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Arbitration (*Taḥkīm*) in Islamic and Pakistani Law: A Comparative Study

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Abstract

This article studies arbitration (taḥkīm) *in the Islamic justice system, discussing its various facets such as meaning, history, legal status, components, procedure, effects, powers of the* ḥakam, *value of the arbitral award, and the subject matter of* taḥkīm. *The study also examines the application of* taḥkīm *to family disputes in order to explore how this subject has been dealt with by jurists* (fuqahā'). *This is then complemented with a review of Pakistani law on arbitration. The article also proposes some amendments to the Pakistani law on arbitration. Content analysis of qualitative research has been utilized for the investigation of the issues. An appendix at the end of the article shows the similarities and differences between Islamic and Pakistani law with reference to arbitration.*

Keywords

taḥkīm, *ḥakam*, *iṣlaḥ*, arbitration, arbitrator, award, dispute.

Introduction

Unlike today's modern state, there was no concept of organized courts in the pre-Islamic era. Those who had power dominated and the use of force and violence was a matter of pride. An inductive study of Arabic poetry reveals the extreme attitude of Arabs towards cruelty, injustice, authoritarianism, and law-breaking.[1] Individuals were unable to get their rights without seeking the assistance of their tribe. A person lacking such force, of course, would lose his rights.[2] However, disputes could also

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[2] Ibid.

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be resolved through peaceful settlements with the leaders of tribes, no matter how minor it may be.[3] In case the tribal chiefs failed, disputes used to be referred to a person of renowned reputation in terms of skills, competence, and expertise.[4] Sometimes, a panel of such persons was selected for the same purpose. Instances of female arbitrators could also be found, though not in many cases. A few examples of these were Jum'ah bint Ḥābis al-Iyādī, Ḥadhām bint al-Rayyān, Ṣuḥr bint Luqmān, and Hind bint al-Khuss.[5] In some cases, even astrologers were chosen as arbiters. The reason was that people believed them to be scholars of religion and accepted their decisions as sacred and divine.[6] For instance, Hindah bint 'Utbah dragged her first husband Ḥafṣ b. al-Mughīrah to an astrologer of Yemen for arbitral proceedings.[7] Likewise, a dispute arose between the people of Quraysh and 'Abd al-Muṭṭalib regarding water of Zamzam. The dispute was finally referred to a female astrologer of Syria.[8] The awards were, however, not binding and that is why most of the disputes ended in quarrels and wars.[9] To ensure compliance with the award, disputants were, sometimes, required to provide security in the form of property or hostages.[10]

Another dispute, for example, arose between Quraysh and Khuzā'ah regarding the administration of Mecca, resulting in deaths on both sides. The tribe of Quraysh was about to expel Khuzā'ah from Mecca, but the disputants appointed Ya'mar b. 'Awf as the arbiter. In his award, he declared the entitlement of Quraysh to the administration of the city. He further held that no retaliation from either side would take place and that Khuzā'ah would not be expelled from Mecca.[11] Because of this

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[3] Hāshim Yaḥyā al-Mallāḥ, *al-Wasīṭ fī Ta'rīkh al-'Arab qabl al-Islām* (Mosul: Dār al-Kutub, 1994), 385.

[4] Aḥmad b. Abī Ya'qūb b. Ja'far al-Ya'qūbī, *Ta'rīkh al-Ya'qūbī* (Beirut: Dār Ṣādir, 1960), 1:258.

[5] Jawād 'Alī, *al-Mufaṣṣal fī Ta'rīkh al-'Arab qabl al-Islām* (Beirut: Dār Sāqī, 2001), 5:498, 638. Also see Maḥmūd Shukrī al-Alūsī, *Bulūgh al-Arib fī Ma'rifat Aḥwāl al-'Arab* (Cairo: Dār al-Kitāb al-'Arabī, 1342 AH), 308; 'Uthmān b. Baḥr al-Jāḥiẓ, *al-Bayān wa 'l-Tabyīn*, ed. Fawzī 'Aṭawī (Beirut: Dār Sa'b, 1968), 409.

[6] 'Alī, *al-Mufaṣṣal*, 5:497.

[7] Ẓāfir al-Qāsimī, *Niẓām al-Ḥukm fī 'l-Sharī'ah wa 'l-Ta'rīkh al-Islāmī* (Beirut: Dār al-Nafā'is, 1992), 2:13.

[8] Ibid.

[9] Ṣāliḥ Aḥmad al-'Alī, *Muḥāḍarāt fī Ta'rīkh al-'Arab* (Mosul: Dār al-Kutub, 1981), 164.

[10] Joseph Schacht, *An Introduction to Islamic Law* (New York: Oxford University Press, 1982), 37; Andrew Smolik, "The Effect of Shari'a on the Dispute Resolution Process Set forth in the Washington Convention," 2010, no. 1 (2010): 157–58, http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1595&context=jdr.

[11] Al-Qāsimī, *Niẓām al-Ḥukm*, 2:31-32.

effective arbitration, Ya'mar was granted the title of "*al-shaddākh*" (the crusher of bloodshed)."[12] Another famous episode is his arbitration in the issue of inheritance of a hermaphrodite. The *ratio decidendi* of his award was whether he urinates like a man or a woman.[13]

The Prophet Muḥammad (peace be on him) himself acted as an arbiter in pre-Islamic period. Ibn Sa'd has narrated that in the era of ignorance before Islam, the people used to refer their disputes to the Messenger of Allah.[14] Ibn Sa'd also criticized authors who ignored mentioning 'Umar b. al-Khaṭṭāb as an arbiter in the era of ignorance. In one dispute regarding prisoners, 'Umar gave an award stating that two slaves would be ransomed for one Arab noble and two maids would be ransomed for one noble Arab female.[15] Ibn Sa'd further narrated that some arbitrators of this era later embraced Islam, such as Hāni' b. Yazīd, also known as Abū 'l-Ḥakam. The Prophet once asked him why people had called him Abū 'l- Ḥakam. He replied that it was for his arbitrations between disputants. The Prophet then enquired whether he had a son. "I have Shurayḥ, 'Abd Allāh, and Muslim," he replied. "Which one is the eldest?" the Prophet asked. Abū 'l-Ḥakam responded that Shurayḥ was the eldest. The Prophet advised that his agnomen would be Abū Shurayḥ.[16] The famous battle, *al-Basūs*, began with the death of a camel and continued for forty years (494–534 CE).[17] The dispute was eventually settled by the process of *taḥkīm.* Similarly, another famous war of *Dāḥis* and *Ghabrā'* came to an end as a result of *taḥkīm*.[18]

The arbitrators of that era did not follow any law or code because no such instruments were available. They, however, resolved the disputes by applying customs and usages. Sometimes, they decided as per prevailing beliefs. The disputants were never bound to refer their dispute to arbitration. However, the award was not binding and the maximum sanction for non-compliance was nothing more than the displeasure of the tribe.[19]

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[12] Ibid., 2:32.
[13] 'Abd al-Malik b. Hishām, *al-Sīrah al-Nabawiyyah* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1955), 1:122; al-Qāsimī, *Niẓām al-Ḥukm,* 2:33.
[14] Muḥammad b. Sa'd, *al-Ṭabaqāt al-Kubrā* (Beirut: Dār Ṣādir, 1960), 1:157.
[15] Ibid., 6:153.
[16] Aḥmad b. Shu'ayb al-Nasā'ī, *Sunan*, Kitāb ādāb al-quḍāh, Bāb idhā ḥakkamū rajulan fa qaḍā baynahum; Ibn Sa'd, *al-Ṭabaqāt al-Kubrā,* 6:49; 'Īsā b. 'Uthmān al-Ghuzzī, *Adab al-Qaḍā'* (Riyadh: Maktabat Nizār Muṣṭafā al-Bāz, 2004), 29; al-Qāsimī, *Niẓām al-Ḥukm*, 2:15–16.
[17] Kamal Suleiman Salibi, *A History of Arabia* (New York: Caravan Books, 1980), 68.
[18] Joseph T. Barrett and Joseph P. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (Hoboken: John Wiley & Sons, 2004), 13.
[19] Aḥmad Amīn, *Fajr al-Islām* (Baghdad: Maktabat al-Nahḍah, 1955), 225.

In Arab societies, arbiters enjoyed a great deal of respect. They were seen as men of principles with quality manners and symbols of honesty and worthy of trust. An arbitrator Qays b. ʻAdī, for example, was considered a model of respect even in Arabic language and literature.[20] The same was the case with another famous arbitrator Kurayb b. Ṣafwān. The members of Ṣafwān family were respected to such extent that the pilgrims would not leave for Muzdalifah unless Ṣafwān had left for it.[21] Amongst the famous arbitrators of pre-Islamic era were Ḥājib b. Zurārah, Aqraʻ b. Ḥābis, Aktham b. Ṣayfī, and ʻAbd al-Muṭṭalib b. Hāshim, the grandfather of the Prophet.[22] It has also been reported that arbiters used to wear quality apparels during arbitral proceedings. Woolen clothes were a sort of traditional uniform of arbitrators. Moreover, it was the privilege of an arbiter to hold a mace (wooden, boney, or iron stick) in his hand as a sign of authority.[23]

The Meaning of *Taḥkīm*

Taḥkīm literally means making, appointing, or empowering someone to decide. The person so appointed is known as *ḥakam*. The verb *ḥakama* literally connotes stopping or staying something or action for the purpose of reform.[24] It also means to stop someone from cruelty or to bridle an animal.[25] According to Justice Cornelius, its common understood meaning is *qāḍī* or judge.[26]

Taḥkīm, on the other hand, technically means "the consensual reference of a dispute by disputants to a neutral for resolution."[27] The writers of *al-Majallah* have followed the same definition.[28] Here, the word

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[20] Muḥammad b. Ḥabīb, *al-Muḥabbar* (Hyderabad: Dā'irat al-Maʻārif al-ʻUthmāniyyah, 1942), 133.
[21] Ibid., 183.
[22] Fāṭimah Muḥammad al-ʻAwwā, *ʻAqd al-Taḥkīm fī 'l-Sharīʻah wa 'l-Qānūn* (Beirut: al-Maktab al-Islāmī, 2002), 208.
[23] ʻAlī, *al-Mufaṣṣal*, 5:499.
[24] Rāghib al-Iṣfahānī, *al-Mufradāt fī Gharā'ib al-Qur'ān* (Alexandria: Maktabat Fayyāḍ, 2009), 175.
[25] Ibid. Also see ʻAbd al-Raḥmān al-Kīlānī, *Mutarādifāt al-Qur'ān* (Lahore: Maktabat al-Salām, 2012), 451; Tanzil-ur-Rahman, *Qānūnī Lughat* (Lahore: Maghribi Pakistan Urdu Academy, 1983), 264.
[26] Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lahore 113.
[27] ʻAlī b. Khalīl al-Ṭarāblusī, *Muʻīn al-Ḥukkām* (Beirut: Dār al-Fikr, n.d.), 24; al-Qāḍī Mujāhid al-Islām, *al-Niẓām al-Qaḍā'ī al-Islāmī* (Beirut: Dār al-Kutub al-ʻIlmiyyah, 2001), 154; Muḥammad ʻAmīm al-Iḥsān al-Mujaddidī, *al-Taʻrīfāt al-Fiqhiyyah* (Beirut: Dār al-Kutub al-ʻIlmiyyah, 2009), 53.
[28] *Majallat al-Aḥkām al-ʻAdliyyah* (Beirut: Dār Ibn Ḥazm, 2011), sec. 1790. Also see al-Ghuzzī, *Adab al-Qaḍā'*, 28.

"neutral" shall include a sole arbitrator as well as more than one.[29] Some writers have added to the definition the words by application of rules of the *sharīʿah*.[30] According to Ibn Nujaym, *taḥkīm* is the sub-discipline (*farʿ*) of *qaḍāʾ*.[31] Ibn Farḥūn states that *taḥkīm* is a non-state authority (established by individuals). He further adds that *taḥkīm* is a sub-branch of *qaḍāʾ* dealing with financial matters and excludes *ḥudūd, liʿān*, and *qiṣāṣ* from its domain.[32]

The Legal Justification for *Taḥkīm* in the *Sharīʿah*

Islam recognized arbitration as a mechanism of conflict resolution with some modifications. Its legality could be inferred from the Qur'ān, *sunnah*, and *ijmāʿ*. The basic element for its validity is, however, public necessity.[33] Had it not been legalized, the public would have faced hardship. Avoidance of hardship (*rafʿ al-ḥaraj*), public good, and necessity are amongst the secondary sources of Islamic law.[34] Following are the provisions of the Qur'ān and *sunnah* that provide legal justification for arbitration.

Announcing the arbitral authority of the Prophet, the Qur'ān states "But nay, by thy Lord, they will not believe (in truth) until they make thee judge of what is in dispute between them and find within themselves no dislike of that which thou decidest and submit with full submission."[35]

The application of *taḥkīm* in family disputes was mandated in the following verse which states, "And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware."[36]

Regarding arbitration between the people of Torah, special directives were revealed.

> Listeners for the sake of falsehood! Greedy for illicit gain! If then they have recourse unto thee (Muḥammad) judge between them or disclaim

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[29] Muḥammad Amīn b. ʿĀbidīn, *Ḥāshiyat al-Radd al-Muḥtār ʿalā 'l-Durr al-Mukhtār* (Quetta: Maktabah-i Rashīdiyyah, n.d.), 8:144.
[30] Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh* (Damascus: Dār al-Fikr, 1989), 6:756.
[31] Ibrāhīm b. Muḥammad b. Nujaym, *al-Baḥr al-Rāʾiq* (Beirut: Dār al-Maʿrifah, n.d.), 7:24.
[32] Ibrāhīm b. Muḥammad b. Farḥūn, *Tabṣirat al-Ḥukkām* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995), 17.
[33] Al-Ṭarāblusī, *Muʿīn al-Ḥukkām*, 23.
[34] Al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*, 2:734.
[35] Qur'ān 4:65.
[36] Ibid., 4:35.

> jurisdiction. If thou disclaimest jurisdiction, then they cannot harm thee at all. But if thou judgest, judge between them with equity. Lo! Allah loveth the equitable.[37] How come they unto thee for arbitration when they have the Torah, wherein Allāh hath delivered judgment (for them)? Yet even after that they turn away. Such (folk) are not believers.[38]

Muslims were ordained to resolve their disputes in the following manner:

> O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end.[39]

For resolving the political differences between the Muslims, the following mechanism was revealed:

> And if two parties of believers fall to fighting, then make peace between them. And if one party of them doeth wrong to the other, fight ye that which doeth wrong till it return unto the ordinance of Allah; then, if it return, make peace between them justly, and act equitably. Lo! Allah loveth the equitable. The believers are naught else than brothers. Therefore make peace between your brethren and observe your duty to Allah that haply ye may obtain mercy.[40]

All the above verses reveal that referral of disputes to third parties is highly recommended by the *sharīʿah*. According to al-Shāfiʿī, the commanding verb in verse 4:35 creates obligation. The two qualifications "*min ahlihā*" and "*min ahlihī*" refer to persons best suited to the job. Further, blood kinship should not be a condition for a job of judicial nature. Furthermore, Caliph ʿUmar appointed ʿUthmān and Ibn ʿAbbās to resolve a marital dispute between spouses; one from Banū Hāshim and the other from Banū ʿAbd al-Shams. Both were strangers (not relatives) to the disputing partners. The appointment of two arbiters is, therefore, necessary *(wājib*) to remove injustice, whereas an arbiter being from the families of spouses is mere directory.[41]

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[37] Ibid., 5:42.
[38] Ibid., 5:43.
[39] Ibid., 4:59.
[40] Ibid., 49:9–10.
[41] Wahbah al-Zuḥaylī, *al-Tafsīr al-Munīr* (Quetta: Amīr Ḥamzah Kutub Khānah, n.d.), 5:62; Abū ʿAbd Allāh Muḥammad b. al-Qayyim, *Zād al-Maʿād* (Lahore: Anṣār al–Sunnah, 1966), 4:33.

The last two verses employ the cognates and derivatives of *ṣulḥ*. However, we should be aware that the term *iṣlāḥ* encompasses all mechanisms of peaceful settlements including arbitration. *Ṣulḥ* refers to reconciliation in shape of a contracts, whereas *iṣlāḥ* is every procedure adapted to arrive at a peaceful settlement. The meaning of *iṣlāḥ* should, therefore, not be confined to mere conciliation or the contract of *ṣulḥ*.[42] The term *iṣlāḥ* in the provisions of the Qur'ān and *sunnah* should be interpreted in this broad sense. So, what the modern world knows as Alternative Dispute Resolution (ADR) today, the Qur'ān and *sunnah* have introduced it as *iṣlāḥ* centuries ago.

Like the Qur'ān, the *sunnah* also supports resolution through arbitration. Narrating his role as arbiter, Abū Shurayḥ informed the Prophet saying, "O Messenger of Allah! My tribesmen usually refer their disputes to me. Both parties go happy with my award." The Prophet expressed his joy and said, "What a nice deed it is!"[43] On another occasion, the Prophet said, "And that whenever you differ about anything, refer it to God and to Muhammad."[44]

Muhammad Hamidullah quotes section forty-two of the Medina Pact as follows:

> And that if any murder or quarrel takes place among the people of this code, from which any trouble may be feared, it shall be referred to God and God's Messenger, Muhammad (SAW); and God will be with him who will be most particular about what is Written in this code and act on it most faithfully."[45]

In his another work, Hamidulalh says that the judicial administration was headed by Muḥammad and that his award was final. If disputants hailed from the same tribe, the chieftain was the court of first instance. If they belonged to distinct tribes, the dispute was to be referred to the Prophet.[46]

As mentioned earlier, the Prophet himself performed as an arbiter on several occasions. His arbitration while resolving the dispute of the Black Stone (*al-Ḥajar al-Aswad*) has been recorded by historians[47] and is

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[42] Al-Kīlānī, *Mutarādifāt al-Qur'ān*, 593–94.
[43] Al-Nasā'ī, *Sunan*, Kitāb ādāb al-quḍāh, Bāb idhā ḥakkamū rajulan fa qaḍā baynahum.
[44] Muhammad Hamidullah, *The First Written Constitution of the World* (Lahore: Ashraf Press, 1975), 12.
[45] Ibid., section 42.
[46] Hamidullah, *The Emergence of Islam* (Islamabad: Islamic Research Institute, 2004), 198.
[47] 'Abd al-Raḥmān b. Muḥammad b. Khaldūn, *Ta'rīkh Ibn Khaldūn* (Karachi: Nafis Academy Printers, 1981), 36; Barrett and Barrett, *History of Alternative Dispute Resolution*,

too famous to be mentioned in detail. The Prophet also arbitrated between Ka'b b. Mālik and 'Abd Allāh b. Abī Ḥadrad in a loan issue. When the Prophet saw them arguing, he said, "O Ka'b," beckoning with his hand as if intending to say, "Write off half the money." So Ka'b took half.[48] On another occasion, the Prophet directed Abū Bakr to iron out some differences between himself and 'Ā'ishah.[49] Similarly, the Prophet said that anyone who arbitrated between two people and did not decide on merits was liable to the curse of Allah.[50]

The Qur'ān uses two terms for a judge, that is, *qāḍī* and *ḥakam*. Their triliteral roots are *q-ḍ-y* and *ḥ-k-m*. The Prophet preferred being arbitrator to being *qāḍī*. The Qur'ān uses the verb *ḥakama* while mentioning the judicial activity of the Prophet. On the other hand, the verb *qaḍā* frequently occurs and refers to the meaning of promulgating an ordinance by Allah or deciding a controversy by Him on the Day of Judgement. It may, nonetheless, be noted that in verse 6:65 both verbs occur in parallel. The verb *ḥakama* refers to the role of the Prophet as an arbitrator, whereas the verb *qaḍā* denotes the authoritative status of his decision.[51]

After the defeat of Quraysh in the battle of Aḥzāb and the following defeat of the Jewish tribe of Banū Qurayẓah, the Prophet, at the request of Aws, appointed Sa'd b. Mu'ādh as arbiter. Sa'd awarded the following: "Execute their men, captivate their women and children and share out their animals among the Muslims."[52]

Ijmā', particularly that of the Companions, provides evidence for the legality of arbitration.[53] Caliph 'Umar appointed Zayd b. Thābit as the arbitrator. 'Uthmān and Ṭalḥah appointed Jubayr b. Muṭ'im as the arbitrator in their dispute. It is pertinent to mention that both arbitrators were not regular judges/*qāḍīs*.[54] Shurayḥ (before his

13; Ibn Hishām, *Sīrat al-Nabī,* trans. Maulavī Quṭb al-Dīn (Lahore: Faraz Imtiaz Press, 2006), 1:221.

[48] Ibid.

[49] Abū Ḥāmid al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn* (Beirut: Dār al-Ma'rifah, 1900), 2:44.

[50] 'Abd al-Razzāq b. Humām, *Muṣannaf* (n.p.: Dār 'Umar, 1980), 1:443.

[51] Muhammad Khalid Masud, Rudolph Peters and David S. Powers, *Dispensing Justice in Islam: Qadis and Their Judgements* (Leiden: Brill Academic Publishers, 2006), 7.

[52] Ibn Hishām, *Sīrat al-Nabī*, 2:260–61; Muḥammad Aḥmad Bāshmīl, *Ghazwat Banī Qurayẓah* (Beirut: Dār al-Kutub, 1966), 198–211; Muḥammad b. Ismā 'īl al-Bukhārī, *Ṣaḥīḥ*, Kitāb al-Maghāzī, Bāb marji' al-Nabī ṣallā Allāh 'alayhi wa sallama min al-aḥzāb wa makhrajihi ilā Banī Qurayẓah wa muḥāṣaratihi iyyāhum.

[53] Muḥammad b. Aḥmad al-Sarakhsī, *al-Mabsūṭ* (Quetta: Maktabah-i Rashīdiyyah, n.d.), 21:58.

[54] Muḥammad Nāṣir al-Dīn al-Albānī, *Irwā' al-Ghalīl fī Takhrīj Aḥādīth Manār al-Sabīl*

appointment as judge) arbitrated between ʻUmar and another person in a contract of sale.[55] Analogy/*qiyās* also approves the legality of arbitration.[56]

The preceding discussion establishes that the primary and secondary sources of the *sharīʿah* support arbitration as a mechanism of dispute resolution in Islamic law. The following lines, however, should be kept in mind as far as the claim of *ijmāʿ* is concerned.

According to the Shāfiʿī school, arbitration is allowed provided that no formal judge or regular courts have been established in an area.[57] Some jurists even go to the extent that arbitration is not allowed at all. Famous literalist scholar Ibn Ḥazm, for example, held that arbitration was unlawful. He argued that it was a form of civil disobedience and amounted to resisting the authority of the chief executive/*imām*.[58]

Likewise, the Khawārij opposed arbitration and claimed that it was a form of recognizing the authority of false deities (*al-taḥākum ilā ʾl-ṭāghūt*). This stance is unacceptable under any stretch of interpretation and Caliph ʻAlī referred to the position of the Khawārij as "a right argument with an abused ill-intended construction."[59]

In general, opinions rejecting the validity of arbitration are weak because of the following:

1. There is no direct evidence for the prohibition of arbitration.
2. It contradicts evidences forwarded by the majority.
3. Civil disobedience may be thought of in case of prohibitive orders of the *imām*.
4. The Prophet allowed *taḥkīm* while regular *qāḍī*s were functioning. The Companions also followed suit.
5. There are many factors requiring arbitration, such as confidentiality in family matters and accounts as well as a general desire to reach a prompt solution to a conflict. A complete ban on arbitration will amount, of course, to unwanted restrain and inconvenience (*ḥaraj*).

(Beirut: al-Maktab al-Islāmī, 1985), 8:238–39.

[55] Ibid., 8:231.

[56] Al-Ṭarāblusī, *Muʿīn al-Ḥukkām,* 24–25.

[57] Ibn ʻĀbidīn, *Ḥāshiyat al-Radd al-Muḥtār*, 8:140.

[58] Muḥammad b. al-Kāṭīb al-Sharbīnī, *Mughnī ʾl-Muḥtāj* (Beirut: Dār al-Maʿrifah, 2010), 4:506–7; Muḥammad b. Aḥmad al-Ramlī, *Nihāyat al-Muḥtāj* (Beirut: Dār al-Kutub al-ʻIlmiyyah, 2009), 6:267, 269–70; ʻAlī b. Aḥmad b. Ḥazm, *al-Muḥallā* (Cairo: Dār al-Turāth, n.d.), 9:425.

[59] ʻAlī b. Muḥammad al-Sawājī, *Ittifāq al-Taḥkīm wa Istiqlāluh* (Riyadh: Maktabat al-Malik Fahad al-Waṭaniyyah, 1430 AH), 50–55.

The Subject Matter of Arbitration

What cases are fit for arbitration and what are not is not as simple in the *sharīʿah* as it is understood in law. In the *sharīʿah*, it depends upon the nature of the dispute. Civility or criminality is not the sole criterion in this regard. One shall have to examine the dispute whether it comes within the ambit of *ḥuqūq Allāh* or *ḥuqūq al-ʿibād.* This would provide a basis for determining what should be the subject of *taḥkīm* or what types of cases could be referred to arbitrators. *Ḥuqūq Allāh* literally means the rights of God. Masʿūd b. ʿUmar al-Taftāzānī defines it as the right "which contains public benefit not specific to any person. It is attributed to Him due to its high significance and widest utility."[60] *Ḥuqūq al-ʿibād* literally means the rights of subjects. Al-Taftāzānī defines it as the right "which involves a personal benefit such as the prohibition of appropriation of another's property."[61]

Ḥuqūq al-ʿibād are sometimes referred to as *ḥaqq al-salṭanah* (right of the state) or *ḥaqq al-sulṭān*. The right of the state may also carry the right of Allah. The right of Allah may not involve the right of the state.[62] Sometimes the right of Allah may coexist with that of the individual. In such a situation, either the right of Allah or the right of the individual will be dominant. Following the division of rights, jurists have different approaches towards the subject matter of arbitration.

1. According to Ḥanbalī, Imāmī, and Ẓāhirī schools as well as some Shāfiʿīs, all kinds of cases, such as *ḥudūd, qiṣāṣ*, family issues, and *liʿān,* irrespective of their nature, may be resolved through arbitration. They argue that arbitrator is the appointee of the caliph and is, therefore, competent to hear all sorts of cases.[63] This argument, however, is not convincing because if someone is appointed by the caliph for this purpose, he becomes a regular judge. He cannot be called an arbitrator in the technical sense.
2. According to the Ḥanafī school, *ḥudūd* cases are not arbitrable. However, arbitration is allowed in all other cases, particularly where the rights of individuals are involved. According to them, cases that

[60] Masʿūd b. ʿUmar al-Taftāzānī, *al-Talwīḥ ʿalā ʾl-Tawḍīḥ* (Karachi: Mīr Muḥammad Kutub khānah, n.d.), 637.
[61] Ibid.
[62] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 2009), 92.
[63] ʿAlī b. Sulaymān al-Mardāwī, *al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf* (Cairo: Maṭbaʿ al-Sunnah al-Muḥammadiyyah, 1958), 197–98; Muḥammad al-Jawād al-Ḥusaynī, *Miftāḥ al-Karāmah fī Sharḥ Qawāʿid al-ʿAllāmah* (Tehran: Maṭbaʿ-i Rangīn, 1377), 10:3; Ibn Ḥazm, *al-Muḥallā*, 9:435.

admit conciliation also admit arbitration.[64] They have, nonetheless, included *li'ān* in *ḥudūd* for the purpose of arbitration. The permission of arbitration in all other cases except *ḥudūd* is only their academic stance and they avoid giving official status (*fatwā*) to this stance. They argue that a *fatwā* in this regard would give a free license to the public and would render *qāḍīs* irrelevant. It would also encourage the people to avoid having recourse to state-run institutions.[65] In *qadhf* and *qiṣāṣ,* they have two opposite opinions.[66]

3. The Shāfi'ī school does not allow arbitration in criminal cases (*ḥudūd* and *ta'zīr*).[67]
4. The Zaydī school and some Ḥanbalīs rule that arbitration is permissible in every case except matrimonial issues, *li'ān, qiṣāṣ*, and *qadhf.* They argue that the nature of these matters is hazardous and has significant bearing on society.[68] This argument is quite strange because, on this standard, *ḥudūd* cases should not be referred to arbitration.

Some contemporary scholars of Islamic law and jurisprudence, particularly the honourable judges of Pakistani courts, see that practical utilization of arbitration in criminal cases is impossible owing to the issue of their execution. This apprehension, however, could be simply answered by adding a provision in the law restricting execution of the award only to the court.

Credentials of the *Ḥakam* (Arbitrator)

Unlike the situation in law, the *ḥakam* enjoys the status of a *qāḍī* in the *sharī'ah*. He must, therefore, bear the eligibility and agreed-upon qualifications required for the appointment of a *qāḍī*.[69] According to Mālikī jurists, he must be trustworthy (*'ādil)*, jurist (*faqīh),* Muslim, freeman (*ḥurr*), and male.[70] The award shall not be enforced if, at the

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[64] Muḥammad Ḥanīf Gangōhī, *Ma'dan al-Ḥaqā'iq* (Karachi: Dār al-Ishā'at, 2003), 2:98.

[65] Sayyid Amīr 'Alī, *'Ayn al-Hidāyah* (Lahore: Maktabah-i Raḥmāniyyah, 1992), 3:366; Muḥammad b. 'Abd al-Wāḥid b. al-Humām, *Fatḥ al-Qadīr* (Quetta: Maktabah-i Ashrafiyyah, n.d.), 7:298–99; Ibn 'Ābidīn, *Ḥāshiyyat al-Radd al-Muḥtār*, 8:142–3.

[66] Ibn al-Humām, *Fatḥ al-Qadīr*, 7:298–99; Ibn 'Ābidīn, *Ḥāshiyat al-Radd al-Muḥtār*, 8:142–43.

[67] Al-Sharbīnī, *Mughnī 'l-Muḥtāj*, 4:378–9.

[68] Al-Mardāwī, *al-Inṣāf,* 197–98; Aḥmad b. Yaḥyā al-Murtaḍā, *al-Baḥr al-Zakhkhār al-Jāmi' li Madhāhib 'Ulamā' al-Amṣār* (Beirut: Mu'assasat al-Risālah, 1975), 6:114.

[69] Al-Ṭarāblusī, *Mu'īn al-Ḥukkām,* 27; Ibn 'Ābidīn, *Ḥāshiyat Radd al-Muḥtār*, 8:141; Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, 50; al-Ghuzzī, *Adab al-Qaḍā'*, 35.

[70] Ibrāhīm b. Ḥasan b. 'Abd al-Rafī', *Mu'īn al-Ḥukkām 'alā 'l-Qaḍāyā wa 'l-Aḥkām* (Tunis: Dār al-Gharb al-Islāmī, 2011), 1:311.

time of reference, the arbitrator was a minor, slave, or non-Muslim, though he might have become major, freed, or Muslim at the time of pronouncing the award.[71] However, since Abū Ḥanīfah has validated the appointment of a non-Muslim as a *qāḍī* in disputes of non-Muslims, his appointment as an arbitrator in such cases would be valid accordingly.[72] His argument is that ʻAmr b. al-ʻĀṣ, the governor of Egypt, appointed *qāḍī*s from the local population (Copts/*Aqbāṭ*) to adjudicate the disputes of their own people and Caliph ʻUmar approved it.[73] However, a non-Muslim cannot be appointed as an arbitrator between Muslim disputants even if they consent to it. Ḥanafī, Mālikī, Shāfiʻī, Ḥanbalī, and Ẓāhirī scholars concur with each other in considering Islam a prerequisite for a *qāḍī* and *ḥakam*,[74] relying on the verse "And Allah will not give the disbelievers any way (of success) against the believers."[75]

Incompetency of a person to become a witness in some cases shall, spontaneously, render him incompetent to arbitrate in the same cases.[76] A woman cannot be appointed as arbitrator in cases of *qiṣāṣ*. Other elements, affecting the competency of a witness, would render a person incompetent to be an arbitrator, such as a convict for the offence of *qadhf*, perjury, and the like.[77] According to majority of jurists (i.e., Mālikī, Shāfiʻī, and Ḥanbalī scholars, and Zufar), a woman is incompetent to be a *qāḍī* and hence incompetent to be an arbitrator in all types of disputes. Since the Ḥanafīs permit a woman to become a *qāḍī* in cases other than *ḥudūd* and *qiṣāṣ*, she is also competent to be appointed as arbitrator in the permitted areas.

A *ḥakam* must have necessary knowledge of the *sharīʻah*, predominantly, the disciplines of *adab al-qāḍī, fiqh al-munākaḥāt, fiqh al-muʻāmalāt,* and *fiqh al-jināyāt wa 'l-ʻuqūbāt.* Though he needs not to be a *mujtahid*, an absolute layman would not serve the purpose. An arbitrator must be conversant with his job in terms of knowledge and skills. This

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[71] Muḥammad b. ʻAlī al-Ḥaṣkafī, *al-Durr al-Mukhtār* (Quetta: Maktabah-i Rashīdiyyah, n.d.), 8:141; Sayyid Amīr ʻAlī, trans., *Fatāvā-i ʻĀlamgīrī* (Lahore: Ali Ijaz Printers, n.d.), 5:195.

[72] ʻAlī b. Muḥammad al-Māwardī, *al-Aḥkām al-Ṣulṭāniyyah wa 'l-Wilāyāt al-Dīniyyah* (Beirut: Dār al-Arqam, n.d.), 132; ʻAlī, *Fatāvā-i ʻĀlamgīrī*, 5:196.

[73] ʻAbd Allāh Muḥammad al-Shāmī, *Niẓām al-Qaḍā' wa 'l-Murāfaʻāt fī 'l-Sharīʻah al-Islāmiyyah: Dirāsah Fiqhiyyah Muqārinah* (Beirut: al-Maktabah al-ʻAṣriyyah, 2012), 55-56.

[74] Mahmood Ahmad Ghazi, *Adab al-Qāḍī* (Islamabad: Islamic Research Institute, 1993), 204–07, 218.

[75] Qur'ān 4:141.

[76] Al-Ṭarāblusī, *Muʻīn al-Ḥukkām,* 27.

[77] ʻAlī, *Fatāvā-i ʻĀlamgīrī*, 5:196.

much knowledge is essential for a *qāḍī*, therefore, it is necessary for a arbitrator too. The following *ḥadīth* should be given effect.

> Judges are of three kinds. Two are in Hell and one in Paradise. The one who could determine the truth and decided accordingly will be in Paradise, the other who adjudicated between the people ignorantly shall go to Hell, and the other one who miscarried justice [ignorantly or knowingly] shall also go to Hell.[78]

Perhaps, it is because of the above reasons that Ibn ʻĀbidīn (d. 1836) had to say through extended analogy, "Appointment of an arbitrator other than a scholar is prohibited."[79] The element of the required knowledge and skills becomes more significant in case of institutionalized arbitrations. In the case of a *qāḍī*, this requirement is known as experience (*khibrah*).[80]

If a person, carrying the above features, can not be found, then an ordinary person may be appointed as arbitrator. Such person shall, then, be called *ḥakam al-ḍarūrah* (arbitrator of necessity) and we may also have *qāḍī 'l-ḍarūrah.*[81]

Procedure to Conduct *Taḥkīm*

A study of cases disposed of through *taḥkīm* would reveal that complicated procedural rules should not be adhered to in arbitration proceedings. Arbitration is an informal mechanism for expeditious resolution of disputes. Procedural requirements shall not defeat its purpose. For example, a party must not be precluded from producing a witness whose name was not entered in the relevant list. Similarly, Estoppels will not hit this case for the possibility of telling the truth currently. Limitation/*taqādum* shall not run against a party. Engaging of counsel, unwanted personal attendance, place of seating, compulsory working timings, and other requirements of hearing in a court room shall not find a place in arbitral proceedings. It would not, however, mean that natural principles of justice such as opportunity of hearing to each concerned, right of adducing evidence, right of cross-examination, the right to be defended by an advocate, and the like shall be overstepped. As discussed earlier that a *ḥakam* enjoys almost the status of a *qāḍī*, he is liable for ensuring fair trial. Neutrality of the *ḥakam* is as

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[78] Muḥammad b. Yazīd b. Mājah, *Sunan*, Kitāb al-aḥkām, Bāb al-ḥākim yajtahid fa yuṣīb al-ḥaqq.
[79] Ibn ʻĀbidīn, *Ḥāshiyat Radd al-Muḥtār*, 8:144.
[80] Al-Ghuzzī, *Adab al-Qaḍā'*, 42–43.
[81] Ibid., 22–23.

necessary as maintaining equality between disputants.[82] Additionally, the main objective should be simple and quick resolution of a dispute preferably in a win-win situation. This is what we can observe in the *taḥkīm* of the Prophet in several of his dispute resolutions.[83]

Judicial Review of Award

The award may be judicially reviewed. The term "judicial review" includes revision, review, and appeal. If an award is challenged in the judicial forum, the court shall examine it. If the award is found against the opinion of the court meaning thereby that in the opinion of the court the arbitrator has not arrived at the right conclusion of the case,[84] it shall set it aside.[85] Even the judgement of a *qāḍī* on an award may be challenged in the court of another *qāḍī*.[86] If the award is found sustainable with some modifications, the court shall modify it accordingly. Remission of award by the court to the arbitrators for reconsideration has not been mentioned in the classical works of jurists. The probable reason would be the prolongation of the process goes against the very purpose of arbitration (*taḥkīm*). In case of a difference of opinion, the *qāḍī* shall decide the case as he deems fit.[87] Placing reliance on the above arguments, the contemporary jurist Mujāhid al-Islām held, "Filing an appeal against the award of a *ḥakam* is permissible."[88]

It is evident from the above that an award is open to attack in courts by the aggrieved party. The grounds for such an attack may be contrariness of the award to the Qur'ān, the *sunnah, ijmā',* or a gross miscarriage of justice. Considering the significance of the subject, Muḥammad b. Ismā'l al-Bukhārī had to caption one chapter of his book as "When the judge decides discriminately or against the norms of

[82] Kamal Halili Hassan, "Employment Dispute Resolution Mechanism from the Islamic Perspective," *Arab Law Quarterly* 20, no. 2 (2006): 181-207, https://www.jstor.org/stable/27650545.
[83] Ghazi, *Adab al-Qāḍī*, 127–28.
[84] We have deliberately written, "in the opinion of the court the arbitrator has not arrived at the right conclusion of the case," instead of original translation "if the award is found against the school of thought to which the *qāḍī* belongs." Both convey the same meaning, but the former is more familiar to contemporary legal systems.
[85] Ibn 'Ābidīn, *Ḥāshiyat Radd al-Muḥtār*, 8:145; Mujāhid al-Islām, *al-Niẓām al-Qaḍā'ī al-Islāmī,* 157; al- Ghuzzī, *Adab al-Qaḍā'*, 36.
[86] 'Alī, *Fatāvā-i 'Ālamgīrī*, 5:199.
[87] Ibid., 5:197.
[88] Mujāhid al-Islām, *al-Niẓām al-Qaḍā'ī al-Islāmī*, 157.

qualified jurists (*ahl al-'ilm*), his decision shall be reversed."[89] The captioned chapter opens with the following *ḥadīth* that particularly pertains to the decision of Khālid b. al-Walīd during a war:

> The Prophet sent (an army unit under the command of) Khālid b. al-Walīd to fight against the tribe of Banū Jadhīmah and those people could not express themselves by saying, "*aslamnā*," but they said, "*ṣaba'nā*! *ṣaba'nā*!" Khālid kept on killing some of them and taking some others as captives, and he gave a captive to every one of us and ordered every one of us to kill his captive. I said, "By Allah, I shall not kill my captive and none of my companions shall kill his captive!" Then we mentioned that to the Prophet and he said, "O Allah! I am free from what Khālid b. al-Walīd has done," and repeated it twice.[90]

This shows that decisions of the lower court may be reviewed by the apex judicial authorities.

Powers of *Ḥakam*s in Family Disputes and the Approach of Pakistani Courts

There has been an interesting scholarly discussion between the jurists and commentators whether the phrase "*ḥakam*" used in the Qur'ān means an "arbitrator" or "conciliator." Discussion on the relevant verses would require their citation. Practice in Pakistani courts shall also follow this discussion for the purpose of further clarification. The translation of a relevant verse reads,

> And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware.[91]

For negligence on the part of husband, the Qur'ān prescribes,

> If a woman feareth ill treatment from her husband, or desertion, it is no sin for them twain if they make terms of peace between themselves. Peace is better. But greed hath been made present in the minds (of men). If ye do good and keep from evil, lo! Allah is ever Informed of what ye do.[92]

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[89] Al-Bukhārī, *Ṣaḥīḥ*, Kitāb al-aḥkām, Bāb idhā qaḍā 'l-ḥākim bi jawr aw khilāf ahl al-'ilm fa huwa radd.
[90] Ibid.
[91] Qur'ān 4:35.
[92] Ibid., 4:128.

The second verse carries no ambiguity. It attributes the act of *iṣlāḥ* (all modes of amicable settlement) to spouses, meaning thereby that the resolution shall lie in their own hands. It means negotiation ending on conciliation as it would also include pacifying the situation through *taḥkīm*. As far as the first verse is concerned, the first controversy relates to the addressee whether it is the spouses themselves, the executive, the nobles, or the community. According to al-Ṭabarī, it is the *sulṭān*/executive.[93] Al-Jaṣṣāṣ says that this refers to the spouses.[94] Justice Tanzil-ur-Rahman has preferred the meaning to be that of mayors, elders, and councilors.[95] The generality of the pronoun used shows that the command has been communicated to the community as a whole. The main issue is whether a *ḥakam* could conciliate and mediate only or he has the power to arbitrate. It seems that the ambiguity has been caused by the simultaneous use of *ḥakam* and *iṣlāḥ* in the verse. The former connotes arbitration and the latter apparently refers to all the three remaining modes of alternative dispute resolution: mediation, conciliation, and negotiation. The various meanings of the word *ḥakam* have also contributed to the diversity.

The *ḥakam,* therefore, means (1) a judge, *qāḍī*, and arbitrator;[96] (2) prevention or stop (literal meaning);[97] (3) self-intervener (*al-munṣif min nafsih*);[98] and (4) prevention from regular litigation.[99]

The exegete al-Rāghib al-Iṣfaḥānī holds that the verb *ḥakama* originally means prevention of something for the purpose of reform.[100] This meaning of *ḥakama* conveys the meaning of "*teegha*" in the tribal adjudication system of the Pukhtūns.[101] The above variety of meanings

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[93] Muḥammad b. Jarīr al-Ṭabarī, *Tafsīr al-Ṭabarī* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 5:91.
[94] Abū Bakr al-Jaṣṣāṣ, *Aḥkām al-Qur'ān* (Beirut: Dār al-Fikr, n.d.), 2:270–71.
[95] Tanzil-ur-Rahman, *Majmū'ah- i Qavānīn-i Islām* (Islamabad: Islamic Research Institute, 2012), 2:644.
[96] Ibrāhīm Muṣṭafā et al., *al-Mu'jam al-Wasīṭ* (Istanbul: Dār al-Da'wah, 1989), 1:190.
[97] Ibid.
[98] Aḥmad b. Fāris al-Rāzī, *Mu'jam Maqāyīs al-Lughah* (Beirut: Dār Iḥya' al-Turāth al-'Arabī, 2008), 258; al-Murtaḍā al-Zabīdī, *Tāj al-'Arūs min Jāwāhir al-Qāmūs* (Beirut: Dār al-Fikr, 1994), 8:353.
[99] Al-Ḥasan b. 'Abd Allāh b. Sa'd, *al-Furūq fī 'l-Lughah* (Beirut: Mu'assasat al-Risālah, 2006), 327.
[100] Al-Iṣfahānī, *al-Mufradāt fī Gharā'ib al-Qur'ān*, 175.
[101] *Teegha* literally means stone. To place a *teegha* on the heart denotes patience and tolerance. When the tribal elders place it in a certain place, it conveys the message that both the combating parties have made pledges not to attack the lives and properties of each other until they arrive at a permanent settlement. *Teegha*, in other words, means a

and the subsequent word *iṣlāḥ* have led to the development of following two views:

First View

The authority of the *ḥakam* is confined to reconciliation. He has no power to arbitrate unless there is express, separate authorization by the spouses. The *ḥakam*s are mere attorneys of the spouses.[102] The subsequent word *iṣlāḥ* supports this interpretation because it conveys the meaning of reconciliation at the first glance. A divorce or separation could not be called *iṣlāḥ*. This view is held by traditional scholars such as al-Ḥasan al-Baṣrī, 'Aṭā', Qatādah, and Abū Ḥanīfah. Al-Shāfi'ī and Aḥmad, in one of their opinions, agree with this view. The Literalists and Imāmī Shī'ahs also support this view.[103] Al-Sharbīnī says that a *ḥakam* is like an attorney (*wakīl*).[104]

Second View

According to this view, in case of failure of conciliation, the *ḥakam*s are competent to initiate arbitration proceedings. They shall pass an award that may result in separation. In the ADR perspective, it would be a med-arb phenomenon. The advocators of this view are Sa'īd b. al-Musayyib, Sa'īd b. Jubayr, al-Sha'bī, Mālik, and Awzā'ī.[105] Al-Shāfi'ī and Aḥmad, in one of their opinions, agree with this interpretation. Al-Baghawī says that this opinion is the most appropriate.[106] Al-Ṭabarī has narrated the opinion of Ibn 'Abbās confirming the authority of the *ḥakam* for separation.[107] Ibn Ḥajar has also supported the same by arguing that the *ḥakam* is a substitute of the executive in both mechanisms. Ibn al-Qayyim is a great supporter of this view. He has categorically criticized the view that *ḥakam*s are mere attorneys. He argues that it is quite astonishing that Allah has declared them *ḥakam*s and the people call them *wakīl*s.[108]

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temporary truce in a feud. See Sher Mohammad Khan Mohmand, *The Pathan Customs* (Islamabad: Saeed Book Bank, 2011), 67–68.

[102] Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 2:270-71.

[103] Ibn Ḥazm, *al-Muḥallā*, 10:87.

[104] Al-Sharbīnī, *Mughnī 'l-Muḥtāj*, 3:261.

[105] Muḥammad b. Aḥmad b. Rushd, *Bidāyat al-Mujtahid* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1992), 2:122–23.

[106] Al-Ḥusayn b. Mas'ūd al-Bayḍāwī, *Ma'ālim al-Tanzīl* (Multan: Idārah-i Tālīfāt-i Ashrafiyyah, n.d.), 1:424.

[107] Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 5:91.

[108] Ibn al-Qayyim, *Zād al-Ma'ād*, 965–66.

Justice Tanzil-ur-Rahman has summarized both views along with their arguments.[109]

The Pakistani courts, however, have followed the first view. Justice Cornelius has opined that a *ḥakam*, in the absence of express authorization of the spouses, has no power to make a separation award between them. This would not be called a judicial separation. In this connection, judicial power could not be conferred upon *ḥakam*s.[110] Later on, Justice B. Z. Kaikaus also implicitly expressed that the authority of *ḥakam*s is confined to conciliation only.[111]

In the light of the above discussion, the first view could be preferred on the following grounds:

1. *Ḥakam* does not necessarily mean arbitrator or judge.
2. The phrase *iṣlāḥ* in the verse points to reconciliation.
3. Fragile matters that require pro- and contra-evidence and quality judicial wisdom could not be put on the shoulders of elders of the family.
4. To permit *ḥakam*s to award separation would go against public policy.
5. Practice in Pakistani courts does not support the absolute authority of family *ḥakam*s. The learned judges call them conciliators and confine their authority to reconciliation only. The courts hold that giving findings on *ṭalāq* issues is beyond the jurisdiction of conciliators and *ḥakam*s.[112]

The above details show that the objective of the verse is reconciliation. The med-arb proceedings have not been aimed at. The contemporary jurist Wahbah al-Zuḥaylī argues that the analogy supports the first opinion and holds that the prior consent of the spouses for separation is necessary. The *ḥakam*s, in their own capacity, are not competent to award separation.[113] Muḥammad ʻAlī al-Ṣābūnī has also preferred the opinion of Abū Ḥanīfah and has argued that the use of word *iṣlāḥ* instead of *tafrīq* could not be called "by the way."[114] Muḥammad Rashīd Riḍā also made the same point.[115]

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[109] Tanzil-ur-Rahman, *Majmūʻah-i Qavānīn-i Islām*, 2:662.
[110] Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lahore 113.
[111] Mst. Balqis Fatima v. Najm-ul-Ikram, PLD 1959 Lahore 566.
[112] Batool Tahir through nominee v. Province of Sindh through Secretary Local Government and 3 others, PLD 2005 Karachi 358.
[113] Al-Zuḥaylī, *al-Tafsīr al-Munīr*, 3:63.
[114] Muḥammad ʻAlī al-Ṣābūnī, *Rawāʻiʻ al-Bayān fī Tafsīr Āyāt al-Aḥkām* (Beirut: ʻĀlam al-Kutub, 1986), 1:521, 525–27.
[115] Muḥammad Rashīd Riḍā, *Tafsīr al-Manār* (Beirut: Dār al-Maʻrifah, n.d.), 5:79.

One must keep in mind that the above difference of opinion between commentators of the Qur'ān relates to the circumstances where the spouses did not authorize the *ḥakam*s to make any decision including *ṭalāq*. In case of such authorization, however, the word *ḥakam* would mean *taḥkīm* in its all respects. Here, none of the jurists has held a dissenting opinion.

Amendments Needed to Pakistani Laws

In Pakistani laws, wherever the phrases arbitration, conciliation, reconciliation, and mediation occur, a proviso should be added to prevent repugnance and inconsistency with the *sharīʿah*. Similarly, in sections 10 and 12 of the Family Courts Ordinance 1964, amendments should be introduced to incorporate the accurate concept of *ḥakam*s. Their powers may also be clarified by adding a new sub-section. Keeping the current situation of Pakistani society, their powers should not extend to the award of separation. If such an extension becomes indispensable, then it should be subjected to the scrutiny, supervision, and approval of the Family Court. The legislators should also revisit the Dissolution of Muslim Marriages Act, 1939 and Family Laws Ordinance, 1961. A section defining the qualifications of a *ḥakam* should be introduced to the Arbitration Act 1940.

Conclusion

Both the *sharīʿah* and the Pakistani legal system recognize arbitration as a mode of dispute resolution. There is no problem with arbitration as far as civil justice system is concerned. A careful study of available material reveals that permissibility of arbitration in civil cases is a rule and its prohibition is an exception. Moreover, the criterion in this regard is public policy. Public policy could be determined from the kind of right involved in the dispute. The effect of the arbitral proceeding on the society would also help in determining the public policy. Because almost all civil cases involve a private right, jurists of both systems have allowed arbitration in civil disputes.

It is evident from the judgements of the apex courts that the Pakistani legal system does not allow arbitration without a prior written agreement. An oral agreement is of no value. A subsequent agreement would also not be valid. This stance appears to be inconsistent, though not repugnant, with the *sharīʿah*, according to which oral agreements are as effective as written agreements. Moreover, subsequent assents have necessary effects in the *sharīʿah*. These assents validate the acts suffering from extrinsic rectifiable defects. Furthermore, due to the similar nature

of the job, the *sharīʿah* requires the *ḥakam* to have the qualification of a *qāḍī*. The Pakistani legal system does not require such a qualification. Therefore, chapters I, II, and IV of the Arbitration Act, 1940 need necessary amendments in this regard.

In criminal cases, arbitration is lawful if it is confined to the determination of damage caused and the fixation of compensation. This confinement, however, has no legal cover. There is no specification, exception, or *takhṣīṣ*, neither in the *sharīʿah* nor in the Pakistani legal system. The real problem is that awarding of punishment through an arbitration is practically impossible, particularly when the concept of modern states prevails worldwide. Owing to this fact, *al-Majallah* has confined arbitration to monitory and property claims only. Law, therefore, allows arbitration in civil areas only, and this is the factor that has compelled the Ḥanafī school to hold that arbitration in a theft case is not allowed except it is confined to the determination of damages. *Taḥkīm* should not be, as a matter of policy, applied to criminal areas, for availability of a *ḥakam* having the required qualification is difficult. In case of wanting circumstances, it should be applied only to compoundable cases. If its application to non-compoundable cases becomes indispensable, then it should be subjected to the supervision of the court, and the submission of the award should be left to the court for execution. Under no circumstances *taḥkīm* should be allowed in *ḥudūd* cases.

The following appendix shows the general features of arbitration in the Islamic and Pakistani law.

Appendix

Similarities and Differences between Islamic and Pakistani Law with Respect to Arbitration

No.	Arbitration (*Taḥkīm*) in Islamic Law	Arbitration in Pakistani Law
1	Arbitration is a sub-discipline of *qaḍāʾ*/formal adjudication. An arbitration award is as authoritative as the decision of a *qāḍī*.	Arbitration is an informal out-of-court mechanism. Arbitral awards have limited authoritative scope as compared to the verdict of a court.
2	It recognizes arbitration as a mode of resolution of disputes.	It recognizes arbitration is a mode of resolution of dispute.
3	Arbitration is allowed while a suit is pending.	Arbitration is allowed while a suit is pending.

4	Knowledge and skills of an arbitrator constitute a necessary requirement.	The requirement of knowledge and skills is not mandatory.
5	Annulment or modification of an award by a *qāḍī* can take place.	Annulment or modification of an award by a judge can take place.
6	Remission of an award to the arbitrators for reconsideration is not recommended, though not prohibited.	The court may remit award for reconsideration or clarification of ambiguous aspects.
7	There may be one or more arbitrators in all cases except in family disputes where the number shall not be less than two.	There may be one or more arbitrators in all cases including family disputes.
8	An award not preceded by an agreement may be validated through subsequent consent of the parties. Oral agreement is as good as a written one.	Prior written agreement is a prerequisite for validity of an award and oral agreements are not accepted.
9	Civil and criminal nature of a case is not considered a basis for referring a case to arbitration. The sole standard is the nature of the right violated and its relation to public policy.	Only civil disputes, principally, can be the subject of arbitration.
10	The decision of a court on an award is not binding on a subsequent arbitrator or disputants.	Such decision of the court, particularly of the Supreme Court, is binding on subsequent arbitrators and disputants.
11	Arbitration clause in a contract is binding and hence actionable.	Arbitration clause in a contract is binding and hence actionable.
12	According to a majority of jurists, a woman cannot be appointed as an arbitrator.	A woman can be appointed as an arbitrator.
13	Continuity of consent is not always necessary up to the time of pronouncement of award.	Continuity of consent is always necessary up to the time of pronouncement of award.

14	Withdrawal is not permitted after the presentation of evidence has concluded.	Withdrawal can be made any time before the pronouncement of the judgement.
15	*Yamīn*/oath maybe administered to one of the disputants.	Compulsory oath proceedings are not allowed.
16	If new disputes appear, a new arbitration is necessary.	No need for new arbitration.
17	The literalist school opposes the legality of arbitration.	Jurists concur on the legality of arbitration.

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