








## Comparative Analysis of Reconciliation Procedures in Syariah and Civil Courts

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### ABSTRACT

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#### KEYWORDS:

Family Law  
Civil  
Syariah  
Reconciliation  
Divorce

#### CITATION:

Aishah Mohd Nor. (2022). Comparative Analysis of Reconciliation Procedures in Syariah and Civil Courts. *Malaysian Journal of Social Sciences and Humanities (MJSSH)*, 7(10), e001854.  
<https://doi.org/10.47405/mjssh.v7i10.1854>

Reconciliation in divorce proceedings has been introduced in family courts in dealing with application for divorce. This study focuses on the functions, the appointment of committees, and the procedures of reconciliation in Shariah courts and Civil courts to compare the practice of laws between Section 47(5) to (17) of the Islamic Family Law (State of Selangor) Enactment 2003 (IFLSE 2003) and Section 106 of the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976). This study was conducted through doctrinal and comparative legal research of the existing literature, including academic articles, statutes, and case laws relating to reconciliation. The findings establish the similarities and differences of both statutes. This study suggests that a reconciliation before a legal proceeding may employ a subtler approach for out-of-court negotiation leading to potentially better results.

**Contribution/Originality:** This study contributes to the existing literature on the reconciliation process as part of alternative dispute resolutions in marital disputes. This study employs a comparative legal approach by establishing the similarities and

differences between civil law and Shariah law in Malaysia.

## 1. Introduction

Reconciliation is one of many alternatives in dispute resolution involving family matters. In a divorce application, if the Court finds any reasonable possibility of saving a marriage between the parties, the Court may order the parties to reconcile. This compulsory reconciliation is stipulated in Law Reform Act for non-Muslims and in Islamic Family Law Act/Enactment for Muslims. For comparison purposes, this paper is focusing on the Islamic Family Law (State of Selangor) Enactment 2003 (IFLSE 2003) for Muslims who reside in Selangor and Law Reform (Marriage and Divorce) Act 1976 (LRA 1976) for non-Muslims. The objective of this paper is to compare the provision and practice of laws between Shariah Court and Civil Court by referring particularly to Section 47 of the Islamic Family Law (State of Selangor) Enactment 2003 (IFLSE 2003) and Section 106 of the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976).

## 2. Methodology

This study adopts doctrinal analysis and comparative legal study. The researchers analysed articles, statutes, and case laws related to reconciliation in Section 47 IFLSE 2003 and Section 106 LRA 1976 before comparing the laws and practices of these two.

## 3. Provision under Section 47 of the Islamic Family Law (State of Selangor) Enactment 2003 (IFLSE 2003)

Section 47 IFLSE 2003 provides that if both parties mutually consent to the divorce and the Court is satisfied that the marriage has irretrievably broken, the Court shall advise the husband to pronounce one *talaq* before the Court.

It says:

(1) A husband or a wife who desires divorce shall present an application for divorce to the Court in the prescribed form, accompanied by a declaration containing—

- (a) particulars of the marriage and the names, ages and sex of the children, if any, of the marriage;
- (b) particulars of the facts giving the Courts jurisdiction under section 45;
- (c) particulars of any previous matrimonial proceedings between the parties, including the place of the proceedings;
- (d) a statement as to the reasons for desiring divorce;
- (e) a statement as to whether any, and if so, what steps had been taken to effect reconciliation;

(3) If the other party consents to the divorce and the Court is satisfied after due inquiry and investigation that the marriage has irretrievably broken down, the Court shall advise the husband to pronounce one *talaq* before the Court.

The Court shall record the fact of the pronouncement and send a certified copy of the record to the appropriate registrar and the Chief registrar for registration (Section 47(4)). However, if one party does not consent to the divorce, the Court shall investigate

whether there is *shiqaq* (matrimonial discord) in the marriage or any chance of reconciliation between the parties. This investigation is essential for the Court to decide whether to apply Section 47(5), which is to order a reconciliation for the parties, or not.

Section 47(5) provides:

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.

### **3.1. Conciliatory Committee (Jawatankuasa Pendamai)**

#### *3.1.1. Definition and function*

Section 47(5) to (17) IFLSE 2003 deal with the appointment of the Conciliatory Committee (after this will be referred as CC). Conciliation under Section 47(5) is one of the efforts of amicable dispute settlement under the Shariah law, aside from *Tahkim* and *Sulh*. It is an intervention in a matrimonial dispute where an independent person helps to achieve an amicable settlement by proposing solutions to the parties (Bouheraoua, 2010).

The main objective of having the CC is to control the number of divorces among the Muslim community, especially if there is a possibility of saving the marriage between the parties. The role of the Committee is to advise the parties to a reconciliation between them. This principle can be seen in the case of *Razimah v. Yusuf (1993) 9 JH 237*, where the husband had applied for divorce under Section 47. As the wife did not agree to the divorce, the Court appointed the CC to reconcile the parties. However, during the process of appointment, the husband had pronounced a *talaq* divorce outside Court without the permission of the Court. The divorce was pronounced in the presence of two witnesses, without the wife, who was only told of the divorce two months later. The husband then applied to the court to validate the divorce. Without calling the wife and the witnesses, the judge approved the divorce, relying solely on the husband's statement. On appeal, the Shariah Court of Appeal set aside the trial judge's decision and ordered the case to be retried to comply with Section 47. This case highlights that if one of the parties does not agree to the divorce and the court thinks it is necessary to look further into the case, it will appoint the CC which enables the court to control and manage the divorce process in the society.

According to Abdul (2005), the formation of CC is based on the concept of *al-siyasah al-shar'iyah* (*Shariah-oriented policy*) which refers to the policy made by the authority for the sake of the society. In this issue, it is based on the needs to establish a committee that can investigate the causes of conflict between the parties and try to reconcile them. Referring to the law, the role of the CC is to conduct a reconciliation process following the directions of the court. In the event the process of reconciliation is not successful, or the court feels that the committee has not completed the task properly, then the court has the authority to remove the committee and appoint another committee to continue with the similar task as provided in section 47(7) and (8). The process would take not more than six months and would give impact and prolong the process of divorce.

Therefore, the appointment of this CC is based on the order of the court and they need to report the outcome within the time given. This subsection (8) elaborates that when one party does not agree to the petition of divorce, and it appears to the Court that there is a potential reconciliation between the parties, then this CC will be formed, which consists of a Religious Officer as chairman and two representatives: one from the husband and another from the wife (Md Abdul Salam et al., 2021).

The appointment of the two representatives is primarily given to family members for the best interest of the parties as they may have adequate knowledge of the affairs and encourages the best solution for both. This is provided further in subsection (6):

In appointing the two persons under Subsection (5), the Court shall, where possible, give preference to close relatives of the parties, knowing the circumstances of the case.

Nonetheless, this requirement is not obligatory (Ghazali et al., 2006). In the absence of family members, the representatives may be of close friends to the parties as long as they are honest and can be trusted by both parties to assist them in resolving disputes. The representatives must comprehend the causes of the conflict and act in the parties' best interests. There is no explicit gender requirement under this Subsection for men or women to be appointed as representatives of the parties (Md Abdul Salam et al., 2021).

During the reconciliation session, the husband and wife must be allowed to express their opinions without interference from outsiders, including the Syarie lawyers. The discussion is conducted privately between parties, their representatives, and a Religious Officer as the chairman (Majid & Azhari, 1989; Majid, 1993; Narowi et al., 2021).

The process is provided in detail in subsection 10 to 14 of the IFLSE 2003:

(10) 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.

(11) 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 the division of property, and regarding other matters related to the marriage.

(12) No Syarie Lawyer shall 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.

(13) Where the Committee reports to the Court that reconciliation has been affected and the parties have resumed their conjugal relationship, the Court shall dismiss the application for divorce.

(14) 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 shall advise the husband to pronounce one talaq before 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 Section 48.

Upon completion of the session, the CC must send a report or recommendation to the Court on whether the parties should divorce or otherwise. If reconciliation can be established, the Court will drop the divorce application. Otherwise, the Court will advise the husband to pronounce divorce (*talaq*) in front of the Court or refer to *Hakam* (Dahalan, 2019).

### 3.1.2. Exemption of having Conciliatory Committees

Not all divorce applications will be subjected to the process of having CC to assist with reconciliation. The law has proved a list of cases that are exempted from undergoing the process of CC.

Section 47 (15) provides:

- (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.

The appointment of the Committee can be exempted in the above circumstances. Section 47(15)(e) stated that when the Court is satisfied that a reconciliation is impracticable, the parties can be omitted from the reconciliation procedure. This principle has been highlighted in the case of *Rosilah v Abdul Rahman (1991) 8 JH 249*, where the Court of Appeal held that the husband's act of threatening to kill or injure the wife if she makes a complaint about his failure to provide maintenance to the Shariah Court, is considered an exceptional circumstance that falls within the meaning of impracticable reconciliation. In a situation of coercion, there might be difficulty procuring neutral participation of both parties in the discussion, which inevitably leads to an ineffective settlement between the parties. Hence, the attempt at reconciliation is impracticable. The Board of Appeal highlighted Surah al-Baqarah, verse 229; "if they live together, they should live in mutual love and forbearance; however, if a separation is inevitable, they should separate with kindness.." and was satisfied that the existence of coercion would amount to impracticable reconciliation. It is therefore, excluded the appointment of the CC in their divorce proceedings under Section 47(15)(e).

### 3.1.3. Composition of the Conciliatory Committees

The CC appointed by the court consists of a chairman; a Religious Officer, together with two representatives of the parties; of close relatives or friends who know about the parties' affairs and would act for the parties' welfare. The law does not provide the definition of 'Religious Officer' and the gender of that person. In practice, the chairman of the CC is usually a religious officer at the Department of Islamic Religion (*Jabatan*

*Agama Islam Selangor, JAIS*), such as the Head of the Family Counselling and Development Unit (*Unit Perundingan dan Pembangunan Keluarga-UPPK*) or Head of Registration of Marriage, Divorce and Revocation of Divorce Unit ([Abdul, 2005](#)).

The 'Religious Officer' can be a male or a female. This principle can be seen in the case of *Zainab v Abdul Latif (1991) 8 JH 297* where the Board of Appeal had highlighted that the law does not limit the chairperson of CC must be a male. Therefore, a female Religious Officer may be appointed as the chairman of the Conciliatory Committee.

The persons appointed by the parties are replaceable (Section 47(8)). Thus, either party may dismiss their representatives and replace them with another. However, the Court must be informed and approve any replacements before the new person can represent the party.

### *3.1.4. Duration of Conciliatory Process*

Section 47(9) states;

The Committee shall endeavour to effect reconciliation within six months from the date of it being constituted or such further period as may be allowed by the Court.

The above Subsection allows the Conciliatory Committee to carry out its role of reconciliation within the specified period of six months. This period starts from the date the Court forms the Committee. After six months, the Committee must report whatever decision reached during the meetings to the Court. It has been analysed from the cases in the Shariah Court of Federal Territory that this six-month period is enough for the Conciliatory Committee to effect a reconciliation between the parties or to suggest any solution for the settlement of the parties' dispute ([Abdul, 2005](#)).

However, it is the discretion of the Court to extend the duration in cases where this six-month period has lapsed if it is deemed necessary.

The appointment of the Conciliatory Committee in Section 47(5) to (17) IFLSE 2003 was introduced as one of many alternatives in dispute resolution involving Muslim family matters. This practice seems to share similarities with Section 106 LRA for non-Muslims, which will be discussed below.

## **4. Reconciliation under Section 106 of the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976)**

As mentioned earlier, non-Muslims in Malaysia are governed by the LRA 1976 in all matters relating to marriage and divorce. The LRA has provided a provision which is almost similar to the IFLSE 2003 in promoting reconciliation in matrimonial disputes. According to the LRA, before the divorce petition can be made in the Court, the petitioner shall have recourse to the assistance and advice of such persons or bodies as may be made available to effect reconciliation and the term used is Conciliatory Body (after this will be called as CB).

Section 106 provides:



No person shall petition for divorce, except under sections 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties

The reason for having the reconciliation in marriage dispute was elaborated by the High Court in the case of C & A [1998] 6 MLJ 222. It says:

“It is obvious that the purpose and intent of s 106 is to reconcile parties where there is a reasonable probability of a reconciliation. In fact, s.106(5)(b) of the Act provides that together with the certificate it issues, the conciliatory body can make recommendations regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage. In other words, it is apparent that the elders of the religion, community, clan or association (see s 106(3)(a) of the Act) who might be even familiar with the parties and their situation in life could therefore make recommendation for the preservation of the property and the welfare of the minor children. I have also to consider if there is any willful refusal to refer to a conciliatory body. I have also to consider whether the parties are young and whether it is appropriate to write off their prospects of reconciliation as hopeless and whether the guidance of the conciliatory body which oft times has proven valuable in promoting a stable and satisfactory reconciliation, would prove beneficial to this case.”

#### **4.1. Reconciliation**

##### *4.1.1. Definition of reconciliation*

The law does not provide a proper definition of reconciliation. However, according to [Finer Report \(1974\)](#), reconciliation is defined as assisting the parties to a marriage to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving assents, or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, disposition of the matrimonial home, lawyers' fees, and every other matter arising from the breakdown which calls for a decision on future arrangements.’

The objective is to empower families to make the best decisions and reach the best solutions over the whole range of problems involved, placing primary emphasis on the family's practical needs at the time when the Court assumes control over the relationship between its members and their affairs. While reconciliation means reuniting the spouses, the aim of reconciliation is to encourage the parties to abandon the divorce petition and rescue their marriage.

##### *4.1.2. Function, Role and Power of the Conciliatory Body*

The aim of the having CB is to reconcile the estranged parties so that all matrimonial problems can be solved, and they can resume cohabitation. But if the CB fails to reconcile the parties, it will issue a certificate of non-reconciliation. Section 106(5)(b) of LRA 1976 states:

If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume married life together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it

thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage.

This Section confers the power on the CB to give recommendations relating to maintenance, division of matrimonial property, and custody of minor children to be attached with the certificate of non-reconciliation.

The CB may permit any family member to join the reconciliation session. The parties are not allowed to be represented by lawyers in this session. This is clearly stated in Section 106(5)(c):

No advocate and solicitor shall appear or act as such for any party in any proceeding before a conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.

The law clearly mentions that the parties can be represented by family members only, unless with the approval of the CB. It shows that if any friends or outsiders represent the party(ies), the approval of the CB must be obtained prior to the event. As the CB is part of ADR, the discussion is private and lawyers are not allowed to be in the session. In conducting the session, the chairperson of the CB is given full power based on his/her discretionary power and as for now, there are no specific rules in guiding them.

#### *4.1.3. Appointment of the Conciliatory Body*

The appointment of the CB is provided under Section 106(1) of LRA 1976. The provision states that no person shall petition for divorce, except under Sections 51 and 52, unless he or she has first referred the matrimonial difficulty to a CB and that body has certified that it has failed to reconcile the parties. This requires that any party who wants to petition for divorce to refer their matrimonial problems to this CB before the presentation of the petition. This has created a situation whereby interim orders are not immediately available because a person is barred from petitioning for a divorce without a certificate of non-reconciliation from the conciliatory body, and interim proceedings are an essential part of divorce proceedings.

The Court would only grant a dissolution of marriage after being satisfied that all efforts at reconciliation had been unsuccessful. Reconciliation attempts are essential prior to any petition for divorce, as clearly enunciated in Section 57 (2) of the LRA 1976. This Section clearly states that every divorce petition shall state the steps taken to affect reconciliation.

This can be seen in the case of *Jennifer Patricia Thomas v Calvin Martin Victor David* where the Court held that the procedural step taken by the wife to obtain a certificate from the CB under Section 106 would be sufficient to invoke the Act as it constitutes the pendency of matrimonial proceedings so that the wife is at the liberty to apply for the CB injunction against molestation under Section 103 of the LRA 1976.

However, a proviso to Section 106(1) provides exceptional circumstances where reference to the conciliatory shall not be applicable. The circumstances are:

- i. where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;



- ii. where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;
- iii. where the respondent has been required to appear before a conciliatory body and has willfully failed to attend;
- iv. where the respondent is imprisoned for a term of five years or more;
- v. where the petitioner alleges that the respondent is suffering from incurable mental illness; or
- vi. where the Court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.

The application of proviso (vi) of Section 106 can be seen in the case of *C v A*. The Court held that it is upon the petitioner to satisfy the Court that he had sought the assistance and advice of persons, namely his relatives, but failed since they have lived apart for 20 years. In this case, the petitioner petitioned for the dissolution of the marriage and was prepared to pay the costs. Before filing an answer to the petition, the respondent raised a preliminary objection that there was non-compliance with Section 106 of LRA 1976 since the reconciliation was unsuccessfully attempted by the petitioner's relatives and not by a CB as defined by Section 106(3) of the LRA 1976. Relying on the fact that since both parties had lived apart for over 20 years, counsel for the petitioner argued that this fact was an exceptional circumstance within the meaning of proviso (vi) to Section 106(1). The Court was satisfied that there is certainly no reasonable possibility of reconciliation. They live apart for 20 years without any contact with one another, which indicates the impracticability of both parties getting back together.

Another case that shows the application of proviso (vi) to Section 106(1) is *Vivian Lee Shea Li v Sia Chong Liang*. In this case, the husband (respondent) was charged with assaulting the wife (petitioner) and intentionally causing injury to the parents-in-law. The petitioner had filed the divorce petition and served it to the respondent. The respondent then raised a preliminary objection on the ground that the petitioner had failed to adduce any affirmation from any CB that efforts for reconciliation could not reconcile both parties. On the other hand, the petitioner stated that the requirement of Section 106(1) of the Act was not applicable in this case, relying on the provisions of proviso (vi) to Section 106(1) as there existed special or exceptional circumstances in her case, making the reference to the CB impracticable. The Judge dismissed the preliminary objections on the ground that there were exceptional circumstances on the part of the petitioner because the respondent had several times said that he wanted to commit suicide along with the children. On another occasion, he said he would throw acid on the petitioner. This endangered the life of the petitioner as well as the children. The respondent was charged under Section 506 of the Penal Code for the offence of criminal intimidation and Section 323 of the same Code for the offence of voluntarily causing hurt. He then pleaded guilty to both charges. This shows that the marriage had irretrievably broken down, and reference to the CB was impractical and fell under the proviso of Section 106(1) of LRA 1976. The Court added that reference to the CB would delay the process and even affect the petitioner's safety.

The Court also exempted the plaintiffs from referring the matrimonial difficulty to the CB before petitioning for divorce in the case of *Kiranjit Kaur Kalwant Singh v Chandok Narinderpal Singh*. The Court held that reference to a CB was not practical as the parties had been separated since July 2007, and the defendant was a resident of France.

However, in the case of *Chin Pei Lee v Yap Kin Choong*, the Court rejected the plaintiff's application for an order exempting the requirement to refer her to a CB for reconciliation before filing for divorce. In this case, the main issue requiring determination was whether the defendant was suffering from an incurable mental illness, thereby exempting the plaintiff from referring her marital problem to a CB under Section 106(1)(v) of the Act. Suraya Othman J held that there was no positive evidence to show that the defendant suffered from an incurable mental illness, and the plaintiff could not simply seek an exemption from referring her marital problem to a marriage tribunal just because she did not desire reconciliation. This reason is not justified and if accepted by the Court, would open the floodgates to abuse by any party treating marriage and divorce as a trivial matter that can be dealt with easily. The Judge further stated that the purpose of introducing Section 106 in the LRA 1976 is to encourage reconciliation. This purpose is clearly established in the Royal Commission on Non-Muslim Marriage, and Divorce report dated 15 November 1971.

The position is similar in the case of *P v S* where reference to the CB would not be impracticable as the wife still wanted the opportunity to be given to her to reconcile. In this case, the husband failed to establish the special circumstances arising from his marital difficulties that warranted the Court's granting of the divorce. The Court observed that even though the husband was no longer interested in the marriage, this should not be a reason to deprive the wife's opportunity to be heard as to how she wanted to reconcile before the CB. The Court held that both the petitioner and respondent were young, highly educated and professionals. They can still sit and discuss their matrimonial difficulties before a CB and state their views and suggestions to solve their marital problems amicably and professionally. If they still fail to come to a settlement, then only it can be said that their marriage has irretrievably broken down. The Court also considered the child's welfare involved in this matter, which should be the primary concern of both the petitioner and the respondent.

On the same note of exempting to refer to the conciliatory body, detailed discussion was seen in the case of *Robert Stevenson Kay v Stephanie Tan Min Chiu & Anor [2020] 1 LNS 1005*. In this case, the respondent (wife) made an application to strike out the petition for divorce filed by the petitioner (husband) as she claimed that the husband did not comply with Section 106 of the LRA 1976 in that he did not refer their marital conflict to a CB or seek an exemption from this Court from referring to a CB prior to filing the divorce petition. However, evidence shows that the dispute between the respondent and the petitioner has been going on for years. Both respondent and petitioner have filed numerous actions and applications in the Family Court of the Kuala Lumpur High Court, and decisions of the Family Court have been appealed to the Court of Appeal. In addition, over the years, the parties negotiated proposed settlements between them through their solicitors but to no avail. The Court was satisfied that exceptional circumstances existed and referring the parties to a CB was impractical. Given the background of the ongoing litigation between the husband and the wife at the Kuala Lumpur Family Court, settlement negotiations and mediation, the divorce petition by the husband would not have come as a surprise to the wife. With the long history of animosity between the parties, the Court found that referring them to a CB would be an exercise of futility. Therefore, the Court did not strike out the petition for divorce filed by the husband.

Likewise in the case of *L v C [2018] 1 LNS 1090*, the wife petitioner filed the divorce petition, then sought an exemption under Section 106(1)(vi) of the LRA 1976 by way of

a Notice of Application filed exempt herself from referring them to a conciliatory body. The husband respondent opposed the application. Preliminary objections by the husband respondent contended that the application shall be by way of an Originating Summons instead of a Notice of Motion; and that the application should be made before filing the divorce petition.

However, both preliminary objections were dismissed as the Court referred to *C v. A [1998] 4 CLJ 38*, which permitted the wife petitioner to seek exemption via oral or affidavit evidence as well as doing so after the petition. The key issue was whether the wife petitioner could prove the exceptional circumstances. The wife petitioner's various allegations of abusive behaviour, supported by the son's affidavit and lack of financial contributions from the husband, were repeatedly denied. The wife petitioner contended husband had stopped returning to the matrimonial home since 2016, but the husband claimed that he was prevented from returning to the matrimonial home since 2017. The Court refused to scrutinise the affidavits in detail to avoid a trial based on the affidavits. The Court found that the wife was unable to establish exceptional circumstances to exempt from reference to a conciliatory body. She was required to refer her matrimonial problems to a conciliatory body, keeping with the main thrust of Section 106. The wife's application was dismissed with costs.

Decisions of the courts on whether to consider or not the exceptional circumstance under Section 106(1) depend on the facts of the cases. The decisions may differ from one case to another. The cases above show that the courts' consideration in some situations where reference to a CB for reconciliation is impossible. If the Court made it compulsory, it would defeat the purpose and could cause injustice to one of the parties. Furthermore, it can create difficulties and complications for the disputing couple, the children, family members and relatives.

#### *a) Composition of the Conciliatory Body*

Section 106(3) of LRA 1976 provides the meaning of a conciliatory body:

- (a) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan or association;
- (b) a marriage tribunal;
- (c) any other body approved as such by the Minister by notice in the Gazette.

In the case of Section 106(3)(a), the Assistant Registrar of Marriages is appointed for church, temple, or association for the CB comprising of members of the organisation they represent. The marriage tribunal mentioned in Section 106(3)(b) is established in each district where the Registrar of Marriages is among the Officers of the National Registration Department (NRD). As of date, no CB has been set up under Section 106(3)(c) of the LRA 1976.

As mentioned in Section 106(4) above, the Marriage Tribunal which is set up for the purpose of conciliation and reconciliation shall consist of a chairperson and not less than two nor more than four other members nominated by the Minister or by such Officer to whom the Minister may have delegated his powers. As for the composition of the conciliatory bodies for the churches, temples, and associations, the LRA 1976 has not prescribed anything on it.

A common complaint is the frequent postponement of CB hearings due to difficulties securing both parties' attendance on the appointed dates. Although six months is the maximum period given to the CB to settle the disputes, the delays aggravate the already tense and unfortunate situation of the estranged parties. Another grouse often raised is that members of the CB are strangers and parties are hesitant to disclose the sordid and private details of their marriage difficulties to the strangers.

The conciliator acts in a purely administrative capacity to convene the parties to resolve their differences, find their common interest and defuse tension. It is hoped that the parties will resolve their differences and achieve an amicable settlement. During the session, both parties are given equal opportunity of being heard. Although the conciliator will offer advice and suggestions, it is up to the parties whether to accept or not the suggested settlement. The conciliator will remain impartial and will not take sides. If the conciliator is well-versed with the customs and traditions of the parties involved, it is a bonus and advantage to the parties as this will facilitate in understanding their problems.

The number of Officers in charge of the marriage tribunal to conduct the reconciliation process should be 3 to 5 persons. The post Officers are Assistant Registrars, and they are either diploma or degree holders. Training or refresher training for the Officers of a Marriage Tribunal is conducted at least once a year. Members of the Tribunal are nominated by the Minister and must have knowledge and experience in this field.

In practice, the NRD had applied RM6 million from the government to improve its services. The allocation was for the appointment of more counsellors, staff training, and recruitment of more qualified volunteers. But in reality, this good intention has not been achieved and practised.

There is a need to employ and engage marriage counsellors or mediators in reconciling estranged parties as matters pertaining to marriage are delicate issues. The Ministry, having jurisdiction over the conciliatory bodies and marriage tribunals, should seriously consider training the panel members so that they are able to handle matrimonial disputes properly. They have only counselling training, which is insufficient to handle matrimonial conflicts.

It is worth to be noted that in practice, there are no rules, practices, and procedures to be observed during the conduct of the hearing and inquiries. Therefore, members of the Marriage Tribunal conduct the reconciliation session at their discretion for the parties' best interest.

#### *b) Duration of Reconciliation Process*

Section 106(5)(a) states:

A conciliatory body to which a matrimonial difficulty has been referred shall resolve it within the period of six months from the date of reference; and 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 may think fit and may, if it considers it necessary, adjourn its proceedings from time to time.

According to this Section, the CB to which the marital conflicts have been referred should solve the problem within six months from the date of reference and shall require the attendance of the parties. However, it has no power to compel the attendance of the parties and often the respondent willfully refuses to attend. The current practice is that if one of the parties does not attend the reconciliation session, the meeting will be adjourned to another date, and if the party again fails to attend, the meeting will be adjourned. The CB will issue the certificate of non-reconciliation if it is satisfied that there is no possibility of reconciliation between the estranged parties.

When issuing a certificate of non-reconciliation, the Marriage Tribunal may append to its certificate such recommendations as it thinks fit regarding maintenance, division of matrimonial property, and the custody of minor children, if any, of the marriage.

Reconciliation under Section 106 LRA 1976 has a wider concept where the implementation begins before the filing of divorce takes place. This gives a subtler approach for the parties to negotiate without the interference of court proceedings, which might be harsh and compelling.

## 5. Discussion

Section 47(5-17) IFLSE 2003 has apparent similarities to Section 106 LRA 1976 and would suggest that this Section sets its inspiration from Section 106 LRA 1976. The comparison between the two can be seen below.

- a) Name: IFLSE 2003 uses the term Conciliatory Committee (*Jawatankuasa Pendamai*) (CC) whereas in LRA 1976, it employs the term Conciliatory Bodies (CB).
- b) Objective: There are similarities in the objective of both CC and CB in cases of non-mutual divorce that is to provide an alternative dispute resolution by assist the couples in resolving their conflicts and saving their marriage. This is applicable only if the Court finds a reasonable possibility for saving the marriage.
- c) Composition of Committees: The composition of CC under IFLSE 2003 is one Religious Officer and two representatives from each party. Whereas the composition of CB under LRA 1976 is persons or bodies appointed under the Act. There is no requirement for representatives from the parties. The establishment of CB under LRA 1976 is more administrative, hence, may become a barrier for the parties to discuss their matrimonial conflicts genuinely and comfortably in depth.
- d) Reappointment of Committee: IFLSE 2003 is more lenient in the appointment of the CC. It allows the parties or the Court to remove and reappoint the representatives, if the process of reconciliation is not successful, or the Court feels that the committee has not completed the task properly. LRA 1976, on the other hand, does not mention the removal and reappointment of the CB. This is because the appointment of the Committee is administrative and does not involve any representatives from the parties, unlike IFLSE 2003. The CB are authorized persons or bodies under an established institution, where in the failure of the session, it is presumably settled within the institution, by changing Officers internally without the involvement of the Court.
- e) Guidelines: According to IFLSE 2003, the Court will give directions to the Committee as guidelines to conduct the CC. However, under LRA 1976, there are no guidelines provided. Therefore, the Officers are guided by common sense rules as to fairness and justice in their conduct of investigations and inquiries. It can be understood that the Committee are well-versed in this field and able to deliver their best during the conciliatory session. However, to maintain professionalism and standard, the Committee should have at least a code of ethics or standard rules as a guide to function effectively.



- f) Duration: There are similarities in the duration of time given which is 6 months in IFLSE 2003 and LRA 1976.
- g) Lawyers: In both IFLSE 2003 and LRA 1976, lawyers are not allowed in the conciliatory sessions.
- h) Involvement of Family Members and Friends: IFLSE 2003 allows family members and close friends to be the representatives of the parties and attend the session as part of the Committee. On the contrary, LRA 1976 allows only family members to attend the conciliatory session. Other than that must gain approval from the Minister or delegated authorities.
- i) Exemption: There are exemption clauses to exclude the parties from CC and CB in both IFLSE 2003 and LRA 1976 respectively. However, LRA 1976 has an additional clause for exemption which is when the respondent has been required to appear before a CB and has willfully failed to attend, under subsection (iii). This clause opens doors to wider interpretation of the exemption depending on the discretion of the judge. However, in circumstances where the marriage is found irretrievably broken, willful delay from one party can do injustice to the other. Both IFLSE 2003 and LRA 1976 mentioned imprisonment under the exemption clause. However, for IFLSE 2003, the period of imprisonment is shorter (3 years) as compared to LRA 1976 (6 years).
- j) Procedure: The reconciliation process under IFLSE 2003 is part of the divorce proceedings after filing the petition of divorce under s.47. Whereas under LRA 1976, the reconciliation takes place before the filing of the divorce petition under s.106.

## 6. Conclusion

Alternative dispute resolutions (ADR) have many advantages for the disputing parties, especially in cases involving the family. Despite the difference in the establishment, the concept of ADR, such as reconciliation, has received legal recognition in both the Shariah and Civil laws. The success of reconciliation depends on the commitment of both parties. Nonetheless, it is viewed that a reconciliation before a legal proceeding is commenced may have a subtler approach to out-of-court negotiation and possibly a better outcome. Compared to reconciliation from the Court's order as part of fulfilling the rigid rules of the legal system. For future recommendations, it is suggested that the six months period for reconciliation be shortened to 3 months to avoid delay in proceedings. Moreover, the appointment of qualified conciliators is also necessary for effective results.

## Acknowledgement

We would like to thank the Selangor Islamic Religious Council (MAIS) for permission to publish this study. We would also like to thank Universiti Teknologi MARA (UiTM), International Islamic University Malaysia (IIUM), Universiti Kebangsaan Malaysia (UKM), and Universiti Islam Selangor (UIS) for the constant support and encouragement of expert contributions to conduct this research.

## Funding

The authors disclosed receipt of the following financial support for the research, authorship, and/or publication of this article through a grant from Selangor Islamic Religious Council, Malaysia [(600-TNCPI/PBT 5/3 (093/2022)].

## Conflict of Interests



The authors reported no conflicts of interest for this work and declare that there is no potential conflict of interest with respect to the research, authorship, or publication of this article.

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