

Shariah Law Reports

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For Editorial Questions concerning this issue, please fax (+603-7882 3506) or email:

Publishing Manager, Malaysia: Paramjeet Kaur (paramjeet.kaur@lexisnexis.com) (+603-7882 3596)

Editors: Ezatul Zuria Azhari (ezatulzuria.azhari@lexisnexis.com) (+603-7882 3613)
Zalmanizam Mahadi (zalmanizam.mahadi@lexisnexis.com) (+603-7882 3617)

Editorial Operations Associate: Preghaladhan Vizia Balakrishnan
(preghaladh.balakrishnan@lexisnexis.com) (+603-7882 3618)

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Tel: +1800 880 182 (direct line) Fax: +603-7882 3501 Email: my.customer.care@lexisnexis.com

Malaysia Office: LexisNexis Malaysia Sdn Bhd
(formerly known as Malayan Law Journal Sdn Bhd)
T1-6, Jaya 33, 3 Jalan Semangat, Seksyen 13, 46100 Petaling Jaya, Selangor
General line: +603-7882 3500 Fax: +603-7882 3501

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FOLLOWED (foll'd) (diikuti)

This is used to denote that the principle of law established in the case (or the dictum referred to) has been applied in the instant case.

NOT FOLLOWED (not foll'd) (tidak diikuti)

This is used where the court has consciously refused to follow a case although potentially relevant. It implies that the annotated case is wrong. If a case is not followed because of some distinction in the facts or law, the proper annotation would be (distinguished).

DISTINGUISHED (dists'd) (dibezakan)

This is used where the annotated case is not applied in the instant case due to some distinction in the facts or in the law.

OVERRULED (over'd) (ditolak)

This is used only where a higher court has held the annotated case to be wrong. Where the court has no power to overrule (eg the Federal Court vis-a-vis a House of Lords decision), the proper annotation would be (not followed).

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EDITORIAL

Dato' Faiza bin I
Barrister at Law (Lincoln
Distinguished Fellow of I

Haji Zain
LLB(Hons) (IIUM)
Advo
President, Sy

Dr Ashgar
LLB(Hons)
LLM(Hons) (U
Advocate and
Assistant Pr

En Zu
LLB(Hons), LLB(S
Advocate and
Programme Head, Postgra
Advoc

En Zain
LLB(Hons)
Lecturer, College of Law,
Univers

En Ahmad
LLB(
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**A CONCILIATORY COMMITTEE AND HAKAM (ARBITRATOR) UNDER
THE ISLAMIC FAMILY LAW IN MALAYSIA**

by

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DR NORA ABDUL HAK
*Assistant Professor, Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia*

C

INTRODUCTION

In Malaysia, the administration of Islamic family law is under the separate jurisdiction of different states where each state has its own enactment over matters relating to the family law governing Muslims.¹ In this article, the discussion focuses upon the provisions on dispute resolutions under the Islamic Family Law (Federal Territories) Act 1984,² which is the model Act followed by other states in Malaysia. The article traces in general the historical background of the IFLA 1984. The main focus of the article is on the provisions concerning the dispute resolution, which is provided for under ss 47(5) to (17) and 48 of the IFLA 1984. These relevant provisions are discussed against the background of the principles and rules of *tahkim* (arbitration) as deliberated in the sources of syariah. Some observations and comment on the practice of conciliatory committee and *hakam* in the Syariah Court of Federal Territory are made.

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BACKGROUND TO THE ISLAMIC FAMILY LAW ACT 1984

The IFLA 1984 was enacted to regulate marriage and divorce in Kuala Lumpur.³ This IFLA 1984 was the result of an attempt made by the Federal

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1 The Federal Constitution of Malaysia under the Ninth Schedule divides the matters into Federal lists and States lists. Muslims personal law (including family matters such as marriage, divorce and inheritance) and native personal law and custom are under the jurisdiction of the States and Legislatures.

2 Hereinafter abbreviated, as the IFLA 1984.

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3 The IFLA 1984 s 1. The Enactments for the other States are; The Islamic Family Law Enactment Kedah 1979 (No 1 of 1984); The Islamic Family Law Enactment Kelantan 1983 (No 1 of 1983); The Islamic Family Law Enactment Malacca 1983 (No 8 of 1983); The Islamic Family Law Enactment Negeri Sembilan 1983 (No 8 of 1983); The Islamic Family Law Enactment Selangor 1984 (No 4 of 1984); The Islamic Family Law Enactment Perak 1984 (No 13 of 1984); The Islamic Family Law Enactment Penang 1985 (No 2 of 1985); The Administration of the Islamic Family Law Enactment Terengganu 1985 (No 2 of 1985); The Islamic Family Law Enactment Pahang 1987 (No 3 of 1987); The Islamic Family Law Enactment Perlis 1992 (No 4 of 1992); and The Islamic Family Law Enactment Sabah 1992 (No 15 of 1992).

government to have a model law for the administration of Islamic Family Law in Malaysia. As a consequence, a committee chaired by Tengku Zaid from the Department of Attorney General was formed.⁴ The draft was then submitted to the Conference of Rulers,⁵ and after it was approved in principle, sent to individual States for their comments and adoption. However, the intention to have a uniform legislation relating to Islamic family law has not been materialised, as when the draft law was considered by the states, a number of significant amendments were made to it.⁶

This first draft of the Islamic Family Law Enactment had made some important changes to the previous law. It was the aim of this draft of IFLA 1984 to provide the provisions concerning marriage, divorce, maintenance, guardianship, and other matters connected with the family for the Muslims in this country more effective.⁷

In Kuala Lumpur, a committee was set up to consider the draft legislation, which had among its members the *Mufti*,⁸ the Chief Judge, Officials of the Religious Department, and two academicians from the University of Malaya and a representative from Wanita Umno.⁹ The draft legislation produced by this committee was enacted as the Islamic Family Law (Federal Territory) Act 1984 (Act 303).¹⁰ This IFLA 1984 as its long title states, 'is an Act to enact certain provisions of the Islamic family law in respect of marriage, divorce, maintenance, guardianship and other matters connected with family life'. It has been rearranged and divided into 10 parts. Among its contents are; Marriage, registration of marriages, penalties

4 Ahmad Ibrahim, *Recent Developments in the Administration of Islamic Law in Malaysia in The Administration of Islamic Laws*, edited by Ahmad Ibrahim, et al, IKIM, Kuala Lumpur, 1997, p 7.

5 Islamic law including family matters falls within the legislative authority of the states, hence the need for the Ruler of each state's approval. See, The Federal Constitution of Malaysia, Schedule 9, List II; For further details on the Conference of Rulers see, art 38 of the Malaysian Federal Constitution and the Fifth Schedule.

6 In particular the States of Kelantan, Kedah and Malacca in which the amendments sought to bring the law nearer to the Shafie views. See, Ahmad Ibrahim, *Family Law in Malaysia*, Malayan Law Journal Sdn Bhd, 3rd Ed, Kuala Lumpur, 1997, pp 9-10.

7 Abdul Monir Yaacob, in *Undang-Undang Keluarga Islam dan Wanita Di Negara-Negara Asean*, IKIM, Kuala Lumpur, 1999, p 21.

8 Mufti is a person who is giving *fatwa* (legal rulings) for the other Muslims to follow. Section 33 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) states that 'the Mufti shall aid and advise the *Yang di-Pertuan Agong* in respect of all matters of Islamic Law, and in all such matters shall be the chief authority in the Federal Territories after the *Yang di-Pertuan Agong*, except where otherwise provided in this Act'.

9 The ladies wing of the United Malays National Organisation ('UMNO'), the ruling party in Malaysia.

10 Ahmad Ibrahim, *Recent Legislation on Islamic Law in Malaysia*, Law Seminar, International Islamic University, Petaling Jaya, July 1986, pp 26-27.

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A and miscellaneous provisions relating to the solemnisation and registration of marriages, dissolution of marriage, maintenance of wife, children and others, guardianship, miscellaneous, penalties and general matters.¹¹

B This attempt at codification is a welcome move since the Islamic law has to be traced from several different sources.¹² However, this codification is not complete and there are several sections of the IFLA 1984 that still refer to the '*hukum syarak*' (the rules and principles of shariah).¹³ This means the primary sources of Islamic law ie the Quran and the Sunnah will still have to be referred to for a full interpretation of provisions that require such interpretation.

C The IFLA 1984 repeals various provisions¹⁴ of the Administration of Muslim Law Enactment 1952¹⁵ of Selangor that had been made applicable to Kuala Lumpur, when it became a Federal Territory in 1974.¹⁶ The provisions of the Administration of Muslim Law Enactment, 1952, had been adopted and enforced in Kuala Lumpur in full before the IFLA 1984 came into force¹⁷ on 29 April 1987, that is, three years after it was enacted.

D Realising the fact that the rate of divorce in the Federal Territory of Kuala Lumpur has risen, the IFLA 1984 is promulgated with the intention, among other things, to make it more difficult to obtain a divorce. Thus, the provisions concerning Conciliatory Committee and *hakam/tahkim* are provided for under ss 47(5) and 48 of the IFLA 1984¹⁸ as means to curb arbitrary divorce in the hand of the husband.

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11 See, the arrangement of sections in the Islamic Family Law Act (Federal Territory) 1984, (Act 303).

F 12 Zaleha Kamaruddin, *Introduction to Divorce Laws in Malaysia*, International Islamic University Malaysia, 1998, p 146.

13 *Hukum Syarak* means the laws of Islam in any recognised sects: the IFLA 1984, s 2(1).

G 14 Section 135 of the IFLA 1984 states; 'Parts VI, VII, ss 155, 156, 158, 159, 160, and para (n) of s 178 of the Administration Enactment are hereby repealed and shall, accordingly, cease to apply to the Federal Territory.

15 PU(A) 444/74, Act A 206.

16 The Administration of Muslim Law Enactment 1952 (Selangor Enactment No 3/52) is extended to Federal Territory PU(A) 44/74, Act A 576/84, PU(A) 390/81.

H 17 See, s 2(1) of the IFLA 1984.

I 18 There are similar provisions on *hakam* in other states in Malaysia. See, Kelantan Islamic Family Law Enactment 1983, s 35(10); Malacca Islamic Law Enactment 1983, s 35(10); Negeri Sembilan Islamic Family Law Enactment 1983, s 48; Selangor Islamic Family Law Enactment 1984, s 48; Perak Islamic Family Law Enactment 1984, s 45; Terengganu Administration of Islamic Family Law Enactment 1985, s 45; Penang Islamic Family Law Enactment 1985, s 48; Perlis Islamic Family Law Enactment 1992, s 48; Ordinan Undang-Undang Keluarga Islam Sarawak 1991, s 46; Sabah Islamic Family Law Enactment 1992, s 48.

The provisions on *hakam* were also provided for under the old legislation of various states in Malaysia.¹⁹ In Pahang, there was provision for the appointment of *hakam* where a married woman applies to a *qadi* (judge) for divorce. In such a case, if the application has been caused by disagreement of an extreme nature between the husband and the wife, the *qadi* (judge) appoints two *hakams*, each representing the husband and the wife respectively, with sufficient powers given by both parties to enable *hakams* to effect a peaceful reconciliation of the parties, to the extent that the *hakam* of the husband divorcing the wife, and *hakam* of the wife applying for a divorce by redemption. If both *hakams* decide for a divorce, whether by redemption or not, *hakam* of the husband may divorce the wife, and the divorce is then registered.²⁰

In Negeri Sembilan, under the Malay Customary Law which is followed, it is laid down that before a divorce takes place there should be due deliberation on the reasons for the intended dissolution. Custom demands that a husband who contemplates a divorce from his wife must go through an arbitration called '*bersuarang*' or settlement. A small feast is held by the husband to which he invites the relatives of the wife as well as his own. The husband will then state his grievances, so that they may be considered by the parties present. Often the presence of the elders has a beneficial effect in resolving what may prove to be a hasty decision or a petty quarrel.²¹

Thus, prior to the current provisions of dispute resolution in the IFLA 1984 there were such provisions provided for under the old legislation, which recognised the practice of resorting the conflicts to a third party for a resolution that prevails among the Muslims society.²²

ANALYSIS OF THE LEGAL PROVISIONS

Analysis of the provisions, which mainly involves ss 47(5) to (17) and 48, are now discussed below:

- 19 M Siraj, *Conciliation Procedures in Divorce Proceedings* [1965] 7 Mal LR, p 321.
- 20 Pahang Administration of the Law of the Religion of Islam Enactment 1956, s 127; see also, Penang Administration of Muslim Law Enactment 1959 s 126; Kedah Administration of Muslim Law Enactment 1962, s 127; Perlis Administration of Muslim Law Enactment 1963, s 90A; Terengganu Administration of Islamic Law Enactment 1955, ss 103, 104, 108 and 109; Kelantan Council of Religious and Malay Customs and Kathis' Courts Enactment 1953 ss 145, 146, 150 and 151; Selangor Rules relating to marriage, divorce and revocation of divorce 1962; Negeri Sembilan Rules relating to marriage, divorce and reconciliation 1963.
- 21 M Siraj, *op cit*, p 324; see also, Zaleha Kamaruddin, *Isu-isu Kekeluargaan dan Undang-Undang*, ABIM, Kuala Lumpur, 1997, pp 190-191.
- 22 For example, the custom of '*bersuarang*' which is practised in Negeri Sembilan, under '*adat perpatih*' has many similarities with the process of *tahkim* in Islam. In Islam the practising custom of a community which is not contrary to the general principles of Shariah should be upheld.

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Section 47(5) is the provision for the appointment of the conciliatory committee and s 48 provides for the appointment of *hakam*. These provisions as set out in the IFLA 1984 are the provisions for the dispute resolution in family matters. The provision under s 48 is in line with the recommendation stated in the Quran that in the case of marital disputes, this method of settlement should be adopted.²³ The appointment of the conciliatory committee is not stated either in the Quran or the Sunnah. However, it can be defended that it is based on *al-siyasah al-shariyyah* (Shariah-oriented policy)²⁴ because of the need to have a committee that can investigate further the causes of conflict between the parties.²⁵ The relationship between these two sections can be described as follows:

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Firstly, both ss 47(5) to (17) and 48 contain many similar provisions. For example, the appointments of the conciliatory committee and *hakam* that they should be from relatives of the parties,²⁶ the conciliatory committee and *hakam* must conduct the reconciliation process in accordance with the directions of the court²⁷ and the court has the authority to remove the conciliatory committee and *hakam* should they be unsuccessful in their effort as directed.²⁸ It seems that there are overlapping roles between the conciliatory committee and *hakam* as reflected from these similar provisions.

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Secondly, s 47 (5) is for the cases where application for divorce is filed by either a husband or wife, and there is reasonable possibility of a reconciliation whereas, s 48 applies to the cases where *shiqaq* (marital discord) between the parties are persisting. Thus, it is for the court to investigate whether there is *shiqaq* (marital discord) in the marriage, whether there is any chance of reconciliation between the parties, and whether steps have been taken to effect reconciliation. This investigation is important for the court to decide whether to apply s 47(5) or s 48.²⁹ However, there is no clear guideline to assist the court in deciding which section is to be applied.

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23 Al-Quran; *al-Nisa*; 35.

24 Concerning *al-siyasah al-shariyyah*, Ibn al-Qayyim al-Jawziyyah in *Turuq al-Hukmiyyah fi al-Siyasah al-Shariyyah*, Matba'ah al-Madani, Cairo, p 16, has observed that it comprises all measures that bring the people close to well being and move them further away from corruption (*fasad*), even if no authority is found for them in the Quran and the Sunnah.

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25 Informal interview with Siti Zulaikha, an expert and a lecturer in family law, in November 1999; see also, the case of *Zainab Mahmood v Latif Jusoh* and *Razimah Haneem v Yusuf Hasbullah*.

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26 The IFLA ss 47(6) and 48(2).

27 *Ibid*, ss 47(7) and 48(3).

28 *Ibid*, ss 47(8) and 48(4).

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29 It is observed that in practice, however, the court will appoint the conciliatory committee under s 47(5) despite the fact that the case may fall under the jurisdiction of s 48.

Thirdly, in s 47 the conciliatory committee has the authority to reconcile the disputes between the parties as far as they can and report the outcome to the court. In s 48, on the other hand, *hakam* has two authorities:

- (1) If authorised by the parties the *hakams* can order a divorce or *khulu*.
- (2) If not authorised the *hakams* must report to the court, and the court will appoint other *hakams* in their place and give them power to order a divorce.

From the above, it is observed that the two provisions may be performing similar function in parts at least. The main difference between the two provisions is that the *hakams*, unlike the conciliatory committee, have the authority to order for divorce or *khulu* of the parties.

Appointment of the Conciliatory Committee

The appointment of the conciliatory committee is provided for under s 47(5) of the IFLA 1984. The subsection states that where the other party does not consent to the divorce or it appears to the court that there is reasonable possibility of a reconciliation between the parties, the court shall, as soon as possible, appoint a conciliatory committee consisting of a religious officer as chairman and two other persons, one to act for the husband and the other for the wife, and refer the case to the committee.³⁰ It is found that, there is no definition for the term 'religious officer' provided in the IFLA 1984. However, in practice the chairman of the conciliatory committee is usually a religious officer at the Administration of Shariah Law Department such as Head of the UPPK (the Family Counselling and Development Unit) or Head of Registration of Marriage, Divorce and Revocation of Divorce Unit. In the case of *Abdul Razak v Siti Yamah*³¹ the judge recognised the effort of reconciliation made by the army religious officer. The facts of the case were that the plaintiff applied for permission to divorce his wife under s 35 of the Malacca Islamic Family Law Enactment 1983. In this case the efforts at conciliation had been made by the religious officer in the army but these had failed. The wife agreed to the divorce and the court allowed the application of the husband and he pronounced the divorce by one *talaq* at the office of the *qadi*.

In the case of *Razimah Haneem v Yusuf bin Hasbullah*³² the husband had applied for divorce to the Shariah court under s 47 of the Islamic Family Law Enactment 1984. As the wife did not agree to the divorce, the court appointed a conciliatory committee in an attempt to reconcile the parties. While the proceedings were still continuing, the husband pronounced a *talaq* divorce outside the court and without the permission of the court. The

³⁰ The IFLA s 47(5).

³¹ (1988) 7 JH 84.

³² (1993) 9 JH 237. This case was appeared before the Shariah Appeal Court of Kuala Lumpur.

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A divorce was pronounced in the presence of two witnesses, but in the absence of the wife, who was only told of the divorce two months later. The husband applied to the Shariah Court to confirm the divorce. The judge of the Shariah Court without calling or hearing the wife and the witnesses confirmed the divorce, relying solely on the statement of the husband that he had divorced the wife. On appeal, the Shariah Court of Appeal set aside the order of the judge and ordered that the case be retried so that the provisions of s 47 of the IFLA 1984 are complied with.

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The above case shows that, as stated in the subsection, if one of the parties does not agree to the divorce and if the court thinks it is necessary to look further into the case it will appoint a conciliatory committee. With this appointment of the conciliatory committee, it helps save court's precious time, and enables the court to control and manage the process of divorce within the spirit of the Quran.³³

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In *Zainab Mahmood v Abdul Latif Jusoh*³⁴ the respondent had applied to the shariah subordinate court to confirm the *talaq* pronounced by the husband in the presence of his wife, the appellant, and alleged to be witnessed by a lady officer in the Counselling Unit of the Federal Territory Religious Department. The appellant denied the allegation and said she did not agree to the divorce. The lady officer in the Counselling Unit was not called to give evidence. The learned trial judge held that the divorce had been effected and approved the application for registration of the divorce. It was held by the Board of Appeal concerning the appointment of the conciliatory committee that as the appellant in this case did not agree to the divorce, the conciliatory committee should have been appointed under s 47(5) so that the divorce can be affected on equitable terms in accordance with the teachings of the Islamic law.

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In practice, after the decision on the formation of the conciliatory committee is made, the court under s 47(5) will ask each of the parties to submit the name of their respective representative as soon as possible. The court normally does not specify that the person appointed must be a male. Thus, a female relative may be appointed to represent a party to be in the conciliatory committee.³⁵ Women are allowed to be appointed for the conciliatory committee as they are considered to be representatives of the parties and not as *hakams*.³⁶

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³³ See, the Quran; *al-Baqarah*:229.

³⁴ (1991) 8 JH 297.

³⁵ For example, in the case of *Tumiran bte Othman v Kamarul Zaman bin Abdul Rahim* (Civil Case No 177 of 1990 unreported) the husband had appointed his sister as his agent. In another Civil Case No 1119 of 1998 the plaintiff appointed his sister to represent him.

³⁶ In *tahkim* the majority of the jurists does not allow female arbitrators as they considered the arbitrators must have the same qualification as a *qadi* except the Maliki jurists (*Ashhab*) as to them the arbitrators are the representatives of the parties.

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The court after receiving the names of the representatives from the parties will then proceed with the appointment of the chairman of the committee. Letters of the appointment will be sent to each of the members of the committee. The appointment letter states the date when they are required to attend briefing session with the court. During this session the court will give the necessary instructions as to the conduct of reconciliation. The court will also brief the committee of the background and the progress of the case so far. Problems that need urgent attention will be mentioned specifically to the members of the committee. The court will ask the members to give special focus to these problems.³⁷ The persons appointed by the parties are replaceable. Thus, either of the parties may dismiss his or her agent and replace it with another person. However, any replacements or changes must be informed and approved by the court before the new person can represent the party. The same procedure also applies to the provisions on *hakam*.³⁸

In appointing the two persons under sub-s (5), the court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.³⁹ Should no relatives be available, the court will seek to appoint respected elders, officers, imams or persons of knowledge in the community, to be members of the conciliatory committee. The court may give directions to the conciliatory committee as to the conduct of the conciliation and it shall conduct it in accordance with such directions.⁴⁰

If the committee is unable to agree or if the court is not satisfied with its conduct of the conciliation, the court may remove the committee and appoint another committee in its place.⁴¹ The time frame for the conciliatory committee is six months. It is stated that the committee shall endeavour to effect reconciliation within a period of six months from the date of it being constituted or such further period as may be allowed by the court.⁴²

The above subsection allows the conciliatory committee to carry out their role of reconciliation within the specified time period of six months. This period starts from the date the committee is formed by the court. In practice, normally during this period, members of the conciliatory committee are able to hold several meetings to discuss the problems of the marriage of the parties and make a necessary effort to put them back together. There are, however, cases where this period has lapsed without having any single meeting between the parties.⁴³ Within this six months period, the conciliatory committee is expected to complete the task of reconciliation. As after six months is over, the committee has to report whatever decision reached during the meetings

37 Informal interview with the officer of the Shariah Court of Federal Territory.

38 *Ibid*.

39 The IFLA s 47(6).

40 *Ibid*, s 47(7).

41 *Ibid*, s 47(8).

42 *Ibid*, s 47(9).

43 Formal interview with Zaky Muhammad, Registrar of the Shariah Court of Federal Territory.

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A to the court.⁴⁴ It is submitted that from the cases analysed in the Shariah Court of Federal Territory, this six months period is more than enough for the conciliatory committee to effect reconciliation between the parties or to suggest any solution for the settlement of the couple's dispute. However, it is observed that the subsection does not state the maximum allowable period of extension.

B It is also provided that the committee shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it thinks fit and may, if it considers it necessary, adjourn its proceedings from time to time.⁴⁵ If the conciliatory committee is unable to effect reconciliation and is unable to persuade the parties to resume their conjugal relationship, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit regarding maintenance and custody of the minor children of the marriage, if any, regarding division of property, and regarding other matters related to the marriage.⁴⁶

D Subsection (12) further provides that 'peguam syarie' (counsel) is not allowed to appear or act for any party in any proceeding before a conciliatory committee and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory committee.⁴⁷

E Subsection (13) provides:
Where the committee reports to the court that reconciliation has been effected and the parties have resumed their conjugal relationship, the court shall dismiss the application for divorce.⁴⁸

And sub-s (14) then states:

F Where the committee submits to the court a certificate that it is unable to effect reconciliation and to persuade the parties to resume the conjugal relationship, the court, and where the court is unable to procure the presence of the husband before the court to pronounce one *talaq*, or where the husband refuses to pronounce one *talaq*, the court shall refer the case to the *hakam* for action according to s 48.⁴⁹

G In *Rosilah Abu Kassim v Abdul Rahman Ibrahim*⁵⁰ the appellant had applied for divorce or *fasakh* (annulment of marriage) on the grounds that the respondent had not given her any maintenance and had threatened to injure

H ⁴⁴ *Ibid.*

⁴⁵ The IFLA 1984 s 47(10).

⁴⁶ *Ibid*, s 47(11).

⁴⁷ *Ibid*, s 47(12). This provision is similar with the provision provided for under s 106(5)(c) of the LRA.

⁴⁸ *Ibid*, s 47 (13).

⁴⁹ *Ibid*, s 47 (14).

⁵⁰ (1991) 8 JH 249.

and kill her if she made a complaint to the court. The court ordered a conciliatory committee to be appointed. The committee subsequently reported that they were unable to effect reconciliation and they advised that a divorce should be effected by *talaq* or *khulu*. The court however, held that the wife had not proved any of the grounds for *fasakh* under s 52 of the Islamic Family Law Enactment and dismissed her application. The appellant appealed against the decision. The Board of Appeal held that in this case, as all attempts at reconciliation had failed, the best solution was to allow the appellant to proceed with her application for divorce under s 47 of the Enactment. In this case the Board of Appeal expressed its disapproval with the way the decision was reached by the lower court without considering the proposals of the conciliatory committee. It states:

As commanded by Allah in verse 229 of *al-Baqarah* that, 'if they live together they should live in mutual love and forbearance however, if a separation is inevitable they should separate with kindness'... In this case, it is obvious that, the trial judge did not take into account the suggestions made by the conciliatory committee. If the judge did not agree with the suggestions proposed he should then dismiss them and appoint another committee as set out in the section.

There are exceptions to the requirement of sub-s (5) as stated in the following sub-s (15) that the reference to a conciliatory committee shall not apply in any case:

- (a) where the applicant alleges that he or she has been deserted by and does not know the whereabouts of the other party;
- (b) where the other party is residing outside West Malaysia and it is unlikely that he or she will be within the jurisdiction of the court within six months after the date of the application;
- (c) where the other party is imprisoned for a term of three years or more;
- (d) where the applicant alleges that the other party is suffering from incurable mental illness; or
- (e) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory committee impracticable.⁵¹

It is argued that there is difficulty in ascertaining the proper meaning and context of the term 'exceptional circumstances or impracticable' as they are highly vague and ill-defined term.⁵² Thus, it is suggested that the provision concerning this should be deleted or redefined to avoid uncertainty over what is exceptional and what is not.⁵³

51 *Ibid*, s 47(15); These exceptions are similar to those provided under the LRA 1976 pertaining to divorces on the ground of irretrievable breakdown of marriage. See, the LRA 1976, s 106(1) however, s 106(1) has additional sub-s (iii).

52 See, sub-s (15)(e) where the term exceptional circumstances are used.

53 There have been discussions on what is meant by 'exceptional circumstances' in English law. In *C v C* [1979] 1 All ER 556, Scarman LJ in addition, agreed that what is exceptional must be judged by prevailing standards of acceptable behaviour between spouses.

The situations appointment of the committee shall r under ss 50(1) and of marriage). Fu representatives b situation where it committee shall n between the partie

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It is submitted under sub-ss (5) to community especial the parties. It is the reconciliation betwe provision to that of 1976, and would su s 106. Essentially th of the causes of th committee will be ex in his judgment ove code of practice for code of practice for qualification of the p to improve the perfo reconciling the dispu against s 48 ie, the p

54 In 1994, some ame 902 of 1994. See, Journal Sdn Bhd, 1

55 The IFLA s 47 (17).

56 See, the case of *R Zainab Mahmood v.*

57 See, the case of *Rai Zainab Mahmood v.*

58 *Ibid*.

A A The situations provided for under sub-s (15) are the exceptions to the
appointment of the conciliatory committee. It is felt that the conciliatory
committee shall not apply to sub-s (15) as the wife can apply for divorce
under ss 50(1) and 52(1) ie, on the ground for *khulu* and *fasakh* (annulment
of marriage). Furthermore as the attendance of the parties or their
representatives before the conciliatory committee is required, in the
B B situation where it is difficult to procure their attendance the conciliatory
committee shall not be an appropriate mean for the resolution of disputes
between the parties.

C C Prior to its substitution in 1994,⁵⁴ sub-s (16) of the IFLA 1984 provided
that a *talaq* pronounced by the husband or an order made by the court
should not be effective until the expiry of the *'iddah* (waiting period for a
divorced woman or widow). The current sub-s (16) provides that a *talaq*
raj'ie (revocable divorce) pronounced by a husband unless revoked earlier,
either expressly or impliedly, or by an order of the court, should not operate
to dissolve the marriage until the expiry of the *iddah* period. Thus, the
D D current one has specified the word 'a *talaq*' of the former sub-s (16) to the
word '*talaq raj'ie*'. The last subsection of s 47 ie, (17) states 'If the wife is
pregnant at the time the *talaq* is pronounced or the order is made, the *talaq*
or the order shall not be effective until the pregnancy ends'.⁵⁵

E E It is submitted that the main objective of the conciliatory committee
under sub-ss (5) to (17) is to control the number divorce among the Muslim
community especially if there is possibility of saving the marriage between
the parties. It is the role of the committee to advise and to give effect to the
reconciliation between them.⁵⁶ One sense the apparent similarities of this
provision to that of s 106 of the Law Reform (Marriage and Divorce) Act
1976, and would suggest that this section sets its inspiration from that of
F F s 106. Essentially this provision assists the judge in his proper management
of the causes of the breakdown of the marriage.⁵⁷ The report of the
committee will be extended to the judge who will then take it into account
in his judgment over the case.⁵⁸ However, the provision does not have a
code of practice for the member of the committee. It is suggested that the
code of practice for the members of the committee together with the
G G qualification of the persons appointed should be provided. This would help
to improve the performance of the committee in carrying out their role at
reconciling the dispute between the parties. It is when this section is viewed
against s 48 ie, the provision on *hakam*, that, as the cases (which will be

H H 54 In 1994, some amendments were introduced to the IFLA 1984 through Act A
902 of 1994. See, Mimi Kamariah, *Family Law in Malaysia*, Malayan Law
Journal Sdn Bhd, 1999, p 146.

55 The IFLA s 47 (17).

56 See, the case of *Razimah Haneem v Yusuf Hasbullah* (1993) 9 JH 237 and
Zainab Mahmood v Abdul Latif Jusoh (1991) 8 JH 297.

I I 57 See, the case of *Razimah Haneem v Yusuf Hasbullah* (1993) 9 JH 237 and also
Zainab Mahmood v Abdul Latif Jusoh (1991) 8 JH 297.

58 *Ibid*.

discussed later) will show clearly this section seems to be an impediment to the application of s 48 ie, the practice of *hakam* in Malaysia.

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Appointment of Hakam

The appointment of *hakam* is provided for under s 48 of the IFLA 1984. It states that if satisfied that there are constant quarrels (*shiqaq*) between the parties to a marriage the court may appoint in accordance with the *hukum syarak* two *hakams* to act for the husband and wife respectively.⁵⁹ The appointment of *hakam* may also be a consequence of the failure of the conciliatory committee under s 47(14) to effect the reconciliation between the couple, and the subsequent failure of the court to effect the pronouncement of one *talaq* by the husband before the court.⁶⁰ There are three issues to be discussed, that is, whether the appointment of *hakam* is voluntary or mandatory, the person/authority responsible for the appointment and, the appointment of the close relatives. Below are the discussions of these issues.

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Voluntary or mandatory

The appointment of *hakam* under this provision is in line with the Quranic commandment that in the case of marital disputes, two *hakams* should be appointed.⁶¹ However, the word 'the court may appoint' found in the section implies that the appointment of *hakam* is at the discretion of the judge. It is suggested that the word 'may' should be replaced with the word 'shall' as the appointment of *hakam* if there is *shiqaq* (marital discord) is obligatory and not mere recommendation.

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Although the opinion of the jurists concerning this issue varies, the opinion, which says it is obligatory, is preferred and it is the opinion of the majority. Islam prescribes that before the actual dissolution of the marriage, a final effort for reconciliation is always to be made to smooth out any differences between the couple by the appointment of two *hakams*. It is the role of the *hakams* that they should endeavour to understand the nature and causes of the grievances of the parties and try to bring about reconciliation between the two.⁶²

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Who should appoint hakam

The provision under the IFLA 1984 states that the appointment of *hakam* is made by the court and the court also gives directions to the *hakam* as to the conduct of the arbitration.⁶³ There are different views of the Muslim

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59 The IFLA s 48(1).

60 The appointment of *hakam* under the IFLA 1984, however, is at the discretion of the judge. The judge may or may not refer the case to *hakam*.

61 Al-Quran; *al-Nisa*; 35.

62 Ahmad, KN, *Muslim Law of Divorce*, Kitab Bhavan, New Delhi, 1978, p 277.

63 The provisions in Jordan and Egypt also empower the judge to appoint *hakam*.

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A jurists on who should be responsible for the appointment of *hakam*. This is due to their variance in interpreting the meaning of the phrase 'if you fear' of verse 35 of *al-Nisa*'. However, majority of the jurists, views that, it is the judge who should be responsible for the appointment of arbitrators.⁶⁴

B It is submitted that, although there are views that, the relatives of the parties or any rightfully guided person may appoint *hakam*, this is not possible nowadays as the court is the only recognised institution vested with the authority to administer the disputes between the couple. This is in contrast to the early period of Islam ie, at the time of the Prophet and his Companions where the appointment of *hakam* came from any other member of the society. Ahmad,⁶⁵ however, views opinion that the word 'you' is addressed to the Muslim in general, is more appropriate as it allows the parties, their relations, friends or well-wishers to have recourse to *tahkim* and themselves appoint *hakam* to restore amity and happy conjugal relations between the husband and wife. If this is allowed, it may offer less formal system that may accelerate the process of *tahkim*. However, it is submitted that a number of other problems may arise if the above opinion is practised for example, the status of the outcome of such settlement and its enforcement on the parties.

Appointment of the close relatives

E In appointing *hakam*, the court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.⁶⁶ This preference to the close relatives is in line with the manifest meaning of verse 35 of *al-Nisa*' and the opinion of the majority of the jurists. The wordings of the subsection had clearly stated that the appointment of the close relatives is preferred whenever they are available. If the close relatives are not available or they may be available but not qualified to be appointed as *hakams*, the court may under these circumstances allow the appointment of non-relative *hakams*. As the purpose of *tahkim* is to find the solution to the disputes between the parties and to effect a reconciliation between them, and if this can be achieved through the non-relative *hakams* the court should allow them to represent the parties.⁶⁷ Furthermore, the IFLA 1984 provides that the court may give directions to *hakams* as to the conduct of the arbitration and they shall conduct it in accordance with such directions and *hukum syarak* (rules and principles of Shariah).⁶⁸ This requires that appointed *hakam* must be a person who knows *hukum syarak*. If for example, a close relative available does not know about *hukum syarak* he should not be preferred to a non-relative whose knowledge on Shariah is adequate. It is observed that in practice the court also

64 *Ibid.*

65 Ahmad, KN, *op cit*, p 279.

66 The IFLA s 48(2).

67 *Ibid.*

68 The IFLA s 48(3).

allows the appointment of a person who is not the relative of the parties as *hakam*.⁶⁹

Qualification of hakam

The provisions on *hakam* do not state in detail the qualifications that are expected of them. It only provides that in appointing *hakam* preference should be given to close relatives of the parties having knowledge of the circumstances of the case.⁷⁰ However, it states that *hakam* should conduct the case in accordance with the directions given by the court and *hukum syarak*.⁷¹ It further states that, if they fail, or the court is not satisfied with the way they conduct the reconciliation process, the court may remove them and appoint other *hakams* in their place.⁷² There is, therefore, no detailed provision on the qualification of *hakam* under the IFLA 1984.

The concept of *tahkim* in its entirety, from definition to its conclusion, qualifications included, has been discussed in detail by the jurists. To date, there is no record of the practice of *hakam* in the Federal Territory, that is, no cases that fulfil under the term '*shiqaq*' (marital discord) and no cases of failure of the practice of the conciliatory committee under s 47 leading to the application of s 48. One reason which is repeatedly mentioned is the qualifications of *hakam*. It is argued that it might not be within reach of the parties or the court to get a suitably qualified *hakam* for the case. Thus, an adequate description of the qualifications of *hakam* should be included in the provisions for easy reference for the court in exercising its power under s 48.

Termination of hakam

The authority for termination of the *hakam* lies in the court. The court may do so if the *hakams* are unable to agree or if the court is not satisfied with their conduct of arbitration. In such a situation, the court may remove them and replace them with new member of *hakams*.

The IFLA 1984 provides:

If the *hakams* are unable to agree, or if the court is not satisfied with their conduct of the arbitration, the court may remove them and appoint other *hakams* in their place.⁷³

69 For example, in the case of *Talib v Che Sepiah* the *qadi* of Kota Bahru under s 74(4) of the Shariah Court and Matrimonial Causes Enactment 1966 had appointed Abdul Ghani bin Haji Mohammad, an *Imam* (a leader in congregational prayer), as the *hakam* for the wife.

70 The IFLA s 48(2).

71 *Ibid*, s 48(3).

72 *Ibid*, s 48(4).

73 The IFLA s 48(4).

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In al-Saqaf,⁷⁴ it is stated that the judge may dismiss the arbitrators and appoint other arbitrators if the arbitrators do not agree with one another and no decision is reached or the judge is not satisfied with the manner the arbitrators conduct the case. This principle is accepted by the majority of the jurists. Thus, it is submitted that, this sub-s (4) of the IFLA 1984 is in conformity with the opinion of the jurists on this issue.

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In the case of *Che Pah v Siti Rahmah*⁷⁵ the plaintiff had applied for an order that his wife, the defendant, should return and cohabit with him. The defendant refused to do so as she claimed the husband was a gambler and a drunkard and did not pray. She asked for a divorce from him and offered to pay compensation for a *tebus talaq (khulu)*. The court after hearing the parties ordered the wife to return to the husband and ordered the husband to pay her maintenance and provide a dwelling house for her. The wife refused to go back to her husband and the husband too did not give the maintenance as ordered. The judge thereupon ordered that *hakam* to be appointed under s 90A(1) of the Administration of Muslim Law Enactment 1963.⁷⁶ Section 90A(1) of the Enactment states:

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Whenever any misunderstanding arises from any decision of the court, as for example, where the husband is asked to divorce his wife but refuses to do so, the court has the power to order both parties to appoint their representatives to find ways of solving the misunderstanding.

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In this case the court on 6 February 1975 had confirmed the appointment of *hakam* of each of the parties. The court then had briefed the two *hakams* as to the conduct of the reconciliation process and reminded them that they should try to effect a reconciliation between the parties. On 9 July 1975 both *hakams* had reported to the court that they were not able to solve the case.

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The court, therefore, on 11 January 1976 appointed another *hakams* under s 90A(2) of the Enactment. In this case, the *hakams* finally were able to get the agreement of the parties for a *khulu* divorce on the payment of RM100 to the husband. This case shows that the court has the power to remove the *hakams* if they are unable to agree, or if the court is not satisfied with their conduct of the arbitration. The decision of the newly appointed *hakams* will be enforceable by the court.

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⁷⁴ Al-Saqaf, al-Sayyid 'Alwi Ibn al-Sayyid Ahmad, *Tarshih al-Mustafidin, Dar Ihya' al-'Arabiyyah*, Egypt, nd, p 330.

⁷⁵ (1974) 2 JH 244. This is a reported case in the old Enactment of Perlis, where the two *hakams* were appointed under s 90A(1) of the Administration of Muslim Law Enactment 1963.

⁷⁶ This is the Act applicable in the State of Perlis prior to the current legislation ie, Islamic Family Law Enactment of Perlis 1992.

of the Mejella.⁷⁷ It further provides that the court has the power to extend the above period to an additional period not exceeding three months and if arbitrators do not submit their report, it shall be deemed that they have not reached an agreement.⁷⁸

It is submitted that the experience of the members of the conciliatory committee may be relevant. The six-month period given to them was adequate for them to either effect a reconciliation or suggest a solution to the couple's dispute to the court. It is at least within the general aims and objectives of Shariah, that this task of arbitration is performed within a specific time frame that is fair and just to the parties concerned, as delays had been blamed for unnecessary hardships to the parties.⁷⁹

Decision of hakam (arbitrator)

The *hakams* shall endeavour to obtain from their respective principals full authority, and may, if their authority extends so far, pronounce one *talaq* (divorce) before the court if so permitted by the court, and in that event the court shall record the pronouncement of one *talaq*, and send a certified copy of the record to the appropriate registrar and to the chief registrar for registration.⁸⁰ If the two *hakams* are of the opinion that the parties should be divorced but are unable for any reason to order a divorce, the court shall appoint other *hakams* and shall confer on them authority to order a divorce and shall, if they do so, record the order and send a certified copy of the record to the appropriate registrar and to the chief registrar for registration.⁸¹

The above sub-s (5) is based on the opinion of the Shafie school which only allows *hakams* to order for a divorce or *khulu'* if they have been so authorised by the husband in the case of divorce and both parties in the case of *khulu'*. Whereas sub-s (6) which authorises *hakams* to order a divorce, adopts the prevailing view of the Maliki school. According to the Malikis, when *hakams* have been appointed, but failed to bring about a reconciliation between the couples, *hakams* have the right to decide whether there should be a divorce. Their decision can be enforced by the court. This opinion is based on the understanding that two the *hakams* are judges, not

77 Article 1840 of the Mejella states:

When the appointment of arbitrators is limited by time, at the expiration of that time it is at an end.

78 Article 8(b) of the Law 1985. In this regard there is no time frame for *hakam* under art 132 of the Law of Personal Status of 1976.

79 In *al-Fatawa al-Hindiyyah, op cit*, Vol 3, p 180, it is stated that it is open to the parties to attach a condition to the investment of the power in the *hakam*. Thus, a condition may be made that *hakam* shall deliver their award within a certain specified time.

80 The IFLA s 48(5).

81 *Ibid*, s 48(6).

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A agents.⁸² As judges they may give decision that they consider beneficial to the parties, particularly whether the marriage should be continued or it should be dissolved.

These sub-ss (5) and (6) are the provisions about the authority of *hakams* to pronounce one *talaq* before the court, however, these provisions do not state the type of *talaq* effected whether it is *rajie* (revocable repudiation)⁸³ or *ba'in* (irrevocable repudiation).⁸⁴ As a consequence this may cause difficulty as far as the registration of divorce is concerned. It is important that the type of divorce effected must be clearly specified in the record of Registrar for future reference. This will become more important if the husband would like to revoke the divorce or remarry the ex-wife. It is suggested that the type of *talaq* effected should be specified in the registration.

In the case of *Talib bin Salleh v Sepiah*⁸⁵ where the facts were that the parties had been married since 1964. In 1976 the respondent brought an action for divorce against the husband, as she alleged he had not been just and had treated her unfairly. Subsequently she agreed to withdraw the action and to go back to live with the appellant, as he promised to act with justice towards her. However, the respondent alleged that the appellant continued to neglect her and did not give her sufficient maintenance. She said she did not want to go on staying with the husband and she applied for divorce under s 69 of the Shariah Court and Matrimonial Causes Enactment 1966. The learned judge after hearing the witnesses found that there were differences between the parties which amounted to *shiqaq* (marital discord) and as the appellant refused to divorce the respondent or

F 82 Imam Malik in *al-Muwatta'* said that 'The arbitrators are empowered either to get separation effected or to bring reconciliation between them.' He further said that he has heard from learned persons that the decisions of the arbitrators, both in case separation is effected and in case reconciliation is brought about between husband and wife, are valid.

G 83 The effect of *talaq raj'ie* is that it does not dissolve the marriage until the period of *iddah* is completed. The divorce may be revoked by the husband during the *iddah* period, and marital relations resumed between the parties without a new marriage contract between them.

H 84 This type of *talaq* is divided into *ba'in sughra* and *ba'in kubra*. In the case of *talaq ba'in sughra*, the husband may remarry his repudiated wife under a new marriage contract. Such is the case after the lapse of *iddah* of the first and second repudiation by the husband. In *talaq ba'in kubra*, occurring after the third pronouncement of repudiation by the husband, the wife becomes temporarily prohibited for the husband to remarry. He can only remarry her after she has married another husband, genuine consummation has taken place, and the second marriage was later dissolved or her second husband has died. See, Jamal J Nasir, *The Islamic Law of Personal Status*, Graham and Trotman, London, 1990, pp 120-121.

I 85 (1979) 1 JH (1) 84. This case was decided by the Shariah Court of Kelantan under s 69 of the Shariah Court and Matrimonial Causes Enactment 1966 and *hakam* was appointed under sub-s (4) of the Enactment.

to agree to *tebus talaq*, he appointed *hakam* under s 69(4) of the Enactment. The *hakams* took over five months to consider the matter but could not reach agreement, as the *hakam* for the appellant did not agree to a divorce. The learned judge then took steps to appoint a *hakam* for the husband with power to divorce the wife, under the powers given by s 74(4) of the Enactment. Subsequently the *hakams* agreed on a *khulu'* divorce and as the *hakam* for the husband was appointed according to the minority opinion of the Shafie school and was given power to pronounce a divorce, he pronounced the '*tebus talaq*' (*khulu'*) on payment of RM100. On appeal, the Board of Appeal dismissed the appeal and confirmed the order of the judge.

Another case where *hakam* was appointed is *Nerat bte Musa v Ahmad bin Kancil*.⁸⁶ In this case there was a dispute between the husband and the wife. The wife applied for *khulu'* divorce but the husband refused to accept. The court decided based on s 90(1) and (2) of the Administration of the Shariah Enactment (Perlis) (No 3) of 1964 to appoint arbitrators from each parties to settle the matter. The *hakam* for the husband agreed that there should be a *khulu'* divorce on the wife paying RM150 and when the wife paid this amount to the husband, he pronounced the *talaq* on her.

The above provision is in line with the opinion of the Muslims jurists that *hakams* have the authority to order for a separation of the parties either through *talaq* divorce or *khulu'*. This provision is important as it gives authority to *hakams* to order for a divorce in the case where the husband is reluctant to pronounce it whereas the state of *shiqaq* (marital discord) is persisting. With this power to order for a divorce given to *hakams* it is hoped that hardship and injustice in the relationship of the husband and the wife can be avoided. It is important that if the limit of Allah cannot be observed there is no reason for the relationship to be continued.

OBSERVATIONS AND COMMENTS

The Family Counselling and Development Unit of the Division of Administration of Shariah of Federal Territory, responsible for the running and overall management of the conciliatory committee, considers that this committee is similar to *tahkim* (ie, *hakam*) in principle, structure and function, with the exception that this committee does not have the authority to order a divorce. The unit also considers that this committee is utilised by the court in the first instance (ie, s 47) instead of *hakam* (ie, s 48) for the anticipated difficulty of getting representatives of the parties with the qualifications resembling those required of *hakam*. Hence, the referral to *hakam* is made only after the failure of the court to get the husband to pronounce *talaq*, after the failure of the conciliatory committee to bring them back together.⁸⁷

86 (1965) 3 JH 101. This is another reported case from Perlis where *hakam* had been appointed to settle the dispute between the parties.

87 See, sub-s (14) of 47.

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A A In its appraisal of the performances of the committees for the cases (in general), the head of the Unit commented on the difficulties encountered as the representatives do not seem to understand the purpose of committee, and the responsibility expected of them.⁸⁸ Hence, their conduct skewed from striving to reconcile the parties, to defending the respective parties.⁸⁹

B B It may be inferred that, the increased number of cases agreeing to the divorce after failure of the committee to reconcile them, is due to, amongst other reasons, that should the parties not agree to a divorce, the court may appoint *hakam*, which will then prolong the process, and the conflict, and their consequences.⁹⁰

C C It is observed that some of the cases filed in the Shariah Court of the Federal Territory utilised the provisions of s 47(5) of the IFLA 1984. None were referred to s 48 after the failures of the conciliatory committee, as the court was able to get the husband to pronounce *talaq* in each of the respective cases. None utilised the provisions in s 48 directly, though the circumstances of the conflicts may imply the presence of *shiqaq* (marital discord). It can thus be inferred that, inadvertently or otherwise, the presence of the provisions in s 47(5) practically leads to the non-application of the provisions for *hakam* in s 48. The absence of the definition of *shiqaq* (marital discord) or circumstances qualifying *shiqaq* leads to the assumption by some judges that the circumstances of a case do not yet fulfil the definition or qualify *shiqaq*. This supports further the non-application of the provisions of *hakam*.

E E It can be seen from the cases filed in the shariah court that there is very small number of cases where the conciliatory committee has successfully reconciled the parties. Most of the cases end with divorce when the husband finally pronounces *talaq* to the wife. It is said that the parties in some cases change the ground for divorce after seeing the chairman of the conciliatory committee or the marriage counsellor, or on the advice of the judge himself. The parties may for example, change the ground for divorce from s 47 to *khulu'* under s 49 or *taliq* divorce under s 50 of the IFLA 1984.⁹¹

F F It is submitted that the conciliatory committee has its inspiration from *hakam* and co-opted with some acceptable principles from s 106 of the Law Reform (Marriage and Divorce) Act 1976. Its application results in the non-applicability of provisions on *hakam*. The observation from cases filed in the shariah courts and opinions expressed so far, imply that the results of the

H H 88 Formal interview with Zawanah Muhammad, head of the Family Counselling and Development Unit of the Federal Territory, Kuala Lumpur in November, 1999.

89 *Ibid.*

90 See, Memorandum on Reform of the Islamic Family Laws and the Administration of Justice in the Shariah System in Malaysia, submitted to the Government of Malaysia in March 1997, at <http://www.geocities.com/bernhardng/memorandums/mreform.htm>.

I I 91 Formal interview with Zaky Muhammad, Registrar of the Shariah Court of Federal Territory of Kuala Lumpur.

deliberations can be better achieved; ie, in keeping with the spirit of the verse 35 of *al-Nisa*, if the provisions of *hakam* be improved, and applied in practice.

CONCLUSION

Generally, the provisions on dispute resolution under the IFLA 1984 are in line with the Islamic law as deliberated by the Muslim jurists. It is observed that although most of the Muslims in Malaysia are the followers of the Shafie School, the legislator, in drafting the IFLA 1984 has also adopted the views of other schools especially the Maliki School.⁹² For example, the authority of *hakams* to order a divorce or *khulu'* without the consent of the principals has been adopted under the IFLA 1984. It is, however, unfortunate that the provisions concerning the appointment of *hakam* which have been included under the IFLA 1984 with the aim to reach an amicable solution between the couple are not being practised due to certain reasons as discussed earlier. Instead the shariah courts in the Federal Territories utilised the provisions of the appointment of the conciliatory committee. As argued, there has been overlap of function and role between these two provisions. It is viewed that in order to effectively bring the *hakam* provision into practise the provision of the conciliatory committee should be abolished. Thus, it is hoped that with some necessary amendments made to the provisions of the IFLA 1984 problems and weaknesses related to the resolution of dispute between the couple can be managed and tackled effectively. In the Western countries following the approach of the Eastern cultures mediation as a means of alternative dispute resolution has gained popularity and received legal recognition especially in cases involving family. It is claimed that resolution of the dispute through mediation has many advantages to the parties and particularly to the children.

92 In Malaysia the most prevalent school is the Shafie school. There are also followers of Hanafi school of law, mainly Northern India and Pakistani Muslims. See, Ahmad Ibrahim, *The Administration of Muslim Law in South-East Asia*, (1971) 13 Mal LR, 124.

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