

**ROLE OF THE CONCILIATORY COMMITTEE AND HAKAM
(ARBITRATOR): THE PRACTICE AND PROVISIONS OF THE ISLAMIC
FAMILY LAW IN MALAYSIA**

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I. 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 paper, as far as statutory provisions are concerned, the discussion focuses upon the provisions on dispute resolutions under the Islamic Family Law (Federal Territories) Act, 1984,² which is also the model followed by many of the States in Malaysia. The paper traces the historical background of the IFLA, 1984 generally and specifically the provisions concerning the dispute resolutions. The critical analysis focuses on section 47 (5) to (17) and, specifically of section 48 and, other related sections of the IFLA, 1984. These relevant provisions are analysed against the background of the principles and rules of *tahkim* (arbitration) as deliberated in the sources of syariah. Suggestions and recommendations to further improve the current practice and provisions are made in this paper.

II. BACKGROUND TO THE ISLAMIC FAMILY LAW ACT, 1984

¹The 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. Generally the Islamic Family Law Act of the States in Malaysia can be divided into 2 categories. First, those States which followed the model of Islamic Family Law (Federal Territory) Act, 1984 but with slight modifications. They are the States of Selangor, Negeri Sembilan, Pulau Pinang, Pahang, Perlis, Terengganu, Sarawak and Sabah. The second category is those States that made significant changes to the original draft agreed to by the Council of Rulers. The differences are particularly in the arrangement of sections, the law and the procedures, and those States are Kelantan, Johor, Malacca and Kedah. Currently there is an effort to uniform all the States Islamic Family Law in Malaysia.

²Hereinafter abbreviated, as the IFLA, 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 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

³The 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 Negari 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).

⁴Ahmad 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.

⁵Islamic 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, Article 38 of the Malaysian Federal Constitution and the Fifth Schedule.

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

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

⁸Mufti is a person who is giving *fatawa* (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.”

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

¹⁰Ahmad Ibrahim, “Recent Legislation on Islamic Law in Malaysia”, Law Seminar, International Islamic University, Petaling Jaya, July 1986, pp. 26-7.

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 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

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 shara*’ (the rules and principles of Shari’ah).¹³ This means the primary sources of Islamic law i.e., the Qur’an and the *Sunnah* will still have to be referred to for a full interpretation of provisions that require such interpretation.

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 29th April 1987, that is, three years after it was enacted. 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 *hakam/tahkim* are provided for under s 48 of the IFLA, 1984¹⁸ as one of the means to curb arbitrary divorce in the hand of the husband. Other provisions relevant to *hakam* are ss 47(5) to (17), 49 (4) and 51 (8) and (9).

The Administration of Muslim Law Enactment, 1952 of Selangor however, was only a law of general application. Besides this main Enactment, the Rules on Marriage, Divorce and Revocation, 1967 were also applied.¹⁹ The

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

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

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

¹⁴Section 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.”

¹⁵P.U. (A) 444/74, ACT A 206.

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

¹⁷See, s 2 (1) of the IFLA, 1984.

¹⁸There 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.

¹⁹It had been provided under the Rules, 1967 that no divorce may take place except before a *qadi*. The parties are required to make application on a prescribed form and it is provided that no divorce or pronouncement of *talaq* will be effective unless the wife agrees to the

Rules of 1967, however, did not apply to Kuala Lumpur because this legislation had not been made under the main Enactment of 1952. Thus, at that time, there were no specific rules and procedures to guide the *qadi* (judge) in conducting marriage and divorce in Kuala Lumpur. The *qadi* (judge) usually exercised his discretion in this matter and the procedure they followed was still that prescribed by the Rules, 1967 despite the fact that there was no legal enforcement.²⁰

The provisions on *hakam* were also provided for under the old legislation of various states in Malaysia.²¹ 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.²²

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.²³

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.²⁴

divorce and the *qadi* has approved to it. Before approving the divorce the *qadi* is required to do what he can to effect a reconciliation between the parties.

²⁰Maznah Hj. Haron, *Muslims Marriage and Divorce in the Federal Territory of Kuala Lumpur*, Academic Exercise, Faculty of Law, University of Malaya, 1976, Kuala Lumpur, p. 96; see also, Zaleha Kamaruddin, *op. cit.*, p. 147.

²¹M. Siraj, *Conciliation Procedures in Divorce Proceedings* [1965] 7 *Mal LR*, p. 321.

²²Pahang 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 ; Trengganu 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.

²³M. Siraj, *op. cit.*, p. 324; see also, Zaleha Kamaruddin, *Isu-isu Kekeluargaan dan Undang-undang*, ABIM, Kuala Lumpur, 1997, pp. 190 -191.

²⁴For 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

III. RELEVANT PROVISIONS ON HAKAM (ARBITRATOR)

The provisions concerning dispute resolution in family matters are contained in ss 47 (5) to (17), 48, 49 (4) and 51 (8) and (9) of the IFLA, 1984. Section 47, which deals with the appointment of conciliatory committee provides for the application by a husband or wife for a divorce by *talaq* or by order. Under this section, if the other party consents to the divorce and the court is satisfied that the marriage has irretrievably broken down, the court shall advise the husband to pronounce one *talaq* before the Court,²⁵ and shall record the fact of the pronouncement and send a certified copy of the record to the appropriate registrar²⁶ and to the Chief registrar²⁷ for registration.²⁸ In a situation, where the other party does not consent to the divorce or it appears to the court that there is reasonable possibility of a reconciliation, the court shall 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.²⁹

Briefly, s 48 provides for the arbitration by *hakam* if the court is satisfied that there are constant quarrels between the parties to a marriage. If the *hakams* are of the opinion that the parties should be divorced but are unable to order a divorce, the court shall appoint other *hakams* and shall confer on them authority to order a divorce.

In s 49 (4), if the husband does not agree to a divorce by redemption³⁰ or does not appear before the Court as directed, or where it appears to the Court that there is a reasonable possibility of a reconciliation, the Court shall appoint a conciliatory committee as provided under s 47 and that section shall apply accordingly.³¹ This subsection allows the court to refer the case filed under s 49 to the conciliatory committee.

The other relevant provision is section 51(8) and (9) which provide if after a revocable divorce³² the husband pronounces a *ruju*³³ and the wife has consented to the *ruju*, she may, on the application of the husband, be ordered by the Court to resume conjugal relations, unless she shows good cause to the contrary, according to *hukum syarak* (syariah rules) in which case the Court

custom of a community which is not contrary to the general principles of Shari'ah should be upheld.

²⁵The IFLA, subsection (3) of section 47.

²⁶*Ibid.*, s 2 (1) states "Registrar" means a Registrar of Muslim Marriage, Divorces, and *Ruju* appointed under s 28, and includes a Deputy Registrar and an Assistant Registrar.

²⁷*Ibid.*, s 2 (1) states "Chief Registrar" means a Chief Registrar of Muslim Marriages, Divorces, *Ruju* appointed under s 28.

²⁸*Ibid.*, subsection (4).

²⁹*Ibid.*, s 47 (5). This provision on Conciliatory Committee contains seventeen subsections.

³⁰The word redemption is used as it is a translation of the Malay word for *khulu* that is '*cerai tebus talaq*'. In *khulu* divorce the wife may offer to pay a certain sum (usually the amount of her dower) to her husband in return for his releasing her from the bonds of matrimony; or the husband may offer to divorce his wife in return for a fixed amount of compensation. It is not necessary that this compensation shall be monetary, except in Shafi'e law. See, El Alami, Dawoud, et al., *Islamic Marriage and Divorce laws of the Arab world*, CIMEL and Kluwer Law International, London, 1996, p. 27.

³¹The literal interpretation to the phrase '*that section shall apply accordingly*' is that s 48 will also be applicable whenever relevant.

³²It refers to the type of divorce that can be revoked by the husband.

³³The IFLA, s 2 (1) states that '*ruju*' means a return to the original married state.

shall appoint a conciliatory committee as provided under s 47 and that section shall apply accordingly. Subsection (9) states if after a revocable divorce the husband pronounces a *ruju*^c but the wife has not consented to the *ruju*^c for reasons allowed by *hukum syarak* she shall not be ordered by the Court to resume conjugal relations, but the court shall appoint a conciliatory committee as provided under s 47 and that section shall apply accordingly.³⁴ The above subsections give protection to a wife to safeguard her right from her ex-husband. This is especially so if a revocable divorce takes place with a revenge from the husband. He may revoke the divorce with the intention to take revenge on the wife and she will suffer as a result of such a relationship. In order to avoid this, subsection (8) and (9) are included in the IFLA, 1984 so that the conciliatory committee can be appointed to look into the matter. Thus, it is the role of the conciliatory committee to investigate further the problem between the couple and to report it to the court.

In the case of *Siti Hawa v Mohamed Redzuan*³⁵ the husband divorced his wife on 14 August 1989 but he revoked the divorce on 27 August 1989. The learned trial judge held that the revocation was valid. The wife appealed and stated that she did not want to go back to the husband. The Appeal Board held that in the circumstances of the case it had no option but to confirm the revocation. The wife could however, if she wished to do so apply under s 51 (9) of the IFLA, 1984 for the case to be referred to the conciliatory committee and to *hakam*.

IV. ANALYSIS OF THE PROVISIONS

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

A. Definition

Section 48 of the IFLA, 1984 is called “arbitration by *hakam*”. There is no definition of *hakam* provided for under this section. The Chief Judge of the Syariah Court (Federal Territory) explained that the word *hakam* was used in the IFLA, 1984 to denote the person conducting the arbitration.³⁶ The IFLA, 1984 does not use the term *tahkim* to refer to arbitration in family disputes. However, there has been suggestion that it be used in other types of disputes such as commercial, international and industrial disputes.³⁷ Thus, for the

³⁴*Ibid.*

³⁵(1990) 1 JH 180.

³⁶Formal interview with the Chief Judge of Federal Territory, Shiekh Ghazali Abdul Rahman in November 1999. He is currently the Director General of the Syariah Judicial Department.

³⁷There has been suggestion to introduce some provisions on *tahkim* to the “Undang-undang Acara Mal Mahkamah Shari’ah Wilayah Persekutuan 1990 (Bill)” in order to encourage Muslims to submit their disputes to *tahkim* in accordance with Islamic Law. It is proposed that “facilities should be made available to the Muslims in Malaysia for disputes between them to be heard and determined in accordance with Islamic Law, i.e., disputes of a civil nature which the Shari’ah court has the jurisdiction.” Salleh, Wan Hamzah in Othman, Mahmud Saedon, *Institusi Pentadbiran Undang-undang dan Kehakiman Islam*, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1996, p. 273.

purpose of the discussion under this chapter the term *hakam* means relevantly both arbitration (the institution) and arbitrator i.e., the person.³⁸

Section 2 (3) of IFLA, 1984, however, states that:

“For the avoidance of doubt as to the identity or interpretation of the words and expressions used in this Act that are listed in the schedule, reference may be made to the Arabic script form for those words and expressions shown against them therein.”

In the schedule³⁹ the word *hakam* appears in the Arabic text exactly as in the classical law. Thus, if any difficulty arises as to the meaning of the word *hakam*, the interpretation as according to Islamic Law will prevail. It is suggested that the definition of *tahkim/hakam* should be provided for under the IFLA, 1984. This definition can be a guideline for the court in giving the necessary instructions to the members of the conciliatory committee and of *hakam*. Perhaps, the definition of *tahkim* as defined by some Muslim jurists in their writings can be adopted.

B. *The Relationship between s 47 (5) and 48 of the IFLA, 1984*

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 Qur'an that in the case of marital disputes, this method of settlement should be adopted.⁴⁰ The appointment of the conciliatory committee is not stated either in the Qur'an or the *Sunnah*. However, it can be defended that it is based on *al-siyasah al-shar'iyah* (*Shari'ah*-oriented policy)⁴¹ because of the need to have a committee that can investigate further the causes of conflict between the parties.⁴² The relationship between these two sections can be described as follows;

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,⁴³ the conciliatory committee and

³⁸In Arabic language *hakam* refers to the person that is the arbitrator who settles a dispute whereas *tahkim* refers to the institution or the process. See, The Encyclopaedia of Islam, Luzac & Co., London, 1979, Vol. III, p. 72.

³⁹See, the IFLA, schedule to s 2 (3).

⁴⁰Al-Qur'an; al-Nisa' ; 35.

⁴¹Concerning *al-siyasah al-shar'iyah*, Ibn al-Qayyim al-Jawziyyah in *Turuq al-Hukmiyyah fi al-Siyasah al-Shar'iyah*, 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 *Qur'an* and the *Sunnah*.

⁴²Informal 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*.

⁴³The IFLA, ss 47 (6) and 48 (2).

hakam must conduct the reconciliation process in accordance with the directions of the court⁴⁴ and the court has the authority to remove the conciliatory committee and *hakam* should they be unsuccessful in their effort as directed.⁴⁵ It seems that there are overlapping roles between the conciliatory committee and *hakam* as reflected from these similar provisions.

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 48.⁴⁶ However, there is no clear guideline to assist the court in deciding which section is to be applied.

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*^c.
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 (further relationship of s 47 and 48 can be seen below).

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*^c of the parties.

C. 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.⁴⁷ 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 Shari^cah 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

⁴⁴*Ibid.*, ss 47 (7) and 48 (3).

⁴⁵*Ibid.*, ss 47 (8) and 48 (4).

⁴⁶It 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.

⁴⁷The IFLA, s 47 (5).

case of *Abdul Razak v Siti Jamah*⁴⁸ 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*⁴⁹ the husband had applied for divorce to the *Shari'ah* 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 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 Syariah court to confirm the divorce. The judge of the Syariah 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 Syariah 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.

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 Qur'an.⁵⁰

In *Zainab Mahmood v Abdul latif Jusoh*⁵¹ the respondent had applied to the Shari'ah 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 effected on equitable terms in accordance with the teachings of the Islamic law.

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.

⁴⁸(1988) 7 JH 84.

⁴⁹(1993) 9 JH 237. This case was appeared before the Syariah Appeal Court of Kuala Lumpur.

⁵⁰See, the Qur'an ; al-Baqarah ; 229.

⁵¹(1991) 8 JH 297.

Thus, a female relative may be appointed to represent a party to be in the conciliatory committee.⁵² Women are allowed to be appointed for the conciliatory committee as they are considered to be representatives of the parties and not as *hakams*.⁵³

The court after receiving the names of 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.⁵⁴ 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.⁵⁵ 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*.⁵⁶

In appointing the two persons under subsection (5), the court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.⁵⁷ 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.⁵⁸

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.⁵⁹ 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.⁶⁰

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

⁵²For example, in the case of *Tumiran bt. Othman V. Kamarul Zaman bin Abdul Rahim* (Civil case, no. 177/90 unreported) the husband had appointed his sister as his agent. In another Civil case no. 1119/98 the plaintiff appointed his sister to represent him.

⁵³In *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.

⁵⁴Formal interview with Zawannah Muhammad, the Chairman of the conciliatory committee of Federal Territory, in November, 1999.

⁵⁵Informal interview with the Officer of the Syariah Court of Federal Territory.

⁵⁶*Ibid.*

⁵⁷The IFLA, s 47 (6)

⁵⁸*Ibid.*, s 47 (7)

⁵⁹*Ibid.*, s 47 (8)

⁶⁰*Ibid.*, s. 47(9)

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.⁶¹ 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 to the court.⁶² It is submitted that from the cases analysed in the Syariah Court of Federal Territory, this six months period is more than enough for the conciliatory committee to effect a 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.

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.⁶³ 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.⁶⁴

Subsection (12) further provides that '*peguam sharie*' (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 leave of the conciliatory committee.⁶⁵

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.”⁶⁶

And subsection (14) then states:

“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

⁶¹Formal interview with Zaky Muhammad, Registrar of the Shari'ah court of Federal Territory in 1999.

⁶²*Ibid.*

⁶³The IFLA, 1984, s. 47(10)

⁶⁴*Ibid.*, s. 47 (11)

⁶⁵*Ibid.*, s 47 (12). This provision is similar with the provision provided for under s 106 (5) (c) of the LRA.

⁶⁶*Ibid.*, s 47 (13)

the husband refuses to pronounce one *talaq*, the court shall refer the case to the *hakam* for action according to s 48.”⁶⁷

In *Rosilah Abu Kassim v Abdul Rahman Ibrahim*⁶⁸ 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 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 a reconciliation and they advised that a divorce should be effected by *talaq* or *khulu*^c. 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 subsection (5) as stated in the following subsection (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

⁶⁷*Ibid.*, s 47 (14)

⁶⁸(1991) 8 JH 249.

- (e) where the Court is satisfied that there are exceptional circumstances which make reference to a conciliatory committee impracticable.⁶⁹

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.⁷⁰ 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.⁷¹

The situations provided for under subsection (15) are the exceptions to the appointment of the conciliatory committee. It is felt that the conciliatory committee shall not apply to subsection (15) as the wife can apply for divorce under sections 50 (1) and 52 (1) i.e., on the ground for *khulu*^c and *fasakh* (annulment of marriage). Furthermore as the attendance of the parties or their representatives before the conciliatory committee is required, in the 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.

Prior to its substitution in 1994,⁷² subsection (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 subsection (16) provides that a *talaq raj‘i* (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 current one has specified the word ‘a *talaq*’ of the former subsection (16) to the word ‘*talaq raj‘i*’. The last subsection of s 47 i.e., (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.”⁷³

It is submitted that the main objective of the conciliatory committee under subsection (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 a reconciliation between them.⁷⁴ One senses 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 s 106. Essentially this provision assists the judge in his proper management of the

⁶⁹*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 subsection (iii).

⁷⁰See, subsection (15) (e) where the term exceptional circumstances is used.

⁷¹There 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.

⁷²In 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.

⁷³The IFLA, s 47 (17).

⁷⁴See, the case of *Razimah Haneem v Yusuf Hasbullah* (1993) 9 JH 237 and *Zainab Mahmood v Abdul Latif Jusoh* (1991) 8 JH 297.

causes of the breakdown of the marriage.⁷⁵ The report of the committee will be extended to the judge who will then take it into account in his judgement over the case.⁷⁶ 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 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 i.e., the provision on *hakam*, that, as the cases (which will be discussed later) will show clearly this section seems to be an impediment to the application of s 48 i.e., the practice of *hakam* in Malaysia.

D. 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 shara'* two *hakams* to act for the husband and wife respectively.⁷⁷ The appointment of *hakam* may also be a consequence of the failure of the conciliatory committee under s 47 (14) to effect a reconciliation between the couple, and the subsequent failure of the court to effect the pronouncement of one *talaq* by the husband before the court⁷⁸ 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;

1. Voluntary or mandatory

The appointment of *hakam* under this provision is in line with the Qur'anic commandment that in the case of marital disputes, two *hakams* should be appointed.⁷⁹ 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.

In Jordan, Article 132 of the Law of Personal Status of 1976 uses the word 'shall' when it orders the judge to refer the dispute between the husband and wife to *hakam*.⁸⁰ It is provided that "if the petition for judicial divorce is by the wife and she proves the husband's harm towards her the judge shall

⁷⁵See, the case of *Razimah Haneem v Yusuf Hasbullah* (1993) 9 JH 237 and also *Zainab Mahmood v Abdul Latif Jusoh* (1991) 8 JH 297.

⁷⁶*Ibid.*

⁷⁷The IFLA, s 48 (1).

⁷⁸The 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*.

⁷⁹Al-Qur'an ; al-Nisa' ; 35.

⁸⁰Similarly under Law No. 100, 1985 of Egypt where the word 'shall' is used.

make efforts to bring about reconciliation between them and if he is unable to do so he shall caution the husband to reconcile with her and shall defer the case for a period of not less than one month. If there is no reconciliation between them he shall refer the matter to arbitrators.”⁸¹

Article 132 then states, “If the claimant is the husband and he proves the existence of dispute and discord the judge shall make efforts to bring about reconciliation between them and if there is no reconciliation the judge shall defer the claim for a period of no less than one month in the hope of a reconciliation. After the elapse of this period if he insists upon his claim and no reconciliation has taken place the judge shall refer the matter to arbitrators.”⁸²

In Pakistan, the relevant provision in s 7 (4) of the Muslim Family Law Ordinance⁸³ states:

“Within 30 days of the receipt of notice under sub-section (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.”

On this provision, S. A Rahman J., in the case of *Ali Nawaz Gardezi v Muhammad Yusuf*⁸⁴ commented that:

“The section clearly contemplates a machinery of conciliation whereby a husband wishing to divorce his wife unilaterally, may be enabled to think better of it, if the mediation of others can resolve the differences between the spouses. The *talaq* pronounced is to be ineffective for a period of 90 days from the date on which notice under subsection (1) of this section is delivered to the Chairman and this period is to be utilised for the attempt at reconciliation....”⁸⁵

Although s 7 (1) of the MFLO uses the word ‘shall’, the requirement to notify a divorce to the Chairman is, in effect, optional and not compulsory and consequently the constitution of Arbitration Council under the MFLO is not compulsory.⁸⁶ However, it was held in the case of *Mumtaz Mai v Ghulam Nabi*⁸⁷ that the enforcement of the MFLO, 1961, has, however, made it

⁸¹The Law of Personal Status, 1976, Article 132 a.

⁸²*Ibid.*, Article 132 b.

⁸³The MFLO, 1961 has made important legal reforms to the Muslim personal law of Pakistan. It modified certain aspects of traditional Muslim family law, which had come in for criticism, especially by women’s groups. It was welcomed because, in essence, several provisions put restrictions on the unilateral powers of the Muslim husband to divorce and to take more than one wife. See, Pearl, D and Menski, W, *Muslim Family Law*, Sweet and Maxwell, London, 3rd ed., 1998, p. 48.

⁸⁴(1963) PLD, SC., p. 51.

⁸⁵*Ibid.*, p. 74.

⁸⁶Pearl, D and Menski, W, *op. cit.*, p. 372.

⁸⁷(1969) PLD , BJ, p. 10.

incumbent and in cases arising after its promulgation reference to Arbitration Council in cases covered by s 8⁸⁸ is a precondition to recourse to the Courts of law.

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.⁸⁹

2. 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.⁹⁰ There are different views of the Muslim 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, the majority of jurists views that it is the judge who should be responsible for the appointment of arbitrators.⁹¹

In Pakistan, the interpretation that the word “you” as referring to the judge has been accepted in many rulings. For example, in the case of *Umar Bibi v Muhammad Din*⁹² it was held that the word contains a direction to the *‘ulul al-amr* (persons in authority and in charge of community affairs) or *qadi* to appoint arbitrators.

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 i.e., at the time of the Prophet and his Companions where the appointment of *hakam* came from any other member of the society. In this relation David Pearl⁹³ remarks that:

“The traditional Muslim law of divorce remained a matter of extra-judicial arrangement between the spouses and their families, with minimal involvement of official agents and generally no need for a court or other state functionary to play a legal role in the dissolution of a Muslim marriage.”

⁸⁸The MFLO of s 8 provides where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talaq*, the provisions of s 7 shall, *mutatis mutandis* and so far as applicable, apply.

⁸⁹Ahmad, K. N, *Muslim Law of Divorce*, Kitab Bhavan, New Delhi, 1978, p. 277.

⁹⁰The provisions in Jordan and Egypt also empower the judge to appoint *hakam*.

⁹¹*Ibid.*

⁹²(1945) A.I.R., Lahore, 51. The decision was reiterated in the later case of *Balqis Fatima v. Najm-Ul- Ikram Qureshi*, 1959, P.L.D. Lahore, p. 566.

⁹³Pearl, D and Menski, W, *op. cit.*, p. 286.

Ahmad,⁹⁴ 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.

3. Appointment of the close relatives

In appointing *hakam*, the court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.⁹⁵ 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 are 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.⁹⁶ 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 shara’* (rules and principles of Shari’ah).⁹⁷ This requires that appointed *hakam* must be a person who knows *hukum shara’*. If for example, a close relative available does not know about *hukum shara’* he should not be preferred to a non-relative whose knowledge on Shari’ah is adequate. It is observed that in practice the court also allows the appointment of a person who is not the relative of the parties as *hakam*.⁹⁸

In Jordan, article 132c of the Law of Personal Status of 1976⁹⁹ which is in conformity with the above Qur’anic verse provides that the *hakam* appointed must be from the family of the wife and the other from the family of the husband if possible. If it is not feasible (that they be from the families of the spouse) the judge shall appoint two men of experience, integrity and with the ability to bring about reconciliation.¹⁰⁰

⁹⁴Ahamd, K. N, *op. cit.*, p. 279.

⁹⁵The IFLA, s 48 (2).

⁹⁶*Ibid.*

⁹⁷The IFLA, s 48 (3).

⁹⁸For example, in the case of *Talib v. Che Sepiah* the *qadi* of Kota Bahru under s 74 (4) of the Shari’ah 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.

⁹⁹This law was based on schools other than Hanafi School, but provision is made in Article 180 for reference to be made to the most appropriate opinion of Abu Hanifah in the case where no specific textual provision is found.

¹⁰⁰Similar provision is contained in Article 7 of Egypt Law No. 100 of 1985 which requires that *hakam* must be from the family of the spouses where possible or if not, others who

E. 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.¹⁰¹ However, it states that *hakam* should conduct the case in accordance with the directions given by the court and *hukum shara*.¹⁰² 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.¹⁰³ There is, therefore, no detailed provision on the qualification of *hakam* under the IFLA, 1984.

In Jordan, it is stated that *hakam* must be two men of upright character who have the ability to bring about reconciliation.¹⁰⁴ Thus, the Jordanian law too does not have detailed provision on the qualification of *hakam*.¹⁰⁵

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.

F. 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.”¹⁰⁶

In al-Saqaf,¹⁰⁷ 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

have knowledge of their situation and the ability to bring a reconciliation between them.

See also Muslim Family Law Ordinance, 1961 of Pakistan.

¹⁰¹The IFLA, s 48 (2).

¹⁰²*Ibid.*, s 48 (3).

¹⁰³*Ibid.*, s 48 (4).

¹⁰⁴Article 132 c of the Law of Personal Status of 1976.

¹⁰⁵There is no detailed provision on the qualification of *hakam* in other Middle Eastern countries such as Syria, Tunisia and Egypt. They also state in brief that *hakam* must be upright persons.

¹⁰⁶The IFLA, s 48 (4).

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 subsection (4) of the IFLA, 1984 is in conformity with the opinion of the jurists on this issue.

In the case of *Che Pah v. Siti Rahmah*¹⁰⁸ 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^c)*. 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 1963.¹⁰⁹ Section 90A (1) of the Enactment states:

“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.”

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. The court, therefore, on 11 January 1976 appointed another *hakams* under s 90 A (2) of the Enactment. In this case, the *hakams* finally were able to get the agreement of the parties for a *khulu^c* divorce on the payment of RM 100 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.

It is interesting to note that the provisions in Jordan¹¹⁰ and Egypt¹¹¹ provide for the appointment of a third *hakam* if the two *hakam* disagree. This third *hakam* will act together with the other two *hakams* and in such a case, the decision of the majority shall be taken by the court.

G. Duration of the arbitration process

¹⁰⁷Al-Saqaf, al-Sayyid `Alwi Ibn al-Sayyid Ahmad, *Tarshih al-Mustafidin, Dar Ihya' al-`Arabiyah*, Egypt, n.d., p. 330.

¹⁰⁸(1974) 2 JH 244. This is a reported case in the old Enactment of Perlis, where the two *hakam* were appointed under s 90A (1) of the Administration of Muslim Law Enactment 1963.

¹⁰⁹This is the Act applicable in the State of Perlis prior to the current legislation i.e., Islamic Family Law Enactment of Perlis, 1992.

¹¹⁰Article 132 h of the Law of Personal Status of 1976.

¹¹¹Article 11 of the Law No. 100 of 1985.

The provisions in s 48 do not provide a time frame for the *hakam* to perform its job. There was no reference available from the jurists, except for article 1846 of the Mejjella.¹¹² However in Egypt, the time frame for arbitrators to perform their task has been specified. The Law No. 100 of 1985 provides that:

“The decree to appoint arbitrators shall include the date that their task shall start and finish, which shall not exceed a period of six months, and the court shall notify the arbitrators and the opposing parties of this. It shall make each of the arbitrators swear an oath that they will perform their task justly and honestly.”¹¹³

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.¹¹⁴

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 Shari’ah, 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.¹¹⁵

H. 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.¹¹⁶ 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.¹¹⁷

¹¹²Article 1840 of the Mejjella states:

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

¹¹³Article 8 (a) of the Law No. 100 of 1985.

¹¹⁴Article 8 (b) of the Law, 1985. In this regard there is no time frame for *hakam* under Article 132 of the Law of Personal Status of 1976.

¹¹⁵In *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.

¹¹⁶The IFLA, s 48 (5).

¹¹⁷*Ibid.*, s 48 (6).

The above subsection (5) is based on the opinion of the Shafi'i 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 subsection (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 agents.¹¹⁸ 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 subsections (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 *raj'i* (revocable repudiation)¹¹⁹ or *ba'in* (irrevocable repudiation).¹²⁰ 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 Jordan, *hakams* shall be required to present their report to the judge with the conclusions they have reached and the judge shall give judgement on the basis of this if the report is in accordance with the provisions of article 132. Thus, in Jordan the judgement will be given based on the report of *hakams*.

In Pakistan, the High Court of Lahore in the case of *Balqis Fatima v Najm-Ul-Ikram Qureshi*,¹²¹ based on verse 229 of *surah* al-Baqarah, held that the *hakam* has the power to separate the spouses and so dissolve their marriage. The court said:

¹¹⁸Imam 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, or in case reconciliation is brought about between husband and wife, is valid.

¹¹⁹The effect of *talaq raj'i* 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.

¹²⁰This 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. 120-1.

¹²¹(1959) P.L.D Lahore, p. 566. The decision of this case was in contrast with the Supreme Court' decision in the case of *Sayeeda Khanam v Mohammad Sami* (1952) P.L.D Lahore, 113. It was decided that if wives were allowed to dissolve their marriage without consent of their husbands by merely giving up their dowers, the institution of marriage would be meaningless, as there would be no stability attached to it.

“...the limits of Allah will not be observed, that is, in their relations to one another, the spouses will not obey God, that a harmonious married state as envisaged by Islam, will not be possible.”

Thus, the court in the above case through its interpretation of Islamic sources, departed from the traditional Hanafi law and allowed judicial dissolution of a marriage by a judge or *hakam*.¹²²

In Malaysia, the practice of the court on this issue can be seen in the case of *Talib bin Salleh v. Sepiah*.¹²³ 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 Shari'ah 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 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 Shafi'i school and was given power to pronounce a divorce, he pronounced the '*tebus talaq*' (*khulu'*) on payment of RM 100. On appeal, the Board of Appeal dismissed the appeal and confirmed the order of the judge.

Another case where *hakam* was appointed is *Nerat bt. Musa v. Ahmad bin Kancil*.¹²⁴ 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 Shari'ah 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 RM 150 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

¹²²Zaleha Kamaruddin, *op. cit.*, p. 173.

¹²³(1979) 1 JH (1) 84. This case was decided by the Shari'ah court of Kelantan under s 69 of the Shari'ah Court and Matrimonial Causes Enactment 1966 and *hakam* was appointed under subsection (4) of the Enactment.

¹²⁴(1965) 3 JH 101. This is another reported case from Perlis where *hakam* had been appointed to settle the dispute between the parties.

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.

V. OBSERVATIONS AND COMMENTS

The Family Counselling and Development Unit of the Division of Administration of Syariah of Federal Territory, responsible for the running and overall management of the conciliatory committee, considers that this committee is similar to *tahkim* (i.e., *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 (i.e., s 47) instead of *hakam* (i.e., 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.¹²⁵

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.¹²⁶ Hence, their conduct skewed from striving to reconcile the parties, to defending respective parties.¹²⁷ 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.¹²⁸

It is observed that some of the cases filed in the Syariah 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

¹²⁵See, subsection (14) of 47.

¹²⁶Formal interview with Zawanah Muhammad, head of the Family counselling and Development Unit of the Federal Territory, Kuala Lumpur in November, 1999.

¹²⁷*Ibid.*

¹²⁸See, Memorandum on Reform of the Islamic Family Laws and the Administration of Justice in the Syariah System in Malaysia, submitted to the Government of Malaysia in March 1997, at <http://www.geocities.com/bernhardng/memorandums/mreform.htm>.

circumstances of a case do not yet fulfil the definition or qualify *shiqaq*. This supports further the non-application of the provisions of *hakam*.

It can be seen from the cases filed in the Syariah 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*^c under s 49 or *ta'liq* divorce under s 50 of the IFLA, 1984.¹²⁹

It is submitted that the conciliatory committee has its inspiration from *hakam* and co-opted with some acceptable principles from s 106 of the LRA, 1976. Its application results in the non-applicability of provisions on *hakam*. The observation from cases filed in the Syariah courts and opinions expressed so far, imply that the results of the deliberations can be better achieved; i.e., in keeping with the spirit of the verse 35 of al-Nisa', if the provisions of *hakam* be improved, and applied in practice.

VI. 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 Shafi'i school, the legislator, in drafting the IFLA, 1984 has also adopted the views of other schools especially the Malikis school.¹³⁰ For example, the authority of *hakams* to order a divorce or *khulu*^c 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 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 alternative dispute resolutions such as mediation and arbitration have 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.

¹²⁹Formal interview with Zaky Muhammad, Registrar of the Shari'ah Court of Federal Territory of Kuala Lumpur in November 1999.

¹³⁰In Malaysia the most prevalent school is the Shafi'i 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.