

ARBITRATION AT MUSLIM RELIGIOUS COMMITTEE COUNCILS IN SOUTHERN THAILAND

Sulaiman Dorloh¹
Sakinah Salleh²
Mohammadtahir Cheumar³

Abstract

This paper analyses the function of arbitration at Patani Muslim Religious Committee Council (PMRCC) and offers mediation mechanisms as an alternative way of solving the matrimonial disputes among the Muslims in the Malay-Muslims majority areas. Conceptually, dispute resolution is being recognized as an effective way in the field of adjudication in Islamic law. Although there have been attempts to implement dispute resolution mechanisms in the Muslim Religious Committee Councils (MRCCs), no attempt so far has been made to upgrade them. To a large extent, dispute resolution has been implemented gradually since the beginning of the establishment of the councils. This paper intends to investigate the current trend and the future direction for the implementation of dispute resolution in PMRCC by exploring the available alternatives to the continued pursuit of the process of dispute resolution in PMRCC while at the same time strengthening the existing structures. Finally, the

¹ Lecturer at Faculty of Shariah and Law, Universiti Islam Sultan Sharif Ali (UNISSA), Gadong, Brunei Darussalam.

E-mail: sulaiman.dorloh@unissa.edu.bn

² Lecturer at Faculty of Human Sciences, Sultan Idris Education University (UPSI), Tanjong Malim, Perak Darul Ridzuan, Malaysia. E-mail: sakinah.salleh@fsk.upsi.edu.my

³ Lecturer at Sultan Abdul Halim Mu'adzam Shah International Islamic University, (UniSHAMS-CIFER), Kuala Ketil, Kedah Darul Aman, Malaysia.

E-mail: mohammadtahir@unishams.edu.my

author will provide some suggestions as to how dispute resolution in PMRCC might operate. The author will also highlight the strength and weaknesses of arbitration under Thai civil law with a view toward a better legal provision for arbitration.

Keywords: Muslim religious committee councils; southern Thailand; Islamic family law, arbitration.

Introduction

In the past, the task of making compromises was conducted by local learned scholars-*tok gurus*, MRCCs, a leader in congregational prayer-*imam* and head villagers in their respective villages⁴. The study conducted showed that the Muslims who went to the MRCCs were not merely to seek advice but also to seek legal and religious solutions regarding matrimonial disputes.⁵ Normally, MRCCs in other provinces for example Narathiwat, Yala and Satul provinces would assist the aggravated party and call witnesses to confirm the allegation. As for PMRCC

⁴ At present the government has enacted several laws for example, Local Administration Act of B.E. 2457(1987), Conciliation of village committee Act of B.E.2530 (1987) and Voluntary Self- Development and Protection of Village Administration Act of B.E. 2522(1979) to meet those objectives. It is noticed that for the administration of dispute resolution among them, they establish *Shura* Council at the village level. The *Shura* Council has power to adjudicate the disputes arose among them. The decision made by the council was accepted by the communities. See also Ee-Amnuey, Jutharat. *Community Justice: Widening the Sphere of Communities in Doing Justice*169-170. Centre for Development of Thai law: Bangkok, 2008.

⁵ Sulaiman Dorloh, *Dissolution of Marriage and Divorce Proceedings at Majlis Agama Islam and Provincial Courts in Southern Four Border Provinces of Thailand*. Paper presented at the International Family Law Conference 2007, on 16-17 January 2007, Crown Prince's Hotel, Kuala Lumpur, Malaysia, p. 294.

for example, it was established in 1940. The first committee chairman of PMRCC was Haji Sulong bin Abdul Qadir.⁶ His full name was Tuan Guru Haji Mohammad Sulong bin Abdul Qadir Bin Muhammad bin Tuan Minal al-Fatani.⁷ The PMRCC was formed in accordance with the Patronage of Islam Act of B.E. 2488/A.D. 1945 when General Chavalit Yongchaiyudh became the Prime Minister, this Act was replaced by Royal Act Concerning the Administration of Islamic Organization B.E.2540/A.D.1997. Under this Act, the committee members were formed to give advice and to aid the provincial governors in all matters relating to Islam and Malay culture.⁸ The objectives of PMRCC are as follows. Firstly, to act as general Islamic legal guardians prior to marriage-*wali am*, and specific Islamic legal guardians prior to marriage-*wali khas*, secondly is to promote and preserve the Islamic heritage and its teachings thirdly, to oversee the

⁶The second president of PMRCC was Haji Abdul Aziz Bin Haji Abdul Wahab (1948-1974), the third president of PMRCC was Haji Muhammad Amin Bin Haji Muhammad Sulong (1975-1982), the fourth president of PMRCC was Haji Yusuf Bin Wan Musa (1982-1984), and fifth president of MAIP was Haji Abdul Wahab Bin Abdul Wahab (1984-1999). See, Mina Jeh Tae, *Al-Tanzim al-Idari Li Shuun al-Islamiyyah Fi Thailand (The Administration of the Islamic Religious Affairs in Thailand)*, Unpublished Master Dissertation, Kulliyah of Islamic Revealed Knowledge, and Heritage (Fiqh and Usul al-Fiqh), Malaysia: International Islamic University Malaysia, 1998, p. 55.

⁷ Mohd. Zain Bin Abd. Rahman, *An Annotated Translation and Transliteration of Al-Manhal Al-Safi Fi Bayan Ramz Ahl Al-Sufi of Shaykh Dawud Al-Fatani*, Unpublished Master Thesis, International Institute of Islamic Thought and Civilization (ISTAC), (Malaysia: International Islamic University Malaysia, 2000) 14. See also, Ahmad Fathy al-Fatani, *Ulama Besar dari Patani*, Malaysia: Universiti Kebangsaan, 2001, p. 140.

⁸ Sulaiman Dorloh, *Dissolution of Marriage and Divorce Proceedings at Majlis Agama Islam and Provincial Courts in Southern Four Border Provinces of Thailand*. Paper presented at the International Family Law Conference 2007, on 16-17 January 2007, Crown Prince's Hotel, Kuala Lumpur, Malaysia, p. 294.

running of the mosques and undertake the management of all mosque committees in their respective provinces, and fourthly, to solve matrimonial problems of the Muslims and to monitor and take care of abandoned child, needy persons, orphanage, unfortunate and less fortunate persons.⁹

Arbitration under Islamic law

The holy Qur'an called disagreement as *ikhtilaf* or *shiqaq*. The word "*shiqaq*" is derived from *shaq*¹⁰ which means to break into two.¹¹ The literal meaning of *shiqaq* is discord or hostility.¹² Therefore, the word "*shiqaq*" means conflict between a couple of such serious characters that will render the bond of marriage wrecked.¹³ The *shiqaq* thus denotes a situation where disagreement occurs between a husband and wife which leads to a conflict in the family for instance, both of them are consistently quarreling with each other to such an extent that they cannot live together peacefully.¹⁴ Thus, if the spouses are not able to come to an agreement between themselves and separation seems to be looming, it is permissible for those in authority, for example, a judge to appoint two men as arbitrators to see how they can bring about reconciliation between

⁹ Ibid., p. 297.

¹⁰ Al-Shawkani, *Nail al-Autar*, (Beirut: Dar al-Kutub al-Ilmiyyah), 1993, vol.1, first edn., p.185.

¹¹ Al-Munjid Fi al-Lughah wa al-A'lam, (Beirut: Dar al-Mashriq), 2005, p. 396.

¹² Saalih Gahaanim al-Sadlaan, *Marital Discord (al-Nushuz)*, (USA: al-Basheer Co., n.d.) p. 55. See also S.J. Hussein, "Marriage Breakdown: Comparative view" IIUM Law Journal, Vol.1, no.1 1983, p. 125.

¹³ Maulana Muhammad Ali, *The Religion of Islam*, (New Delhi S. Chand and Co., n.d.),673, K.N. Ahmad, Family Law, *Muslim Law of Divorce*, (New Delhi: Kitab Bhavan,1978) 278.

¹⁴ Saalih Gahaanim al-Sadlaan, *Marital Discord (al-Nushuz)*, ibid., p. 127.

the two and keep the tie of good relationship and proper dealings between them.

The holy *Qur'an* sets forth the basic rules governing the procedures such as the appointment of a person who has the right to make decision for the disputant who commonly called *hakam*¹⁵ or an arbitrator. Allah Almighty says "If two parties among the believers fall into a quarrel. Make ye peace between them."¹⁶ From the verse mentioned above, Allah has laid down procedures that should be followed when a disagreement arises between husband and wife. The appointment of *hakam* or arbitrator from both parties is necessary. Secondly, an amicable settlement is permissible in all matters among Muslims except the amicable settlement which makes the unlawful as lawful and that which makes the lawful as unlawful.¹⁷

According to *al-Qurtubi*¹⁸ the above-mentioned verse is addressed to judges to settle marital disputes by referring the matters to arbitration and it is recommended in the holy Quran. Ibn Batal¹⁹ is of the opinion that the Muslim jurists agreed that the above-mentioned verse is addressed to judges and not agent. The *Malikis*, one view from the *Shafi'is* and *Hanbalis* are of the view that the arbitrators mentioned in the verse are the judge and not the agents. Therefore, being the judge, they can dissolve the marriage irrespective of whether the spouses agreed or not. The *Maliki's view* in *al-*

¹⁵ In 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, (London: Luzac and Co., 1979) Vol. III, p.72.

¹⁶ The Holy Qur'an, al-Hujurat, verse 9.

¹⁷ Saalih Gahaanim al-Sadlaan, *Marital Discord (al-Nushuz)*, *ibid.*, p.128.

¹⁸ Al-Qurtubi, *al-Jami Li Ahkam al-Qur'an*, (Egypt: Dar al-Kutub al-Arabi, 1967) 115.

¹⁹ Ibn Hajr al-Asqalani, *Fath al-Bari*, Vol.9 (Maktabah al-Salafiyah, n.d.,) 403.

Muwatta said that the arbitrators are empowered either to get separation effected or to bring reconciliation between them. The *Maliki's* view is based on the understanding that the hakam is judge, not agent. As a judge, he may give decision that they consider beneficial to the parties, particularly whether the marriage should be continued, or it should be dissolved.²⁰ However, the *Hanafis*, one view from *Shafi'is* and the *Hanbalis* are of the opinion that the arbitrator could not dissolve the marriage because they are agents except with the permission of the spouses or judges. The first view is more practical than the second one because the judge has the right to either separate or reconcile between the spouses compared with the agents.

Article 1847-1850 of the Corpus of Juridical Rules-*Majallah al-Ahkam al-'Adliyyah*²¹ stated that the validity of the arbitration agreement is subject to four conditions. Firstly, the dispute must have already arisen, and the dispute is to be defined very clearly secondly, there must be an arbitration agreement and thirdly, the arbitrator must be appointed by name. If the parties agree that the arbitrator shall be, for instance, the third person encounter on the road, or the fifth person to enter a particular place, the agreement would be void and fifthly, the arbitrator must be mentally and physically competent to act as such, possessing the capacity to act as a *qadi* according to *Hanafis*, *Maliki* and *Hanbalis*. But *Shafi'is* gives an arbitrator a lesser

²⁰Nora Abdul Hak, *Role of the Conciliatory Committee and Hakam (Arbitrator): The Practice and Provisions of the Islamic Family Law in Malaysia*, Paper presented at the International Family Law Conference 2007, 16-17 January 2007 at Crown Princess Hotel, Kuala Lumpur, Malaysia, p.21.

²¹ The word "al-Majallah" in Arabic means a page which contains wisdom. See, Mahmasani, *Falsafat al-Tashri' Fi al-Islam*, Malaysia: Penerbitan Hizbi, 1987, p.5, See also Ibn Manzur, *Lisan*, xiii, 127.

status than a judge-*qadi* because he is removable by the parties, whereas a judge is not so removable.

Features of Arbitration Pursuant to Practice Guidance at PMRCC

According to the Royal Act Concerning the Administration of Islamic Organization B.E.2540/A.D.1997, the committees of MRCCs are responsible to settle Muslims' marriage, divorce, and inheritance disputes. However, before settling those problems, negotiation and reconciliation are conducted from the beginning with the presence of the parties in the arbitration meeting until the end of the negotiation. This session is conducted irrespective of whether it is fruitful or not. Legally speaking, it is a contract for amicable settlement when there are conflicts. To achieve the objectives of the reconciliation, the PMRCC for example, has set up arbitration working procedures. It can be summarized as follows, the applicant must bring the letter of marriage and letter of intention for entering a arbitration from the leader-*imam* of the respective areas, the committee will then consider whether the conflict is existing or not, if the conflict is present the committee will suggest the applicant to enter for the arbitration by filling a complaint form²² at PMRCC. The committee will open the session by knowing each other- *ta'ruf*, the committee will then explain the arbitration process at PMRCC both in Islamic law and Thai civil law. The committee will later ask the applicant whether the applicants want to enter the arbitration process. If the applicants agree to enter for mediation the committee will first, consider the complaints of the aggravated party. If the mediation is successful, the committee shall issue a mediation letter.²³ The arbitration committee will be assisted by PMRCC's Muslim judge-*Qadi shar'i*. If the party

²² See: Letter of complaint for arbitration and reconciliation issued by PMRCC.

²³ See: Letter of arbitration and conciliation issued by PMRCC.

disagrees with the arbitration committee, the committee will then send the report to the provincial court²⁴ subject to the approval of the president of PMRCC and the decision shall be made based on the report prepared by the arbitration's committee.²⁵

There are several points to be highlighted. Firstly, the conciliation is optional. PMRCC's committee will be acting as an appointed mediator. The counseling given by PMRCC's committee is binding upon the other parties. Secondly, the conciliatory committees were appointed to execute the duties as conciliators in accordance with the conciliation procedures of PMRCC. They all were under the supervision of Muslim judge-*Qadi shar'i*.²⁶ This process is not adversarial, but it is rather a co-operative and consensus-oriented process. On these issues, the committee will advise the parties on their legal right or on how they should resolve the issues between them when they want to file a legal suit at the provincial court. According to the current practice, the mediation committee, on the behalf of the Muslim council, will issue a letter of

²⁴ It refers to the Patani Provincial Court. In every province, there is one provincial court. However, according to the hierarchy of Thai court, the Provincial court is called Court of First Instance. According to Constitutional Court of Justice Act, article 14(2) provides the provincial court with its jurisdiction has the authority to hear and try the cases throughout the province.

²⁵ Practice Guidance Concerning Conciliation (PGCC). This practice was issued by PMRCC. In Narathiwat province for example, the normal practice is that when the complaint was lodged to the council, the committee in charge shall direct the parties to enter for reconciliation before the conciliatory committee. If the conciliatory committee is unable to persuade the parties to resume marriage life together, the committee will ask the husband to pronounce the divorce.

²⁶ It is to be noted that Muslim judge-*Qadi shar'i* is appointed by the committee of PMRCC. The Muslim judge-*Qadi shar'i* takes responsibility to render legal rulings-*fatwa* on any point of Islamic law.

conciliation to the party, and this letter is considered as a proof of facts that such person has gone through mediation process. However, such a letter of conciliation is recognized by some institutions only, for example, the provincial court. In case of unsuccessful mediation, the Muslim judge-*Qadi shar'i* will write a memorandum and send the case to the provincial court. Several problems were accounted; among others were limitation of time, counselors, and atmosphere. In promoting reconciliation, PMRCC requires an active role of the provincial court by asking the applicants to have recourse to the assistance and advice from PMRCC for the purpose of effecting reconciliation. In addition, it is also suggested that the result of conciliation rendered by PMRCC either on family or inheritance matters should be recognized by the executive officials besides the provincial courts. In other words, the executive officials should accept the outcome of such conciliation. The obvious examples can be seen in cases of marriage and inheritance.²⁷

Comparatively speaking, the practice guidance on the conciliation of PMRCC can be compared to the "Practice Suggestions Concerning Conciliation for Settlement in Thai Civil Court". Those practice suggestions were issued by the President of the Supreme Court on 7 March B.E.2539 (1996) by virtue of section 1 of the statute of the Court of Justice. It provides that whereby the president of the supreme court is empowered, in the capacity as head of the judiciary to lay down directions for the judges in conducting arbitration and reconciliation in cases where the presiding judges is of the opinion that there is a reasonable chance of amicable settlement between the parties, the court shall initiate the conciliation proceedings. The practice suggestions may be summarized as

²⁷ Sulaiman Dorloh, *The Position of Islamic Law in the Four Southern Border Provinces of Thailand*, Jurnal Syari'ah, Vol.14, Jul-Dec 2006, p.19.

follows; the court may designate a special room²⁸ for the conciliation process. The atmosphere shall be informal, and the judges and lawyers will not be wearing their gowns. The court, with the approval of the parties, may appoint a neutral or expert arbitrator to rule on the matter given. The award rendered by the arbitrator, if approved by the court, shall be incorporated in the final judgment, where a speedy settlement is achieved, the court may consider returning the court fees to the parties.²⁹

It found that reconciliation at Thai civil court is also optional,³⁰ the presence of the judges and lawyers are necessary for the purpose of reconciliation. The expert and neutral arbitrators are requisite. This practice suggestion seems to be contrary with the pilot project conducted by Thai Alternative Dispute Resolution (TADR), Office of the Judiciary. According to the pilot project,³¹ the

²⁸ The idea of providing a special room for conciliation is to provide a proper atmosphere for mediation.

²⁹ Vichai Ariyanuntaka, *Jurisdiction and Recognition and Enforcement of Foreign Judgment and Arbitration Awards: A Thai Perspective*, Paper presented at the 8th Singapore Conference on “International Business Law, Current Legal Issues in International Commercial Litigation”, held on 30 October-1 November 1996 at Shangri-La Singapore, p.12.

³⁰ It is to be noted that in the year of 2000, the civil court started providing an optional for parties to refer cases to mediation before the first hearing day. This practise has helped parties settle their cases at an earlier stage. The criminal court has also used mediation on some specific criminal case. However, under a recent amendment to the Civil Procedure Code, conciliation is compulsory in small claim disputes. See section 193 paragraph two of the Civil Procedure Code as amended by the Civil Procedure Amendment Act (No.17) B.E. 2542(1999) See also. Speech by Judge Sombat Deo-is-res was the chief Judge of the Criminal Court. Thammanoon Phitayaporn, Strengthening the Independence and Efficiency of the Judiciary in Thailand, *Dulaphak Thai Law Journal*, Vol.3. No. 51, September-December 1990, p.114.

³¹ There were four pilot courts which set a model of Court–Annexed Mediation, Provincial Court of Nonthaburi,

court can assign not only judges, but the court can also select a person who is not a judge. This is because the number of judges is limited, the appointment of non-judge as a mediator may help and reduce judges' workload. The applications and claims for reconciliation can be made at PMRCC's office in accordance with the Act on the Application of Islamic Family law and law of inheritance, 1945³² and Royal Act Concerning the Administration of Islamic Organization, 1997³³ and Islamic family law which is being applicable from time to time including matters relating to reconciliation in matter of the matrimonial problems, breaching of promise to marry or betrothal, ancillary claims for divorce such as *iddah* maintenance, arrears of maintenance, jointly acquired property and any other reasonable claims for example claiming for custody of children, maintenance of children, division property³⁴ and to adjudicate in property disputes,³⁵ and any other issues concerning Islamic family law.³⁶

Looking at the types of applications it can be said that PMRCC plays a major role in the implementation of conciliation in Patani province though, PMRCC's annual budget allocated by the government is lesser than other government organizations. Similarly, the monthly salary for staff of the PMRCC is paid on a mutual agreement basis due to insufficient budget. Below are a few of the cases brought to the mediation process of PMRCC from 2001 to 2006.

Provincial Court of Chonburi, District Court of Northern Bangkok and District court of Nonthaburi. Ibid, p.116.

³² Hereinafter abbreviated, as the APIFL, 1945.

³³ Hereinafter abbreviated, as the Royal Act, 1997.

³⁴ It refers to inheritance issues.

³⁵ For example, issues relating to *waqf*, succession, gift.

³⁶ PMRCC practice guidance concerning conciliation, p.1.

Table 1

Year	Number of cases	Number of cases settled	Number of pending cases
2001	300	10	290
2002	345	50	295
2003	330	12	318
2004	320	15	305
2005	350	11	339
2006	390	8	382

Source: PMRCC

Table 2 below shows the types and number of cases being brought to arbitration process at PMRCC.

Table 2
Type and number of cases

Type of cases	Number of cases settled	Number of cases settled
	(Jan – Apr2008)	(Jan- Dec2007)
Ta’liq cases	92 cases	228 cases
Matrimonial cases	23 cases	46 cases
Jointly acquired property cases	10 cases	16 cases
Inheritance cases	16 cases	49 cases

Source: PMRCC

The statistics given above showed that PMRCC has several settlement processes. The results of the statistic showed the mediation process, which is being operated at PMRCC as an example, has functioned generally according to PMRCC’s

objectives and the Royal Act, 1945 which is to resolve conflicts between parties before the case is tried and decided by the provincial courts.

Royal Act on Administration of Islamic Organization B.E.2540 (1945)

As for PMRCC before the Act of 1997 came into force, the committee of the Muslim religious council is religiously responsible to settle Muslims' marriage, divorce, and inheritance disputes. When the Royal Act concerning the Administration of Islamic Organization B.E.2540 (1945) came into force, the Act of 1997 reaffirmed and recognized the practice of the Muslim religious committee. The Royal Act was enacted, among others to regulate marriage and divorce for Muslims in Thailand. It can be seen in the section 4, article 26(11) which provides to the effect that "The Provincial Islamic Religious Committee has the power to compromise and reconcile disputes concerning family and inheritance according to Islamic rules when there is a request from the Muslims." According to the above-mentioned Act, PIRCs or PMRCCs have been given the power to compromise and reconcile the said matter over a person professing the religion of Islam. However, it might be noticed that there is no definition of reconciliation under the Act of 1997. It generally takes the form of mediation and conciliation. The Act also does not touch on the process of reconciliation and the appointment of an arbitrator as well as procedures for regulating reconciliation sessions.

In the local case of Ramlah Binti Haji Hamid's case,³⁷ a dispute arose between the husband and wife. The wife alleged that her husband was a gambler, he had stolen her money. She asked for a divorce from him, but her husband refused. The wife

³⁷ The Patani Muslim Religious Committee Council, 2541/435.

then made an application to the PMRCC for divorce by redemption-*khul'*. The council ordered the appointment of two conciliatory committees to settle the dispute. The committee, after both parties agreed and asked the wife to pay the amount of money to the husband. In the local case of Fatimah Haji Abdullah v Ku Abdullah Ku Heng,³⁸ the applicant, Fatimah filed an application at PMRCC to adjudicate matters concerning the division of jointly acquired property. After a letter of appearance was issued, the husband, in front of the arbitration committee argued that the applicant is not entitled to get such division. The above cases show that, if one of the parties does not agree to the divorce, the PMRCC will appoint a conciliatory committee. This appointment of a conciliatory committee, helps PMRCC to manage the process of divorce.

Arbitration under Thai Civil Laws

Out-of-court settlement systems in Thailand can be done in two ways, namely arbitration and conciliation. Conciliation or mediation is now being practiced by the courts throughout the country. Even cases at the Appellate court may be settled by reconciliation. Traditionally, it was the King in medieval times who was the fountain of justice. The King roles, as stated in the ancient inscription. Stated that:

“He who is troubled may ring the doorbell of the palace and the King shall come out to decide the case by himself”.

By virtue of this Act, the interior minister has issued three regulations pertaining to the conciliation namely, Conciliation of Village Committee Act

³⁸ The Patani Muslim Religious Committee Council, 2549/115(6).

(CVCA, 1987) B.E. 2530 (1987), Voluntary Self Development and Protection of Village Administration Act of B.E.2522 (1979). These three regulations empower the village committee in distance area to act as arbitrators to settle any civil dispute arising among members in the village. Thai Civil Procedure Code 1999 (TCPC,1999) according to Thai Civil Procedure Code,1999.³⁹ TCPC,1999 provides the mechanisms of settlement by way of conciliation before the hearing started. The power is given to the presiding judge to make an order of appearance to the disputed party.⁴⁰ The presiding judge has the power to reconcile the parties to bring about an agreement and compromise. This can be seen in sections 19 and 20 of TCPC,1999. Section 19 of TCPC,1999 provides:

“The Court shall have power to order all or any of the parties to appear in Court in person as it may think fit, even when such party or parties are represented by lawyers. If the court is of the opinion that the personal appearance of the parties may bring about an agreement or a compromise as provided by the following section, it shall order them so to appear.”

Section 20 of the TCPC,1999 also provides *inter alia* that:

³⁹ As mentioned by Thai Civil Procedure Amendment Act (No: 17) B.E.2542 (1999). Hereinafter abbreviated, as the TCPAA, 1999.

⁴⁰ It is interesting to note that according to this section for the purpose of conciliation, when the order of appearance is issued to the litigants though the legal representation is appointed. Disobeying the court order to make a personal appearance is contempt of court according to section 31(5). However, it is arguable that the wisdom behind forcing the litigant to appear before the court after the order for appearance is issued to the litigant for conciliation with the threat of contempt of court.

“The court shall at any stage of the trial, have power to try to bring about an agreement or a compromise as to the matters in dispute.”

From the above-quoted laws, it is observed that the two laws are performing similar functions. The main difference between the two laws is that LAA, 1914 is given the power to the local authority, unlike TCPC, 1999 the power is vested to the court. Application of conciliation at the Thai Citizen and family court, the core importance of judicial proceedings at the Thai Citizen and family court lies in section 108 of the Act on Establishment of Thai Citizen and Family Court Act, B.E. 2534 and its proceedings concerning citizen and family cases, B.E. 2534. It states *inter alia* that:

“... At any stage of family cases trial, the court shall endeavor to bring the applicant for reconciliation. The court shall take the following factors for consideration, namely, to endeavor to preserve and protect the status of the marriage of the applicants. If the court fails to do so, the separation shall be an alternative one. The court shall protect and help the interest of the children. The court shall protect the rights of the children, and the court shall find the best ways to keep a better relationship between the couples. The law allows the court to carry out their role of reconciliation and make a necessary effort to put them back together.”

Section 108 of the Act also provides a mechanism as to how to protect the interest of the aggravated parties. Referring to the court-annexed mediation (a form of ADR) pilot project was evaluated by a team of professors from *Sukhothai-Thammatirat* University (STU). The evaluation report revealed that 56.6% of cases referred to

mediation could be settled. In the case of the district courts, over 80% of cases were settled by mediation. In addition, the report states that the parties of 95.3% will refer their cases to mediation if they have disputes in the future. It also found that the lawyers of 92.9% will recommend their clients to use mediation in the future. However, the number of cases referred to mediation is limited. Only 5.5% of civil cases in the courts were referred to the system.⁴¹ For the interest of conciliation process, the court may appoint the following persons as conciliators in family cases, they are, father, mother, guardian, close relatives, any persons that court thinks fit for counseling. Moreover, the Ministry of Justice has issued rules for the administration of the court of justice in the matter of conciliation of the disputes B.E. 2544(2001).⁴² According to this rule, the qualifications of the arbitrator are as follows, he must have a basic knowledge in sciences, economics and Thai civil laws, he must be 25 years old, he must be morally excellent, he must not become an incompetent person by the judgment of the court, and he has never been sentenced to be imprisonment unless it was in negligence.⁴³ In appointing a conciliator, the court shall, where possible, give preference to close relatives of the parties. If close relatives are not available, the court may under these circumstances allow the appointment of any person that the court thinks is fit for counseling, preferably social welfare staff. The responsibility of the conciliator is to reconcile and mediate between the disputed parties.⁴⁴ In exercising his duty, no coercion is allowed.⁴⁵

⁴¹ Keynote speech made by Judge Atthaniti Disatha-Amnarj, Chief Judge of the Supreme Court, in the "Orientation Program for Chief Judge of Trial Court" on March 3, 2003.

⁴² Hereinafter abbreviated, as RAJC, 2001.

⁴³ Rules and regulations for administration of the court of justice in matter of reconciliation of disputes: rule no: 28.

⁴⁴ *Ibid.*, rule no: 32(1)(2).

⁴⁵ *Ibid.*, rule no:32(3).

Observations and Suggestions

The study clearly explained that the arbitration for dispute resolution is the methods suitable for family and inheritance disputes which the parties agree to operate, therefore, apart from the issuance of rules and procedures and regulations governing the mediation process, the provincial court should recognize the outcome of the mediation and it shall be accepted by all relevant government sectors. Therefore, it is suggested that the quorum shall consist of three personnel, that is, provincial court judge-*Dato' Yuthitham*,⁴⁶ Muslim judge-*Qadi shar'i* from office of MRCCs and Muslim lawyers or university law lecturers. The reason is for the neutral conciliation leading to the ruling that is closed to the justice as much as possible. The mediation shall operate in the provincial court or MRCCs, so that the party believes that the mediation for dispute resolution is systematic and reliable. If both could not be achieved PMRCC may appoint a person who is not a judge to mediate the cases. The non-judge mediator appointed by PMRCC should be retired provincial court judges-*Dato' Yuthithams*, retired government officers, lawyers, and persons having

⁴⁶The term “*Yuthitham*” is a Thai word which means justice whereas the word “*Dato*” is a Malay word which is referring to a venerable person. However, the Malay Muslims in the south usually call the Muslim judges as “*tok kadi*”. According to the rule of the Administration in the seven principalities of 1902, the title of the Muslim judge was called “*tok kali*”. This title was first employed by the Thai government to refer to a Muslim judge. In 1917 the Ministry of Justice has changed the title of the “*to kali*” to “*Dato' Yuthitham*”. See a letter issued by the Ministry of Justice No: 30/4353 dated on 24th September 1917. For further reading on the roles and qualification of the *Dato' Yuthitham* in the Provincial Court, See Sulaiman Dorloh, *The Position of Islamic Law in the Four Southern Border Provinces of Thailand*, Jurnal Syariah, vol:14, Jul-Dec 2006, at.6-7.

experience in various fields. This can help the process of arbitration efficiently.

To conciliate the disputes, the mediator shall be qualified with good personalities, shall pass the training or curriculum on conciliation the dispute resolution, so that he has correct knowledge, understanding and attitude towards conciliation. MRCCs shall list the persons who wish to be arbitrators. The training and upgrading of the skills of conciliatory committee in PMRCC should be encouraged therefore, the mediator carries on the duties within the need and ability of himself. Furthermore, the presenter is of the opinion that the Department of Islamic Studies, Faculty of Islamic Sciences, Prince of Songkhla University (PSU), Patani campus should compulsorily impose that the department introduces an arbitration course in family matters as implemented in some of the higher learning institutions in Malaysia and Brunei Darussalam. Through this approach, the graduates of the department will be fully equipped with mediation skills. Thus, there would be no problem for PSU students being a mediator for PMRCC or provincial courts. In fact, this can be extended to cover all Muslim matters like *waqf*, succession, testate, intestate, gift, and others. To support PMRCC in implementing the arbitration, a guidebook should be prepared and distributed to the public. Seminars and training programs for PRMCC mediators must be organized in the future.

Conclusion

From the preceding discussion, it can be concluded that reconciliation at PMRCC is optional. Both RAAISO, 1997 and TCPAA,1999 and PMRCC working manual have identical provisions for the reconciliation. Those provisions as set out clearly aimed at saving marriage breakdown. As for PMRCC and the provincial court, it is found that both

institutions are working hard to settle matrimonial disputes through arbitration. The ability of these two bodies to work effectively is dependent on the role played by the arbitrators during the conciliation sessions. Given the arbitrators' new and high qualifications, it is possible that the number of divorce cases may be reduced in the four southern provinces of Thailand. Despite the formal ADR awarded to the provincial court and PMRCC, the outcome of the two practice guidance systems has never been solved as far as PMRCC's arbitration process is concerned. The government and private institutions are unwilling to accept the fact that the result of the arbitration arrived at PMRCC. Secondly, it seems that the Royal Act of 1945 has so far failed to provide provisions for ADR in family matters for the Malay-Muslim majority area of southern Thailand.

References

- Abdullah Yusuf 'Ali. (1992). *The Meaning of the Holy Qur'an*, Washington, USA: Amana Corporation.
- Al-Shawkani, Muhammad Ibn 'Ali Ibn Muhammad 'Abd Al-Allah. (1993). *Nail al-Autar*, Qahirah: Dar al-Hadith.
- Al-Qurtubi, Abu 'Abd Al-Allah Muhammad Ibn Ahmad al-Ansari. (1967). *Al-Jami Li Ahkam al-Quran*, Egypt: Dar al-Kutub al-Arabi.
- Ahmad Fathy al-Fatani. (2001). *Ulama Besar dari Patani, Malaysia: Penerbit Universiti Kebangsaan Malaysia*.
- Alternative Dispute Resolution in Thailand, Central Intellectual Property and International Trade Court Thailand, Institute of Developing Economies (IDE-JETRO), March 2002.
- Ibn Hajr al-Asqalani. (n.d.). *Fath al-Bari*, Maktabah al-Salafiyah.
- Ibn Manzur, Jamalal-Din Muhammad. (n.d.). *Qamus Lisan al-Arab*.
- Jutharat Ee-Amnuey. (2008). *Community Justice: Widening the Sphere of Communities in Doing Justice*, Centre for the Development of Thai Law, Bangkok.
- Maulana Muhammad Ali. (n.d.) *The Religion of Islam*, S. Chand and Co., New Delhi.
- Mohd. Zain Bin Abd. Rahman, *An Annotated Translation and Transliteration of Al-Manhal Al-Safi Fi Bayan Ramz Ahl Al-Sufi of Shaykh Dawud Al-Fatani*, Unpublished

Master Thesis, International Institute of
Islamic Thought and Civilization (ISTAC),
International Islamic University Malaysia,
2000.

Nora Abdul Hak, *Role of the Conciliatory Committee
and Hakam (Arbitrator): The Practice and
Provisions of the Islamic Family Law in
Malaysia*, Paper presented at the
International Family Law Conference 2007,
16-17 January 2007 at Crown Princess Hotel,
Kuala Lumpur, Malaysia, p.21.

Nik Salida Suhaila Nik Saleh, *Arbitration Awards:
Its Enforceability and Possibility to be set
aside according to Malaysian Law and
Shari'ah*. Paper presented at the International
Seminar on Shari'ah & Common Law 2008,
on 20-21 September 2006, Palace of Golden
Horses Hotel, Seri Kembangan, Selangor
Malaysia.

Saalih Gahaanim al-Sadlaan. (n.d.) *Marital Discord
(al-Nushuz)*, al-Basheer Co., USA.

Sulaiman Dorloh, *The Position of Islamic Law in the
Four Southern Border Provinces of
Thailand*, Jurnal Syariah, Vol.14, Jul-Dec
2006, p.6-7.

Sulaiman Dorloh, *Dissolution of Marriage and
Divorce Proceedings at Majlis Agama Islam
and Provincial Courts in Southern Four
Border Provinces of Thailand*. Paper
presented at the International Family Law
Conference 2007, on 16-17 January 2007,
Crown Princess Hotel, Kuala Lumpur,
Malaysia.

Thammanoon Phitayaporn, Strengthening the Independence and Efficiency of the Judiciary in Thailand, *Dulaphah Thai Law Journal*, Vol.3. No. 51, September-December 1990, p.114.

Vichai Ariyanuntaka, *Jurisdiction and Recognition and Enforcement of Foreign Judgment and Arbitration Awards: A Thai Perspective*, Paper presented at the 8th Singapore Conference on International Business Law, Current Legal Issues in International Commercial Litigation' 30 October-1 November 1996 at Shangri-La Singapore, p.12.

List of Statutes

Administration of court of justice in the matter of conciliation of the disputes B.E. 2544(2001).

Arbitration Act B.E. 2530 (1987).

Thai Civil Procedure Amendment Act (No: 17) B.E.2542 (1999).

Royal Act concerning the Administration of Islamic Organization B.E.2540 (1997).

Practice suggestions were issued by President of Supreme Court on 7 March B.E.2539 (1996).

Mosque Act of 1947, 1955.

Patronage of Islam Act, 1945.

Regulations for registration of mosque, Act of 1948.

Rules/ Regulations

Court of justice, regulations pertaining to mediation,
B.E.2544 (20001).

Court of justice, regulations pertaining to mediation
of financial dispute, B.E.2544 (2001).

Decided cases

Fatimah Haji Abdullah V Ku Abdullah Ku Heng,
Patani Muslim Religious Committee
Council, 2549/115(6).

Ramlah binti Haji Hamid, Patani Muslim Religious
Committee Council, 2541/435.