provide of clear procedures on the implementation of *tahkim* as provided under s48 of the Islamic Family Law Enactment of Selangor 2003 has been attained, E3. I4 said,

*“Firstly, if we look at the basis of the development of Hakam rules, the objective has absolutely been achieved. Prior to this (inception of Hakam Rules 2014), judges and lawyers do not have a specific guidelines to conduct tahkim as accordance to s48. With the Hakam rules, problems surrounding this do not arise anymore, that is to handle divorce cases under s48.*

In addition, I2 was also of the view that the HRS 2014 have helped the wives more compared to husbands.

As for I1 and I4, who have been emphasizing that the main objectives of *tahkim* are to resolve the *shiqaq*, E1 and to construe *islah*, E2, they were of the view that these objectives were achieved. I4 said,

*“Secondly, .. as I mentioned before, the main objective is to implement islah, not to direct to divorce. The numbers of tahkim that have ended in reconciliation is small. Realistically, those parties either the wife or the husband who has applied for divorce (under s47), they are already ascertain in term of their decision to divorce, thus inevitably it is difficult to help them to reconcile. Therefore if there are cases, that the parties have reconciled, to me it is a success to be proud of”.*

In view of I2, the objectives were attained by way of the success of *tahkim* in providing rooms for the parties to resolve mutually. According to I4,

the objectives were attained by way of the potential of *tahkim* to ‘rescue’ the parties from divorce. As he mentioned, as most of the parties were already ascertained with the divorce decision, the fact that small percentage of these parties been helped to overcome their disputes without divorce was a significant success of *tahkim*.

I2 and I3 who have been highlighting on the expedition of case settlement were of the view that *tahkim* has helped in term of faster settlement of divorce cases, significantly for application of divorce under s. 47 of the Enactment. It was also noted that, 90% of the cases underwent *tahkim* were resolved within the prescribed duration, i.e. within 30 days after commencement of *tahkim* proceedings from the cases were registered at the Court.

Based on these, *tahkim* has attained its objectives based on the interviewees perspectives who have been directly or indirectly involved in the *tahkim*. Notwithstanding these, it is noteworthy to mention that initially there are eight objectives of *tahkim*. Nevertheless, the attainment of the objectives as discussed by interviewees was only confined to four objectives as indicated in Figure 3.3. It was also observed from the data, that there was a slight difference of understanding of the objective to construe *islah*. In previous section, construing *islah* was perceived as the *tahkim* acting as amicable solution to the parties. In the interviews, particularly those of I1 and I4, different understanding were observed. While I4 perceived the *islah* from the practice of *tahkim* itself, I4 perceived the *islah* from the end result of *tahkim*. These are some interesting insights that may again, result in the differing perspectives of the attainment of *tahkim* objectives.

## Problems in the Practice of *Tahkim* in Selangor Shariah Courts

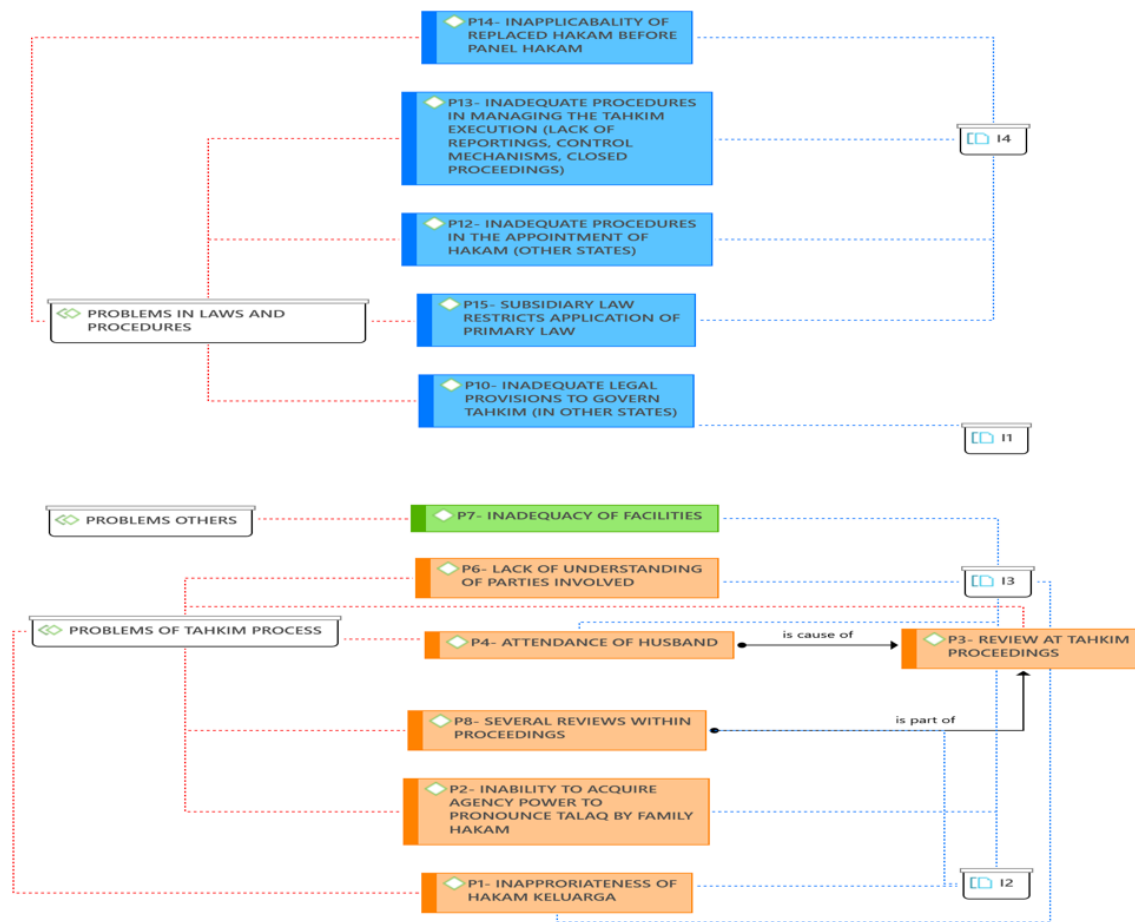


FIGURE 5. Atlas.ti Network of problems related to *tahkim* practice

Notwithstanding the attainment of the objectives, it was found that there are significant number of problems surrounding the practices of *tahkim* as mentioned by the interviewees. Although are not part of the ‘goals’ in the goal approach effectiveness model, this study has included the problems aspect to assess the attainment of the objectives of *tahkim*, hence the effectiveness of *tahkim*. From the interviews, three themes were developed for problems, i.e. problems related to the laws and procedures of *tahkim*, problems related to the *tahkim* process, or problems related to others as depicted above.

From the interviews data, several problems were identified within the *tahkim* laws and procedures. These problems were observed primarily from I4.

1. Inapplicability of replaced *Hakam Keluarga* before *Hakam Panel*, P14.

14 has observed that there is an inapplicability of replaced *Hakam Keluarga* as provided in s 48(4) Islamic Family Law Enactment of Selangor 2013.

In the section, the court was vested with the power to appoint the *Hakam Keluarga*, s48(2), replace the *Hakam Keluarga* with another *Hakam Keluarga*, s48(4), and appoint *Hakam Panel*, s(6). According to I4, the appointment of the second *Hakam Keluarga* to replace the first due to his disagreement or due to his incompetency as in the view of the court has not been practiced. Failure to spare a room for this appointment is against the original requirement of the Enactment.

## 2. Inadequate procedures relating to *tahkim*

As indicated in Figure 3.4, in P10, P12 and P13, it was found that I4 and I1 have mentioned about inadequacy of procedures, particularly in the laws governing the *tahkim* and appointment of *hakam*. However, these two issues were linked to other states than Selangor. Notwithstanding these, I4 observed that inadequacy of procedures still prevail in the Selangor *tahkim* practice. These are evident in term of the execution of act of reconciliation (*islah*) by *hakam*, the reporting of the *hakam* session as well

the recordings to be made available to the parties in case they decided to apply for review of the *tahkim* decisions. He said,

*"Issues (arising from tahkim) in other places (states) are that they do not have hakam who are specifically trained and appointed as hakam to implement the practice of hakam (tahkim),... Notwithstanding these, there are still issues that are on how to control these hakam when they conduct the tahkim?... tahkim is a closed proceeding. It only presents a simple report at the end of the tahkim, where the final resolution will be reported, that is reconciliation or divorce with simple justifications why the parties need to be divorced. During the process of tahkim, at this moment, there is no specific mechanism or rule to ensure that the hakam implement (materialize) 'islah' as required by the Islamic rulings. Therefore, it is up to the hakam themselves as they have been trained beforehand... but if they fail to implement this, there will be no record on this".*

R14 of the HRS 2014 stipulates that there is one particular form to be filled by the *hakam* at the end of each *tahkim* session. However, the content of the form that is available in the First Schedule suggests that the form is meant to report only the final findings of the *tahkim*. Moreover, r14 also requires that the report as filled in the form need to be presented to the court. Taking all of these into consideration and in agreement with the view of I4, the reporting of the *tahkim* is inadequate and in need of further improvement. Similar view was found in the study of Mohamad Dahalan & Yahya (2017).

### 3. Subsidiary law restricts the application of main legislation, P15.

I4 has highlighted, in his view, that there is a legal inconsistency related to the limitation to appeal as provided in the HRS 2014, as a subsidiary law, against the general right to appeal as provided in the main legislation, i.e. s. 63 of the Administration of Islamic Laws Enactment of Selangor 2003. He explained that while s63 gives the right to parties in dispute to appeal to the higher court, r18 of the HRS 2014 negates the right to appeal.

Within the *tahkim* process, several problems have also been identified:

#### 1. Inappropriateness of *Hakam Keluarga*, P1.

This relates to the inability of *Hakam Keluarga* to resolve the disputes of the parties due to bias or inability of the *hakam* to be neutral parties in handling the disputes as well as their lack of knowledge towards the parties' disputes. This problem was noted by I1 and I3.

As found in r4 of the HRS 2014, preference over the persons to be appointed as the *hakam* is made by his/her being a close relative, either through blood relationship (*qarabah*), in laws relationship (*musaharah*) or breast feeding relationship (*rada'ah*) and in particular as well, who knows about the case, i.e. the disputes between the parties. This shows that while the rules have highlighted the importance of appointing appropriate *hakam*, the problem in findings the *hakam* who is neutral and has adequate knowledge of the parties' disputes prevails. In similar vein, a study by Abdul Hak, (2008a) also observed the same. She was of the opinion that this was due to inadequate guidelines provided in the law on the qualification of *hakam*.

#### 2. Difficulty for the *hakam* to obtain the delegated power to divorce from the husbands.

It was observed by I2 that when the *hakam* was appointed by the parties, the husband in particular were reluctant in delegating the power to divorce to the *hakam*. This has caused the *tahkim* proceedings to be stalled and alternatively, *Hakam Panel* will be appointed. This *Hakam Panel* does not require the delegation from the husband because their power to pronounce the *talaq* is vested by the Court/Judge. However, when the *talaq* was pronounced by the *Hakam Panel*, the husband will be in disagreement and denial towards the effectiveness of the *talaq*.

#### 3. Failure to attend the *tahkim*, particularly by the husband.

As indicated in P4, P8 and P8, attendance and technical issues relating to attendance of parties, particularly the husband are among the problems faced in the *tahkim* process. According to I2, failure of the husband to attend the *tahkim* session may enables the *hakam* to proceed with the *tahkim* as prescribed in r13 of HRS 2014. However, as explained by I3, the husbands who failed to the *tahkim* will be using this excuse to file for revision in the higher court. It was also mentioned that the husbands used to raise some technical issues, e.g. non-receival of the summons, or failure of summons service by the court to him. In fact, it was mentioned by I2 and I3 that application for reviews of the *tahkim* process were also made by the parties, even though the *tahkim* has yet to be completed. I2 mentioned that parties who were dissatisfied with the decision of the judge to move to *Hakam Panel* may apply for review from the higher court. As a result, the subordinate court will order

the *hakam* to redo the *tahkim* from beginning, i.e. from *Hakam Keluarga*. Thus, failure of the parties may entail other implications, i.e. when the parties contested the decisions of *hakam* through revision as elaborated in the next point.

#### 4. Review of *tahkim* decisions.

As indicated in P3 and P8, another problem faced in the *tahkim* process is the application for review. The review can be applied after the *tahkim* has completed and even when the *tahkim* is still ongoing. As mentioned earlier, the application to review is usually associated with the failure of husband to attend the *tahkim* or other technical issues. Similar assertion was found (Narowi, Noor, & Kharirunddin, 2020).

I2 observed,

*“normally application to review is brought by the husband, (because he feels) as if his power to pronounce the talaq has been taken away by the hakam. (also, he claims that) his views have not been heard, .. among others (grounds used to apply for review is), hakam has failed to find a resolution but directly resort to divorce, (hakam has failed because of) not looking for reconciliation, or another ground is that the court was in mistake to declare the (state of) syiqaq”.*

When the *tahkim* decisions been reviewed, or the process of *tahkim* been reviewed, the overall duration for dispute resolutions of the parties is prolonged as mentioned by I2 and I3.

#### 5. Lack of understanding of parties on *tahkim*

I3 stated that one of the problem surrounding the *tahkim* is the lack of understanding of the parties in the disputes on the functions of *tahkim*. In other words, they do not know that the purpose of entering into *tahkim* is to ensure better and smooth processes in the application of divorce under s47 of the Islamic Family Law Enactment of Selangor 2003. In most cases, application under the section is troubled due to the fact that the applicant has weak justification for the divorce application. Prior to HRS 2014, the applicant will be advised to proceed with other types of divorce, under s49, application of divorce by way of *khulu* or application of divorce by way of *fasakh*, s 53 of the Enactment.

In view of these as well, it was found that problems associated with the practice of *tahkim* in Selangor Shariah courts may be linked to the parties, the *hakam*, particularly *Hakam Keluarga* as well as procedures in the execution of *tahkim*.

In term of problem related to other aspects, only one problem was underscored by I3, i.e. inadequacy of facilities to support the *tahkim*.

As indicated in P7, I3 as the head of ADR unit has mentioned problems in relation to facilities provided for the *tahkim*. He said,

*“Another problem (related to tahkim) is the logistic issues. At the court (building), mediation (sulh) will be conducted in sulh room, there is a specific place.. for tahkim, the court is still in the process of improving the logistic sides.. (this is because) in some courts, that have many cases, five tahkim have to be conducted concurrently”*

These problems are significant in order to discuss the attainment of *tahkim* objectives. According to the interviewees, the objectives of *tahkim* have been attained. Nevertheless, there are problems surrounding the practice of *tahkim* that may implied the non-attainment of the objectives. For instance, while some of the interviewees observed that the *tahkim* has construed *islah* between the parties, it is unclear how that objective has been attained when there are insufficient evidences to support the construe of *islah* within the reports of each *tahkim* session. Hypothetically, for the *tahkim* to act as amicable solution to the parties, constructively progressive mutual understanding and agreement between them must be achieved. However, reports on these are yet to be discovered.

This is also in conundrum with the problem related to the appointment of *Hakam Keluarga*. The *tahkim* that has been promoted through al-Nisa': 35, is a forum between *hakam* from the parties' family representatives (*al-ahli*). Nevertheless, the issue of suitability of the *Hakam Keluarga* has been underscored by the interviewees. Although it is agreeable to point this problem to the parties, i.e. their failure to find and appoint a proper *hakam*, it is also partly due to unclear guidelines provided in the legislation. As a matter of fact, it can also be argued that, since *tahkim* is attached to the formal court system, less collaboration may be anticipated by the family members of the parties in dispute.

In addition, procedures in term of revision of the decisions of *tahkim*, as underscored by the interviewees, are in dire need to be made stringent. For instance, when the parties enter into the *hakam* proceedings, they can be required to sign a commitment contract where a disclaimer clause can be included to prevent future claims by the parties. This may help to reduce the 10% prolonged case settlement. Even though 10% is a small percentage,



it is afraid that it may still hinder the attainment of the objectives of *tahkim* in Selangor Shariah courts.

#### Assessing the effectiveness of *Tahkim* in Selangor Shariah Courts Based on the Goal Approach

Efficient and productive performance have been the primary criterion of organizational effectiveness (Mahoney & Weitzel, 1969). Goal approach within the organizational models has been one of the old and established approach in measuring organizational effectiveness. This approach assumes that each organization is established to achieve one or more goals (Yehia & Megeed, 2016). Thus, the goal approach in organizational effectiveness assumes the organization is effective based on the attainment of its establishment goals.

The effectiveness of alternative dispute resolution in Shariah courts in the past literature is still insignificant in numbers. Although its effectiveness is often equated to expedition of case settlement (Ahmad 2015; Mohamad Dahalan & Yahya 2017; Mohd Ali & Hasan 2002), there are other ways to assess its effectiveness particularly using established organizational effectiveness models. A study done by Shany (2012) found that goal approach is beneficial in analyzing the effectiveness of the international courts. It was claimed that the existing literature on the court's effectiveness has been employing weak proxy, e.g. usage rates of court that may imply two contradicting values. In contradictory, goal approach is based on the primary function of an organization that help to yield objective assessment on effectiveness. In similar vein, *tahkim* effectiveness may also be assessed in similar way. However, like any other organizational effectiveness approaches, goal approach also has some drawbacks that may obstruct its objectiveness, e.g. when there are multiple goals available within an organization and it is not known which of the goals to follow (Evermann 2006).

As discussed in the previous section, ultimate goals/objectives of *tahkim* are to resolve *shiqaq* and construe *islah* between the parties in dispute. According to the interviewees, who are legal practitioners directly or indirectly involved *tahkim* policy-making and process, some of the objectives of *tahkim* have been fulfilled. However, it was observed that there are different views between the interviewees in term of the main objective of *tahkim*. While some perceived the expedition of case settlement as the main objective, thus effective, others perceived the resolution of *shiqaq*

and construing of *islah*, thus effective. In line with the critiques of goal approach, multiple goals in perceiving the effectiveness is inherent (Evermann 2006). Moreover, it was observed during the interviews that all interviewees have acknowledged on problems surrounding the practice of *tahkim* and the need of further improvements towards the procedures and rules governing *tahkim* etc. Considering these, effectiveness of *tahkim* cannot be proven.

Another implication of these is that employing goal approach to determine the effectiveness of *tahkim* is less accurate. In other words, the effectiveness of *tahkim* based on the ultimate goals cannot adequately assess the effectiveness of the *tahkim*. At best, criterion model or behavioral objective approach may be more preferable to highlight the attainment of goals. These models allow the use of individual performance measurement approach that later can be used to assess the organization's effectiveness (Martz, 2008). Alternatively, other organizational effectiveness approaches may be considered, e.g. the managerial process approach and the functional approach. The first approach allows the effectiveness of an organization to be assessed based on series of processes underwent by an organization to attain its goals with main paradigms on productivity-support-utilization (Mahoney & Weitzel, 1969). This can be applied in *tahkim* by assessing the procedures and processes related to *tahkim* to attain its objectives. The latter approach allows the effectiveness to be assessed based on the outputs gained by the organization or how beneficial the organization is towards the society (Beail, 2008). This can be applied on *tahkim* by assessing the satisfaction of parties in *tahkim* and benefits it has construed within the community. These two approaches can be considered for future studies due to their accuracy to include all aspects of *tahkim* that are yet covered by the existing literature.

## CONCLUSION

This is a preliminary study on the effectiveness of *tahkim* based on organizational effectiveness goal approach. This study found that there were two types of objectives of *tahkim*, the direct and indirect objectives. In addition to these, the objectives of *tahkim* were perceived differently by the interviewees. Notwithstanding these, it was noted that there was a mismatch between the responses of objectives and attainment of objectives

by the interviewees. These lead to the inconclusive evidences on the effectiveness of *tahkim*. However, considering that this study was restricted to goal organizational effectiveness approach and other findings on problems surrounding the practices of *tahkim*, it maybe plausible to infer that the effectiveness was not evident due to the inappropriateness of the use of the approach. Thus, this study suggested that future studies to include other organizational effectiveness approaches that range from system resource approach, multiple constituency, functional, managerial process approach to the strategic constituency model, to assess the effectiveness of *tahkim* in Shariah courts in Malaysia.

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