

Practices of settling family disputes in Shariah and Pakistan law.

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Abstract

Generally the Dispute resolution extra judicially refers to the process of Arbitration, Mediation, and Negotiation. The process is used by the parties either before or after the dispute has arisen. Such processes are of great flexibility, costing low than traditional litigation and the speedy resolution of disputes along with other perceived advantages. The practice of arbitration was approved of in the Qur'an, particularly in the matrimonial context.

It is quite clear that the Pakistani law is not making a full use of the basic principles of Quran and Sunnah. The Arbitration clauses used in the Family Law are never being effective rather they have been just formality after the divorce is being pronounced by the family judge. The only attempt made by the family judge in the beginning of reconciliation is not backed by the basic provision of Quran and Sunnah. If the Arbitration is done along with the reconciliation by the judge and making the parties bound by the decision of the Arbitrators, better results can be achieved. It shall be noted that while enacting the procedural law for Tahkim in the present day court system, the legislators keeping the basic principles given by Quran and Sunnah, given by the jurists and specially the Maqasid of Shariah can enact Arbitration procedural laws for themselves.

KEY WORDS: HAKAM AND TAHKIM, ALTERNATE DESPUTE RESOLUTION, SETTLING FAMILY DISPUTES IN PAKISTAN.

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Introduction:

Generally the Dispute resolution extra judicially refers to the process of Arbitration, Mediation, and Negotiation. The process is used by the parties either before or after the dispute has arisen. Such processes are of great flexibility, costing low than traditional litigation and the speedy resolution of disputes along with other perceived advantages.

Negotiation: The participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution.

Mediation: There is a third party ,who facilitates the process ,but not imposing resolution on the parties.

Arbitration: The participation is typically voluntary and a third party ,who as a private judge imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by Arbitration.¹

HAKAM AND TAHKIM IN ISLAMIC LAW:

The practice of arbitration was approved of in the Qur'an, particularly in the matrimonial context: "if ye fear a breach between them twain (i.e. husband and wife), then appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their conciliation; for God hath full knowledge, and is acquainted with all things."²

2.1. Occasion of revelation (Sabab al-Nuzul):

There was an incident of Saad Ibn Rabi with his wife Habiba Bint Zaid, when she was slapped by him and the matter was put forward to the Prophet peace be upon him, who ultimately ordered for Qisas. These Verses were thus revealed thus forbidding to do so. The Prophet peace be upon him said meaning "I intended something and Allah intended something and what Allah intended was far better."³

2.2. Appointment:

According to Saeed Ibn Jubair the Hakams to be appointed from the spouse's family. One from each side. According to the majority of Jurists the Address Khitab in the verse is to the "rulers". The same view is supported by Ibn Abbas and Mujahid. According to some of the jurists the reference is to the husband and wife and some are of the view that it addresses the Guardians i.e. if the Guardians knew that there is Nushooz in between the spouses.⁴ Another view is that the term "خفتم" 'fearful' and "فابعثوا" 'Appoint' are directed towards all the 'Mumineen', thus all are obliged and not only the Imam or ruler.⁵

The Hakams nominated shall be just, Knowledgeable and deep sighted. If such are not available within the families of the spouses, an appointment can be made from outside.⁶ The purpose is to be a witness over cruelty and that can be done by stranger also.⁷ However Imam Malik (may Allah be pleased with him) is of the view that the Hakams shall not be appointed from outside of the families.⁸

2.3. Objective of Hakam:

The Hakams are supposed to ask questions separately from the spouses and thereby to ascertain whether any of them is more tilted towards the separation and hence forth they can decide that which of the party is having "nushooz". After identifying the party at fault

,the Hakams can thereby go for the cure.⁹ The ultimate role of Hakam is to identify the ‘Shiqaq’ i.e dissension from the side of spouse and to find means to stop the recurrence of it in future.¹⁰ The Hakams to see also that the thing objected to by the wife is halal or not like that of second marriage for instance, or there is cruelty on the part of the husband. The Hakams, if found cruelty can also ask for enforcement from the ruler for stopping the recurrence of the same.¹¹ The requirement for Hakam in the Eyes of Allah is that their intention shall be of compromise and reconciliation and not separation as Allah mentions in the Holy verse of the Quran *يُرِيدَا إِصْلَاحًا* “i.e wishes compromise and Allah didn’t mention the opposite side of the work i.e to separate and pronounce divorce. The Hakams are thus obliged to advice and see the matter from their hearts and not superficially.¹²

2.4. Legal Power of Hakam:

The Jurists are at difference whether the Hakams can pronounce Talaq or not. According to Imam Malik and Imam Shafi (in one of his views) the Hakams have full powers to reconcile or pronounce divorce. Imam Abu Hanifa and Imam Ahmad are of the view that they can not do so unless given consent by the spouses. The difference lies as to whether the Hakam is acting as a “witness” & “messenger” (Wakil) only or acting as a “Qazi”.¹³ Imam Malik’s view is supported by the narration from Ali (may Allah be pleased with him) as is mentioned in Dar al-Qutni that people came with spouses and Ali nominated Hakams from each family. Ali told the Hakams that they have to reconcile but if they feel reasonable, they can cause divorce also. On hearing the same, the wife said that she agrees to the same but the pronouncement of divorce was rejected by the husband. Ali forced him to consent to it.¹⁴ Again he supports his claim that the word “Hakam” in Quran is specific and it is not “Wakil” and there is no ambiguity in its understanding.¹⁵ Imam Malik also considers Hakam as “Sultan” emperor.¹⁶ According to Malik *يُرِيدَا إِصْلَاحًا* i.e if they wish ‘peacemaking’ is directed towards the hakams and the spouses and so is yet another evidence of the full powers of the hakams.¹⁷ Within Maliki School of thought, if the Hakams give three Talaqs then according to Ibn al-Qasim is considered one while Ashshab and Mugheera considers it three.¹⁸

However Imam Abu Hanifa’s arguments are also based on the narration from Ali (may Allah be pleased with him). The powers of separation were not given to the Hakams unless the express consent was given by the husband and wife. Also the powers of separation and pronouncement of divorce is always in the hands of the husband, except when he expressly delegates the same through Agency. Thus if they give consent to the Hakams for separation also then they do the same only as acting as agents. A judge i.e Qadi can not compel a wife to give what she received in marriage for divorce as in the case of ‘Khula’. The same requires the consent of wife and if the judge goes on without her consent, it shall be crossing the very basic injunctions of Islam relating to Hifz al-Mal (safety of property).¹⁹ The basic purpose of hakam is to make ‘Islah’ and thus exceeding Sulh and imparting divorce without consensus is an excess of the powers of Islah given.²⁰

OBSERVATION: The Hanafi jurists hereby are referring to the issue of jurisdiction of the Hakams as is being discussed by the present day courts. This can be made a base for enacting the procedural law of Tahkim as shall be discussed further as to the powers of the ruler to make such laws.

The concept of putting the Hakam as an agent of the spouses is again of great significance as while enacting the procedural laws for Tahkim can be inspired by the laws of Agency and can be of special importance when the matters are other than that of family matters.

In case of difference of opinion, it is obligatory for the Hakams to have consenses of opinion, otherwise no effect shall be given to the Award.²¹ There is a consensus of opinion on this point among the jurists.²²

2.5.General requirements of qualification and procedure:

As far as the number of hakam is considered normally it is two, however according to one view it can be one also as is narrated from the Prophet peace be upon him that Hadrat Anas was sent to listen to the confession of a lady in adultery case and to inflict punishment if confessed. The normal requirement in such cases is four witnesses. This is when the address in the Verse is considered to be addressing the Ruler and not the family members.²³

The pillars(Rukn) of Tahkim are offer and acceptance. The Hakam shall not be a slanderer, infidel, slave, infant but can be an unjust person. There is no Tahkim in cases of retaliation. The Hakam can fully utilize the evidentiary procedural matters like Bayyena, (evidence), Iqrar, Nukool and other recognized processes.²⁴ The verdict of a Hakam is binding in the Majlis (sitting) and not afterwards i.e. if he doesn't give verdict and leaves and then later the parties are not willing them to be the Arbitrators.²⁵

2.6. Pre –requisites of Tahkim:

One important thing to be kept in mind that the process of Tahkim shall be preceded by

- i. An advice by the husband to the wife.²⁶ The advice shall be from Quran and Sunnah.²⁷
- ii. Leaving her alone i.e. stop sexual intercourse²⁸, not talking to her and separating his bed and room. Shall not stop talking for more than 1 month as the prophet peace be upon him did.²⁹ According to some jurists the 'Hijr' i.e. separation can last upto 4 months. The verdict is based on the concept of 'Eela'. According to majority view it can last for any time keeping in consideration the conditions and situation of wife. According to some jurists conversation can be stopped only for three days acting on the saying of the prophet peace be upon him. According to others can be prolonged as was the case of the three companions who remained back from the holy war of 'Tabuk'.³⁰
- iii. Beating her according to the limits required by shariah, i.e. According to Ibn Abbas shall be with 'Siwak' and not to be retaliatory like punching or hurting her.³¹

The concept of Tahkim can further be extended to other matters based on the Tahkim of the Prophet peace be upon him in Hudabia. The Tahkim of Saad ibn Muaaz in between Muslims and the Jews. The Tahkim made between Ali and Muawiya (May Allah bless them both)³².

ALTERNATE DISPUTE RESOLUTION IN PAKISTAN IN SETTLING FAMILY DISPUTES:

1.1. Introduction:

Dispute resolution has been most often associated with marital and other family matters. Alternative Dispute Resolution (ADR) is a vast field. In Pakistan, it is not a new concept. In fact, dispute resolution in Pakistan is, in one form or another, as old as the country itself. Parties have presented disputes to Punchaiats or Jirgas – committee of honorable elders of the community.

Pakistan already has certain legislation in the field of Family Laws relating to marital dispute where dispute must first be attempted to be resolved through mediation and conciliation and only upon failure of conciliation parties can go to courts.

In the Indo-Pak Subcontinent ADR is centuries old called the “PUNCHAIAT” or “JIRGA” system in rural areas wherein all disputes were brought before a committee of (respectable and honorable) elders, whose decision was accepted by the parties, and no party could afford to disagree with the decision because of social rejection by the Society.³³

1.2. Domestic (Pakistani) Laws and Rules

As discussed above, laws related to ADR are implicitly mentioned in the Constitution of Pakistan. Explicit mention of ADR methods and mechanisms is made in the following domestic laws of Pakistan:

- **The Small Claims and Minor Offences Courts Ordinance of 2002;**
- **Sections 102-106 of the SBNP Local Government Ordinance of 2001;**
- **Chapter XXII of the Code of Criminal Procedure of 1898 (summary trial provisions); and**
- **The Arbitration Act of 1940.**
- **West Pakistan Family Court Act 1964.(Sec.10,2(a),21).**
- **Muslim Family Law Ordinance 1961.(Sec.7 & 9).**
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1.2.1. West Pakistan Family Court Act 1964.(Sec.10,2(a),21):

According to Sec.10 of F.C.A as soon as written statement is filed, the Family Court shall fix an early date for pre-trial hearing of the case and on that date, court shall examine the plaintiff, the written statement if any and shall also if deems fit hear the parties and their counsel. Sub-Section (3) states: The court shall ascertain the points at issue and attempt to effect compromise or reconciliation between the parties, if this be possible.³⁴

An Attempt on the part of the presiding judge to effect a compromise or reconciliation is not a mere question of technicality. It is an important function which he has to perform in

cases triable under the Family Law Courts Act. Where he fails to do so, he fails to exercise an essential part of jurisdiction vested in him.³⁵

The procedure of reconciliation being put at the discretion of the judge, to do in any manner he likes.³⁶

Sec.2(a) West Pakistan Family Court Act refers to "Arbitration Council". The function of this Arbitration Council further is elaborated in Sec.21. This sec. Allows the applicability of "Arbitration Council" as is explained in Muslim Family Law Ordinance 1961. The Section reads out: Where Family Court passes a Decree for dissolution of marriage solemnized under the Muslim Law, the court shall send by registered post, within 7 days of passing such decree, a certified copy of the same to the appropriate Chairman referred to in Sec.7. of the Muslim Family Law Ordinance 1961. Upon receipt of such copy, the Chairman shall proceed as if he had received intimation of talaq required to be given under the said ordinance.

1.2.2. Muslim Family Law Ordinance 1961.(Sec.7 & 9):

Sec.7 reads as, any man who wishes to divorce his wife, shall as soon as may be after pronouncement of talaq in any form what so ever, give the Chairman notice in writing of his having done so and shall supply a copy thereof to the wife. In Sub section (3) is laid down that the Talaq shall not be effective until the expiration of 90 days, from the day on which notice under Sub-section (1) is delivered to Chairman. Section 7(4) further explains that the Chairman to constitute Arbitration Council for the purpose of bringing about a reconciliation and the Arbitration Council to take all steps to do so. In *Batool Tahir v Province of Sind*.³⁷ It was held that conciliators have no authority to give findings on validity of Talaq. The Counsellors could only record the contentions of both the parties and then could merely state whether reconciliation efforts succeeded or not.

*Mian Arif Mehmood v Mst. Tanveer Fatima*³⁸. Held: After dissolution, wife can recover maintenance by filing application under section 9. Muslim Family Law Ordinance. The same awarded by the Arbitration Council was in accordance with law.

1.2.3. The Small Claims and Minor Offences Courts Ordinance of 2002:

The Small Claims and Minor Offences Court Ordinance is a law intended to establish a court of Small Claims and Minor Offences, where the value of the small claims suit is less than Rs.100,000 (\$1600)³⁹ and the punishment for minor offences is less than three years.⁴⁰ The purpose of the law is to "provide legal cover to amicable modes of settling disputes between parties...easily and expeditiously." This law encourages "amicable settlement" which includes arbitration, mediation, and conciliation.

The Ordinance in section 2(a) mentions, In this ordinance unless anything is repugnant in the subject or context, "amicable settlement" means settlement through arbitration process, other than arbitration under the Arbitration act, 1940 (x of 1940), mediation, conciliation or any other any lawful means mutually agreed upon by the parties.

Although the Family disputes as related to the financial matters are not mentioned in the schedule attached ,yet Part I (16) of the schedule do mentions that any relief not falling under the schedule but agreed to by the parties to be settled under this ordinance.

1.2.4. SBNP Local Government Ordinance of 2001:

The SBNP Local Government Ordinance of 2001 (SBNP – LGO), Sections 102 – 106 under Chapter XI of the Ordinance encourage “amicable settlement of disputes...through mediation, conciliation, and arbitration.” Given that this is provincial law ,it goes to show that Pakistan has resolved to the use ADR methods, even at a local level.The system introduced in Pakistan, establishing elected local governments at the level of Union Council, Tehsil (Sub District Level) and the District level. The institution of Musalihat Anjuman (literally meaning conciliation forums) has been provided at the level of Union Councils for dispute resolution through ADR (including conciliation, mediation and arbitration).⁴¹

1.2.5. Arbitration Act 1940(x of 1940):

The Act provides for three classes of arbitration:

- 1) Arbitration without court intervention (Chapter II, sections 3-19);
- 2) Arbitration where no suit is pending, (but through court) (Chapter III, section 20); and
- 3) Arbitration in suits (through court) (Chapter IV, sections 21-25).

The Arbitrators are required to give award within four months which period can be extended by the court upon plausible reason given by the Arbitrator and the parties. The Arbitrator is not bound by the rules or evidence or the procedural code, has the power to summon the witnesses, record evidence.

1.2.5.1. View of the superior courts of Pakistan on Arbitration:

In *Mian corporation v Lever Brothers Pakistan Ltd.*⁴² It was held :Arbitrator being final judge on the question of law and fact ,the decision shall be given due weight and respect, Unless misconduct alleged and proved against him to the satisfaction of the court.Court can not re-apraise evidence recorded by the Arbitrator,to discover error or infirmity in Award.Possibility of different view couldn't be made ground to disturb Award.

In *Muhammad Farooq v Nazir Ahmad.*⁴³ It was held that the plea of reffering the matter to Arbitrator should be raised promptly at first opportunity.

In *Messers Aer Rianta International Pakistan(Pvt.)Ltd. V Civil Aviation Authority.*⁴⁴Held: Court to proceed with the presumption of correctness attached to the Award.Court's duty was to give every reasonable intendment in favour of Award and lean towards upholding it,rather vitiating the same.

In *Metropolitan Steel Corp.Ltd. v Macsteel International UK.Ltd.*⁴⁵ Held: The agreement of sale contained “Arbitration Clause” ,thus were bound by the same.

*China International Water v Pakistan Water and Power Development Authority.*⁴⁶Held:Their was no mistake of law or fact in the Arbitration Award.Court's Jurisdiction is only of supervisory nature and not of Apellate nature.Court can't reject the Award merely that a different conclusion can be drawn.It is not necessary for the

Arbitrator to frame issues and neither it is necessary for him to give finding on each issue.

In *Sh.Saleem Ali v Sh.Akhtar Ali*.⁴⁷ Held that the Arbitrator's authority could only be challenged if the party was participating under protest .The principle of estoppel attracted where a party having consented to Arbitration and participated in the proceedings.

Award can be set aside on the following grounds :

- i. By misconduct of Arbitrator.
- ii. The Arbitrator commits breach of duty and responsibility.
- iii. Acts contrary to equity and good conscience.
- iv. Acts without jurisdiction or exceeds jurisdiction.
- v. Acts beyond reference.
- vi. Ignores material documents.
- vii. Gives Award based on no evidence.

2.7. CONCLUSION & SUGGESTIONS:

It is quite clear that the Pakistani law is not making a full use of the basic principals of Quran and Sunnah.The Arbitration clauses used in the Family Law are never being effective rather they have been just formality after the divorce is being pronounced by the family judge.The only attempt made by the family judge in the beginning of reconciliation is not backed by the basic provision of Quran and Sunnah.If the Arbitration is done along with the reconciliation by the judge and making the parties bound by the decision of the Arbitrators ,better results can be achieved.

It shall be noted that while enacting the procedural law for Tahkim in the present day court system,the legislators keeping the basic principals given by Quran and Sunnah ,given by the jurists and specially the Maqasid of Shariah can enact Arbitration procedural laws for themselves. Generally the Islamic law can be divided in two spheres . The one is the fixed part of the law i.e Quran , Sunnah, Ibadat, Qiyas, Inheritance, Marriage, Divorce, Hudud.⁴⁸ The second is the growing area of the law and changes with the change of time and hence is subjected to Islamization e.g. Torts, Contracts, Taxation, Constitutional, Fundamental Rights, Buisness Organization, Justice under Administrative Law, Labor Law, Granting of Government Contracts.⁴⁹ Similarly the fields like Cyber Laws, Traffic Laws, New Crimes, Income Tax requires fresh Ijtihad.⁵⁰ From another angle one can say that the fixed is the right of Allah, while the other is the flexible and changing. Thus ranging from Ibadat to penalties, Inheritance to zakat etc. comes in the first sphere. It also includes some of the institutions that relate to the right of individuals and have been determined in the Quran and relate to the first sphere as relates to rights explicitly granted by Allah. Thus marriage will always be a required institution , which can not be replaced by common law marriages and child-care. Inheritance will always be distributed according to the Quranic Injunctions, and Riba will always remain prohibited. There is very little and no scope of further ijtihaad in this area. The jurists devoted fourteen centuries to the development of the fixed part of the law and

have developed it to its limits. They have always left the flexible and changing part that relates to the rights of the individuals as a community for the Imam to develop it and which is still waiting to be developed in accordance with the purposes of Islamic Law and its general principles.⁵¹

The case of ADR also falls in the same category ,hence can be worked upon.

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³² Muhammad Jamal al-din al-Qasimi, *Tafsir al-Qasimi*, (Cairo:Dar al-Hadith,2003), vol.5,108.

³³ www.nyulawglobal.org/globalex/pakistan_adr.htm.VIEWED ON 28/10/2010

³⁴ Shawkat Mehmood Advocate,*Muslim Family Laws*, (Lahore: New Fine Printing Press, 11th edn., 1989),133.

³⁵ Id,134.

³⁶ Ibid.

³⁷ PLD 2005 Karachi 358.

³⁸ PLD 2004 Lahore 316.

³⁹ The Small Claims and Minor Offences Courts Ordinance of 2002,§ 5(a).

⁴⁰ Ibid,Shedule part II.

⁴¹ SBNP Local Government Ordinance, 2001, Chapter XI, § 103(1).

⁴² PLD 2006 SC 169.

⁴³ PLD 2006 SC 196.

⁴⁴ PLD 2006 Karachi 216.

⁴⁵ PLD 2006 Karachi 664.

⁴⁶ PLD 2005 Karachi 670.

⁴⁷ PLD 2004 Lahore 404.

⁴⁸ Nyazee,Imran Ahsan Khan,*Theories of Islamic Law:The Methodology of Ijtihad*,(Kuala Lumpur :The Other Press,2002),p.55.

⁴⁹ Ibid.p.51.

⁵⁰ Ibid . p. 55.

⁵¹ Ibid.p. 123.-124.