

***Arbitration; Legislation, Scope, and Functioning in Pakistani
Legal System
(A pragmatic Approach in Law and Sharī'ah)***

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Abstract:

This study investigates the case of arbitration in the modern states in general and in the Islamic Republic of Pakistan in particular, as a self-binding, amicable mode of Alternative Dispute Resolution (ADR). It starts with arbitration's meaning, history and evolutionary background and discusses them as preliminaries and entrance to the main topic. The study debates Pakistani legislation on the subject, with special focus on the Arbitration Act, 1940. It examines the functioning of arbitration in Pakistani legal system, detects the flaws and areas of improvement therein, and most significantly, suggests proposals for required amendments in the relevant laws. In this connection, the equivocal nature of ADR provisions in some statutes other than Arbitration Act, has been specially highlighted. As per requirement of the Article 2(A) of the Constitution 1973, some inconsistencies of the laws on the subject with Sharī'ah have also been traced. The issue of qualifications of arbitrators (hakams) has been detected as the main subject of inconsistency between law and Sharī'ah, resulting in substantial and effective bearings. A similar inconsistency, comparatively with a lesser effect, has been noted in arbitration of family disputes regarding fixation of number of arbitrators and the hail from families of the disputing spouses. While investigating all these issues, an analytical-cum comparative strategy has been followed. The conclusion contains a concise brief on comparison between Sharī'ah and law on the subject and a package of proposed amendments in the gray areas.

Keywords: Arbitration, hakams, Arbitrator Award, Dispute, Case, Court, Civil, Criminal, Sharī'ah

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1. Introduction:

Arbitration is an out court, consensual form of dispute resolution. The question arises when and where arbitration was conducted for the first time? A considerable number of historians hold that its history could be traced back to 1800BC, when Mari Kingdom (Syria) used arbitration and mediation in disputes with other kingdoms.¹ Qahtān Abd-ur-Rahmān al-Dūrī claims that a stony tablet has been discovered in the northern Iraq during the first decade of 20th century. The tablet suggests that the Sumerians had introduced arbitration in the Northern part of Iraq round about 3100 BC. It contains an engraved record of mid-arb proceedings conducted by Masilam: the king of Kaish (now known as *Ehmīr*) between the city states of *Owmā* (now known as *Jukhī Jukhah*) and *Lajash* (now known as *Talwu*). The dispute was on boundaries and water resources. The tablet also contains an arbitration clause as to future disputes.²

Panchayat (a local arbitration body), since long, has been the main feature of Indian sub-continent. The evidence suggests that in the era of Rig-Veda (1700 B.C.), village committees ‘*sabhas*’ existed. These bodies, in belated stages, turned to *panchayats*. Some writers hold that *panchayat* of India is twenty five hundred years old. It is worth mentioning that both criminal and civil cases could be subjected to *Panchayat* and that its decisions were final and irreversible in terms of judicial review.³ This system was so effective that it remained in force during eight hundred years of Muslim rule in the united India. The reason was, perhaps, the non-repugnancy of *panchayat* to the transmitted sources of Islamic law. The British rulers, however, marginalized it by establishing regular courts and by introducing ‘controlled local bodies’ that safeguarded their revenue interests. In 1765, the *Panchayat* institution was completely abolished by the East India Company in some main areas under its control and it was substituted by the office of *Patwari*: the record keeper of the village. Since then, he has been holding this office and there was no change in his position till the end of the Company’s rule.⁴ The *panchayat* was, however, later on, again restored by the Indian and Pakistani governments.

Like conventional law, the concept of arbitration can be found in *Sharī’ah*, called *Tahkeem*. This term literally means making, appointing or empowering someone to decide. The person so appointed is known as *hakam*. According to Imam Raghīb al-Asfahani, “The verb *hakama* literally contemplates to stop or to stay something or action for the purpose of reform.”⁵ There are many *Āyāt* (verses) of the Holy *Qurān* and *Hadīth* of the Holy Prophet (SAW) that confirm the same. For instance, in the Holy *Qurān* Allah, the Exalted, says “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”.⁶ This verse is purely related to the invocation of *Tahkeem* (arbitration) in family cases. The concept, on the same way, can be found in various traditions of the Holy Prophet (SAW). For example, on occasion, the Prophet (SAW) said; “And that whenever you

differ about anything, refer it to God and to Muhammad”.⁷ Here, the Holy Prophet (SAW) offers his services as an arbitrator. Muhammad Hamidullah, a contemporary Muslim scholar has discussed profoundly, the concept of arbitration in Islamic law with minute details. Moreover, the Prophet (SAW) has also acted as an arbitrator between Ka’ab bin Malik and Abdullah bin Abu Hadrab, in an issue, related to loan.⁸ The discussion evidently endorses the existence of the concept of arbitration in the very age of Islam. This fact has to be proved, with more evidences, in the coming lines of the present work.

In Pakistani legal system, arbitration has a twofold origin; the ancient *panchayat*, as discussed above, and in arbitration system of England. It is for the reason that Pakistan was a part of the Indian sub-continent on one hand and has a Britain legal legacy on the other. It is claimed that arbitration system of England was effectively functioning even long before the establishment of king’s court. Actually, the need of expeditious disposal of commercial disputes led to the arbitral mechanism and its usage could be traced back to 1224.⁹ It is also claimed that arbitration, in the Middle ages, grew out of the international and local courts that were established as alternative set up to the royal court system of England. The whole scheme was due in part to the insisted demand of commercial and trade fraternities who were complaining of the highly lengthy, deadly slow and extremely complicated procedures of law and limited jurisdiction of regular courts in respect of merchants who were non residents of England. The practice of arbitration was eventually given a statutory basis in England when Parliament passed the first Arbitration Act in 1698.¹⁰ Pakistan adopted the pre-partition law on arbitration “The Arbitration Act 1940”, just after her independence in 1947. The Act, inter alia, proposes a three-fold arbitration mechanism, discussed below. Arbitration was also, with the passage of time, introduced in other Pakistani laws including the Constitution of 1973. Details of this brief have been discussed infra.

2. Meaning and Definition of Arbitration (Comparative Approach in Law and *Shari’ah*):

Arbitration as a noun means “an informal process of settlement of disagreement by a neutral”. The verb is “to arbitrate” which means to decide, to determine. “Arbitrator” and “arbiter” are commonly used as synonyms which mean the person chosen to settle a difference. Arbiter is, nevertheless, more general and may be applied to other concepts as well. For example, “Law is the final arbiter of what is considered obscene”, an arbiter of taste/style/fashion.¹¹ The famous rule of Islamic commercial law “*al-’adatu muhakkimah* (The usage is the arbiter)” conveys the same sense.¹² Some experts oppose the above opinion and hold that “arbiter” and “arbitrator” are not synonyms. According to them, arbiter is a person bound to decide in the light of rules of equity whereas arbitrator is not so bound. He (arbiter) is authorized to decide as to his own discretion, skills and experience. To take it the other way round, arbitrator is a referee resolving a dispute, though informally, but all his proceedings are subjected to the law on

the subject. On the other side, arbiter is an umpire, free of legal provisions and technical fetters, resolving a dispute informally by a method more agreeable to justice and reason. Arbitrator is an extra-judicial judge while arbiter is an ordinary resolver. An arbitrator should have, therefore, enough knowledge of arbitration laws. For arbiter, skill and experience is sufficient.¹³ In modern law, however, the above distinction is not observed.¹⁴ The laws/acts on the subject carry the word “arbitrator” and no section mentions the word “arbiter”. In Pakistani laws, this word appears in the relevant commentaries only.

No definition of arbitration appears in the Arbitration Act 1940. General Clauses Act does not mention it. Actually it has got no universal definition.¹⁵ The reason is that different systems carry out arbitration according to their own circumstances, situations and requirements. The definition, given by the Indian Arbitration and Conciliation Act is, therefore, not a definition rather it is a clarification that “arbitration means arbitration whether or not administered by permanent arbitral institution”. The commentator of the Act himself says that;

“Unfortunately, English Law does not provide a comprehensive answer to the question, ‘What is arbitration?’ There is no code of arbitration law, the definition clause of which would contain an exclusive definition of the term. There is no statute which defines ‘arbitrate’, ‘arbitrator’ or ‘arbitration’”.¹⁶

Tahkīm, as an Arabic word for arbitration, literally means; making, appointing or empowering someone to decide. The person so appointed, by the parties, is known as *hakam*. The verb *hakama* literally contemplates to stop or to stay something or action for the purpose of reform.¹⁷ It (*Tahkīm*), on the other hand, technically means “the consensual reference of a dispute by disputants to a neutral for resolution”.¹⁸ *Al-Mujallah*, a codified Islamic law, follows the same definition- with some minor variation.¹⁹ Here, the word “neutral”, given in the definition, include a sole arbitrator, as well, as more than one- as the case may be.²⁰ Wahbah al-Zuhaili, a contemporary Muslim jurist, adds to the definition the words ‘by application of rules of *Sharī‘ah*’.²¹ According to Ibni Nujaim, a renowned Muslim jurist, *tahkīm* is the sub- discipline (*far’*) of *qadā*.²² Ibni Farhun has opined, on the other hand, that *tahkīm* is a non-state authority (authority established by individuals). In his view, *tahkīm* is a sub branch of *qadā* dealing with financial matters and excludes *hudud*, *li‘ān* and *qisās*.²³

3. Legality of *Tahkeem* (Arbitration) in *Sharī‘ah*:

There are many verses of the Holy *Qurān* and *Hadīth* of the Holy Prophet (SAW) that confirm, beyond any doubt, the legality of arbitration. For instance, the Holy *Qurān* “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”.²⁴ Another verse confirms the same by stating “Listeners for the sake of falsehood! Greedy for illicit gain! If then they have recourse unto thee (Muhammad) judge between them or disclaim 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”.²⁵ On the same way, it states in another verse

“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 returns, 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”.²⁶ *Hadīth* of the Holy Prophet (SAW), on the other hand, give legality to arbitration with the same force. , Abu Shuraih informed the Prophet (SAW) and said; “Ye Messenger of Allah! My tribesmen usually refer me their disputes. Both parties go happy with my award. The prophet (SAW) expressed his joy and said, “What a nice deed it is”.²⁷ Moreover, the Prophet (SAW) also arbitrated between Ka’ab bin Malik and Abdullah bin Abu Hadrab, in a loan issue. When the Prophet (SAW) saw them fighting, he said, “O Ka’b,” beckoning with his hand as if intending to say, “Write off half the money.” So Ka’b took half.²⁸

4. Need for Arbitration (A Reality or an Illusion):

The main defect that has degraded our courts in minds of people and has shattered their confidence upon the justice system is what is commonly known as “delays”. Shakespeare speaks of it in his famous drama “Hamlet”.

*“Dickens mocks it in ‘Bleak House’ and tells about the case of Jarndyce against Jarndyce that lay for over one hundred years in the Court of Chancery, and no two men engaged as advocates in that important case understood the real issue involved”.*²⁹

In the Supreme Court of Pakistan, in the year 2000, total pendency of cases was 19832. In 2011, the quantum raised to 37638, nearly double of the previous one.³⁰ Though sufficient disposal was achieved but it was due to the implementation of guidelines of the National Judicial Policy and increase in the number of judges to 27 (which was later on again decreased to 17). The cost per case to the Supreme Court remained Rs: 62833. The expenditure of the litigants is approximately ten times more. Another fact, which matters, is that the said policy resulted in mere disposal more than real dispensation of justice, particularly in the district judiciary. On 31.12.2011, a total of 130385 cases were pending in the Lahore High Court despite the fact that 6333 cases had already been transferred to Islamabad High Court.³¹ A handbook, published by Law and Justice Commission of Pakistan on National Judicial (Policy Making) Committee, carries the following table of pending cases in various courts during 2009.³² The Registrar of Supreme Court of Pakistan has also confirmed the statistics.³³

Superior			Judiciary	Judiciary	Subordinate
I	Supreme Court of Pakistan	19055	I	Punjab	1225879
II	Federal Shariat Court	2092	II	Sindh	144942
II	Lahore High court	84704	III	NWFP (KP)	187441
I	High Court of Sindh	18571	IV	Baluchistan	7664
V	Peshawar High Court	10363		Total	1565926
V	High Court of Baluchistan	4160			
	Total	138945			

The table reveals the stunning backlog of cases. The cases pending in ex-cadre courts such as administrative tribunals, banking courts, labor courts, custom court, anti-terrorism courts etc. are not included. Their backlog is also equally high. In such overburden situation, the courts are not able to cope with the twin problems of “backlog” and “delays”.³⁴

5. Criterion for Suitability of Cases for Arbitration (A Practical Approach in Law and *Shari'ah*):

What type of cases could be referred for arbitration and what could not be so referred, is the most important subject for the current investigation. Though civil issues are the main subject of arbitration, nonetheless civility or criminality of an issue is not the sole touchstone of rendering a case arbitrable or non-arbitrable. Sometimes, a criminal case, particularly, the compoundable and the one demanding for punishment in shape of compensation only may be referred to arbitrator and a purely civil case may not be so referred. A considerable number of legal experts and some jurisdictions even oppose the idea of arbitration in family laws, despite its entire civil nature.³⁵ On the other hand, a case of *Qatal bil-Sabab* under section 322 of the Pakistan Penal Code may be referred for arbitration, notwithstanding its criminal nature.

In law, as discussed above, only mercantile disputes could be resolved through arbitration. The arbitration courts in England were rather established for the settlement of mercantile differences on the behest of traders³⁶. It seems that slowly and gradually, other civil issues hopped in. The underlying reasons behind such referral is, first; the non-involvement of public policy in majority of civil cases and secondly; referral for arbitration, in most of the cases, requires a prior written agreement of the parties that could only be entered into in civil

areas. Principally, criminal issues could not be referred to arbitrator for resolution, probably for the reasons, first; almost all criminal issues carry public policy in them, secondly; entrance to a prior written agreement in the area of offences is not possible, and thirdly; hardships in the execution of punishments. Criminal area is too narrow and too fragile to house arbitration. The reference would be improper if it results in stifling prosecution of criminal. An award purporting to decide whether or not an offence has been committed is invalid.³⁷ The arbitrators cannot confer on themselves the powers of magistrate nor does the magistrate can delegate his authority to arbitrators. Disputes under 145 of the Code of Criminal Procedure 1898 (disputes as to possession) are civil in nature but a reference could not be made to the arbitrators for finding as to possession of immovable property. However, if reference is made and the parties do not object, the magistrate may receive the award as evidence and shall pass appropriate orders thereupon. In case of objection, the magistrate must disregard the award.³⁸

6. Suitability of Family Cases for arbitration (Approach in Law and *Sharī'ah*) :

Common law of countries and continental countries oppose the use of arbitration in family laws. As said earlier, until 1980's, family matters were not arbitrable in the United States. They argue that these cases reflect public policy and, as such, they should be formally decided by regular courts. Public interest should be kept in mind while deciding these issues. Besides, arbitration in family cases would amount to disparity of parties bargaining power and, consequently, the weaker will suffer. It would also lead to diminish court's authority in this delicate sphere. Moreover, the use of arbitration in family cases will hamper state's policy in regulating family issues. Lastly and most importantly, sensitivity of such cases necessarily demands its regular adjudication.³⁹ This view is quite analogous to the opinion of those jurists of Islamic law who hold that a court-appointed *hakam* (arbitrator) in a family dispute shall not arbitrate, and shall remain confined to reconciliation only. Such jurists include Hassan Basri, Atta, Qatadah, Imām Abu Hannifah, Imām Sha'fai' and Imām Ahmad, in one of their opinions, the Literalist (*Zahiris*) and Imamet Shias.⁴⁰

The supporters of arbitration in family laws, on the other hand, argue that it is not correct to hold that each and every family issue reflects public policy. The one which carries the same may be excluded, such as, custody of children and rights of minors. Nevertheless, there is no reason to deprive the spouses from arbitration in their personal civil rights. It is also incorrect to presume that arbitration will not uphold the requirements of public policy. The arbitrators decide like judges⁴¹ though with a different *modus operandi*. The allowance of arbitration in family issues does not oust the jurisdiction of the courts nor does it decrease their authority. It would only mean that last resort should be made to the courts.⁴² Besides, the sensitivity of family matters requires confidentiality which could be obtained in arbitration. Parties will avoid publicity at any rate;

for the open exposure of some facts of the private life may be highly embarrassing. Further, issues of private life are rarely of public significance. If a party sees his suffering due to his weak social status, he has the option not to opt for arbitration. If parties are not able to settle issues by themselves, at least they should be given opportunity to choose arbiters. Their time and money should be protected. Owing to its nature, family disputes require speedy resolution. Inordinate delays will be having detrimental effects in post- marriage and post-divorce relationships. In some areas there would be likelihood of culminating civil disputes in commission of offenses. Even in cases of welfare of the children, if the parents are still able to communicate, then why should they be forced to get the welfare of their children determined by a judge? Who can determine it better, judge or parents and their selectee? To make it more simple, one must presume that the court intervention will be necessary if the parents are not able to arrive to an agreement regarding post- divorce conditions related to their children such as custody, visitation and financial support. Nevertheless, where ex-couple is willing to cooperate and determine post- marital relationship aspects related to their children, then there remains no justification for the intervention of the state's judge. State should deter from interfering into family units as long as their activities are hormonal, acceptable in the society and carry no detrimental effects.⁴³

The criterion for the arbitrability and non-arbitrability, as explained earlier, is to see whether element of public policy is dominant in a case, or personal right. If mere presence of public interest is considered the sole standard, then no dispute can be said fit for arbitration even purely monetary claims, keeping in view their collective impact on economy and society that goes far beyond the parties to private contract. Every case bears some impact, little or more, on the society.

7. Arbitration in Pakistani Statutes:

Apart from Arbitration Act 1940, a number of enactments contain arbitration clauses. The Constitution of Pakistan, though not explicitly like Indian Constitution, provides for arbitration. Nevertheless, a Plethora of judgments of higher forums, some of them are landmark, are available on the subject. Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 and Arbitration (International Investment Dispute) Act 2011 are the latest efforts in this connection. While discussion on the subject in the coming topics, the reader would find below that how rapidly the vacuum was filled in by promulgating a series of Ordinances. In the following, some of these laws are discussed.

7.1 Arbitration in Constitution of Pakistan 1973 -146(3), 153, 154, 156, 159(4) 160, 184(1) and 17(2):

Chapter 2 of Part V of the Constitution speaks about administrative relations between Federation and Provinces. Article 146 (1) of the chapter empowers the Federal Government to entrust any function to the Provincial Government or to its officer, in relation to any matter to which the executive authority of the

Federation extends. According to Sub-article (2), the same job may be done by parliament through an Act, in connection with matters in which the Provincial Assembly has no power to make laws. Sub-article (3) provides that if the Provincial Government performs any function delegated by the Federal government and incurs some extra cost, the latter is bound to pay compensation. Such compensation may be determined by agreement between the two governments. If no such agreement is reached, compensation may be determined by an arbitrator appointed by the Chief Justice of Pakistan.

7.2 Arbitration Act, 1940:

It is a pre-partition law which has been adopted both by Pakistan and India after 1947. In the family of ADR, only on arbitration, an independent complete code is available in Pakistan; “The Arbitration Act 1940 (X of 1940). It is a consolidating and amending Act, regulating and governing all arbitrations except those mentioned in section 47 of the Act. The Act is actually a convergence of previous legislations. It has borrowed a lot from the English Acts as far as arbitration without the intervention of the court (Chapter II) is concerned. In the remaining provisions, it has, albeit with some changes, followed the Schedule II attached to the Code of Civil Procedure 1908.⁴⁴ On the commencement of this Act, all other laws on the subject have stood repealed. The uniformity in application of law has, thus, been secured. The Act came into force on 1st July 1940. It has no retrospective effect and is, therefore, inapplicable to the references pending at the time of its commencement.⁴⁵ Such references were to be governed by Arbitration Act 1899, or by the provisions of Second Schedule of CPC, as the case might be. It extends to the whole of Pakistan without any exception whatsoever.⁴⁶ The Act lays down rules to be followed by the parties, arbitrators, umpires and courts; nonetheless a considerable number of its provisions may be rendered ineffective by express agreement between the parties⁴⁷. The Act confers a supervisory character on courts. Accordingly, the court has to be inclined towards sustainability of the award rather than to destroy it unless there are cogent reasons for its rejection. The Act aims at curtailing litigation in courts and promoting settlement of disputes amicably through selected domestic judges⁴⁸.

7.2.1 Major Subjects of the Arbitration Act 1940:

As said earlier that the Act is a comprehensive law on the subject as for as domestic arbitrations are concerned. So, the Act though gives no definition to arbitration yet it has a great deal of details for each stage of arbitral proceedings, right from the agreement till award and even post award issues. Its main subjects include arbitration agreement, duties and powers of arbitrators and umpires, all matters pertaining to award, powers of the arbitration court in respect of the remission, modification and setting aside of an award, and much more.

7.2.2 Arbitration Agreement (Law and *Sharī'ah* Approach):

Arbitration agreement means an agreement of the parties to submit present or future disputes to arbitration. It is immaterial whether an arbitrator is named therein or not. Even the mentioning of words “Arbitrator” or “Arbitration Agreement” is not necessary.⁴⁹ The agreement must be in written form⁵⁰. It is, however, not necessary that the written agreement should contain provisions for ancillary matters such as mechanism for appointment arbitrators, their powers and remuneration etc. it is sufficient if the substantive part (referral of dispute to arbitration) is reduced to writing. An oral agreement is not enforceable even if the parties were at *ad addendum* (something additionally added to the main oral agreement).⁵¹ The silence of agreement on some connected matter would not render it invalid. If the agreement provides for the connected issues, the parties may alter it in the later stages. The agreement need not be signed by the parties.⁵² Consensus of the parties is, nonetheless, necessary.⁵³ No formal document is required for agreement. It can be written on ordinary paper purporting the consent of the parties.⁵⁴ It may be noted that an arbitration clause in a contract does not bar institution of a suit or a petition to the court. In such a situation, the party can invoke Section 30 of the Arbitration Act 1940 and may have the proceedings stayed.⁵⁵

There is no inconsistency of law with *Shariah* in agreement for referring a present dispute to arbitrators. The problem, however, lies in agreement for referring of future disputes. Agreement, in the context of ADR, means an enforceable contract. Under Islamic law, contract in respect of non-existing things is not allowed. Owing to this fact, eminent contemporary experts on Islamic law of contract such as Abdul Hamid El-Ahdab, Samir Salih, Sanhuri and Shahata oppose such agreements.⁵⁶ The problem may be removed by harmonious interpretation of the relevant provision, meaning thereby, an agreement in respect of future dispute may be allowed with a stipulation of making a fresh contract of arbitration at the time of arising of a future dispute.

7.2.3 Arbitrators (In Law and *Sharī'ah*):

There is no clog on the number of arbitrators. They may be one or more. The right lies with the parties. If the agreement is silent on the number, the appointment of sole arbitrator is to be presumed.⁵⁷ If the parties do not concur, the arbitrator shall be appointed by the court.⁵⁸ In case of even number of arbitrators, an umpire⁵⁹ shall be appointed by the arbitrators.⁶⁰ The court may remove the arbitrators if they do not conduct the proceedings diligently or proved to be guilty of misconduct. Such misconduct will include negligence and breach of duty and it should not be confined to moral turpitude. Additionally, the arbitrators may either misconduct themselves or the proceedings.⁶¹ The arbitrator enjoys some statutory powers such as: stating of case for the opinion of the court, administering oaths to the witnesses and either of the parties, delivering of an award that is either conditional in its operation or grants reliefs in the alternative, correcting clerical errors and mistakes in the award, requiring the parties to

answer any interrogatories for the purpose of clarity.⁶² Though an arbitrator is a sole judge and is free of procedural fetters but this does not entitle him to decide arbitrarily. He must observe the universally accepted principles of justice.⁶³

A rigid inconsistency could be found between law and *Shariah* in respect of qualifications of the arbitrators. Generally speaking, law prescribes no qualifications for arbitrators. His little know-how of the subject would suffice.⁶⁴ Juxtapose to that, an arbitrator must have the qualifications of a *qadi* (judge) under Islamic law. Owing to this fact, the award of hakam is in no case less than the decree of the court. More to the point, necessary fixation of the number of arbitrators in family disputes as two, and their hailing from the family of disputing spouses, is other inconsistency between both systems.

7.2.4 The Award:

At the termination of the arbitral proceedings, an award is passed. It means the finding or decision of an arbitrator upon the submission in arbitration. It must follow the submission, be final, consistent, unequivocal, possible, according to law, reasonable, conclusive and above all it shall dispose of only and all the differences submitted to arbitration.⁶⁵

The arbitrators are required to sign the award and to give notice of it to the parties. The notice should tell that the award has been made and signed.⁶⁶ Signing of the award is not a mere formality and production of unsigned copy would not mean "filing an award".⁶⁷ The signing of the award implies that it should be in written form.⁶⁸ The notice should also carry the fees and charges in respect of arbitration and award. The arbitrators are bound to file the award with all necessary record, bearing the details and reasons. This is not necessary that the arbitrator should frame issues and to give his separate findings. What is required is that the award should be a speaking one and must not be perverse and unsupported by evidence.⁶⁹ Award not based on reasons would justify the intervention of the court for remitting it.⁷⁰ The objective is to prevent the arbitrators and umpires from wanton decisions.⁷¹ The court shall also give notice to the parties for objections if any. An award could not be made rule of the court without giving an opportunity to the parties to file their objections.⁷² It must be pronounced within the time limit provided by arbitration agreement or four months in case of silence of agreement or within the time extended by the court. The arbitrator may also make an interim award if nothing appears to the contrary in the agreement.⁷³

7.2.5 Extent of Intervention of Arbitration Court:

Here, we mean the duties and powers of the court at post award stages. In connection with awards, the court may, pass judgment in terms of the award, modify or correct the award, remit the award for reconsideration by arbitrator or umpire as the case may be, and set aside the award. Thus, it is clear from the above that three options are available to the court either to allow the award or reject it or correct it by modifying or remitting. Each option shall require

separate grounds. If the errors are easily rectifiable such as clerical mistake, errors not affecting the findings, and removable unnecessary inclusions, the court has the powers to modify the award to the required extent.⁷⁴ It may remit the award for reconsideration in case it suffers from a material shortcoming which can be rectified by arbitrators such as; indefiniteness of the award rendering its execution impossible, the inclusion of unnecessary findings, which is not removable, illegality on the face of the award, and leaning of a referred matter undetermined.⁷⁵ As it has been explained above that the court must be inclined towards validity and implementation of award for the purpose of carrying out the very objective of the Act, it may, nonetheless, set aside the award in wanting unavoidable situations and circumstances. These may include the misconduct of the arbiter and umpire⁷⁶, improper procurement of award, making of award after the superseding of arbitration, and invalidity of award for some other reason or under some legal provision.⁷⁷

7.2.6 Schedules Attached to the Act:

Two schedules have been appended to the Arbitration Act.⁷⁸ Section 3 refers to First Schedule and contemplates that, unless the terms of agreement provides otherwise, an arbitration agreement shall be presumed to include the provisions set out in the schedule. The schedule, though, does not have the force of statutory provisions but its importance lies in the fact that its provisions are to be deemed as implied terms of arbitration agreement. Hence, if the agreement is silent on the number of arbitrators, Para 1 would come into action and a single arbitrator will be appointed. Similarly the evenness of the number of arbitrators could be made uneven by appointing an umpire under Para 2 of the schedule. Thus the decision by the majority would be ensured. Other finalizing steps, such as, time limit for an umpire to pass an award in case of going out of all arbitrators due to reasons mentioned in Para 4, production of books, deeds, papers and accounts by the parties, the fixation of costs of reference and award are to be taken under Schedule 1.⁷⁹ The Second Schedule contains five paras and refers to the powers of the court that are necessary to smoothen the proceedings and to provide for special situations such as appointment of a receiver, appointment of guardian for minor or person of unsound mind and preservation or custody or sale of any goods pertaining to the subject matter of the reference.⁸⁰

8. Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011:

The Arbitration Act 1940 governs domestic arbitrations only. It was found that the Act was incapable to answer the issues of international commercial arbitrations. The obvious reasons are the absence of rules and the non-existence of arbitral institutions. To provide for the deficiency, the Government of Pakistan, on 24 April 2009, introduced The Arbitration Bill 2009 in the National Assembly, which was converted into the Act referred above. The law received the assent of President on 15th July 2011.⁸¹ The preamble reveals that the

lawmakers intended to implement the United Nation Commission on International Trade Law (commonly known as UNCITRAL Model Law) in the country. The aim is to build the confidence of foreign investors and to enact a law for investor-friendly Dispute Resolution. In fact, the Act is a modified version of the Indian Arbitration Act 1996.

The Act is actually an upshot of Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2007 [later on 2009] (REAO) that incorporated the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). The Act provides for arbitration, conciliation and other techniques of alternative dispute resolution, within and outside Pakistan. It also provides for re-promulgating a domestic law implementing the International Convention on Settlement of Investment Disputes (ICSID) between States and National of Other States (the Washington Convention). Establishing of arbitration and conciliation centers in Pakistan has also been proposed.⁸²The Act also reproduces the REAO in its Part III and thus preserves the REAO's pro-enforcements provisions regarding arbitration agreements and awards. It has also provided for the lacunas of REAO and gives a clear-cut criterion for distinction between domestic and foreign awards.

9. Arbitration in other Statutes of Pakistan:

In the above, the laws on the subject itself have been discussed. In the following, we are going to focus on other Pakistani statutes that bear provisions for arbitration. These provisions do not carry the details of arbitration process and proceedings. They simply reveal that an issue pertaining to the subject of the enactment may be resolved through arbitration. Though majority of those enactments require the consent of the parties for referring a matter to arbitration, but some enactments allow the referral of some issue without the consent of the parties. In this later situation, the right of appeal has been granted.

9.1 Federal Ombudsman/wifaqi Muhtasib:⁸³

The institution traces back to *Diwan-ul-Mazālim*, established by rightly guided Second Caliph Umar (RA), for keeping a check on the government officials and state functionaries. The need for such institution had been felt since long. It surfaced when Article 276 of the Interim Constitution 1972 provided for appointment of Federal Ombudsman (*Wifāqi Muhtasib*) and Provincial Ombudsman (*Subayee Muhtasib*). For Constitution 1973 also provides for appointment of Federal Ombudsman, the institution was eventually created through President's Order no. 1 of 1983. After Eighth Amendment, by virtue of Article 270-A, the institution enjoys constitutional protection. The objective of the institution is to keep a check on official functionaries, to bridge the gap between citizens and state's machinery, and to improve the system by eliminating abuse of discretionary powers. Now, there are other separate institutes of the same nature on different subjects, such as, Federal Tax Ombudsman, Federal Insurance Ombudsman and federal Ombudsperson against

Harassment of women at workplace. The Federal Ombudsman has been empowered to resolve the disputes through alternative amicable modes. The relevant provision is as under:

9.2 Small Claims and Minor Offences Ordinance 2002:

The Ordinance consolidates the early legislation on the subject. Its aim is to provide inexpensive and expeditious disposal of small claims and offences.⁸⁴ For carrying out this purpose, the ordinance provides for amicable settlement through a *Salis* (Third Neutral or Referee). Phrases “*Salis*” and “amicable settlement” have been defined in the definition clause. The former includes settlement through arbitration.⁸⁵ The peculiarity of the Ordinance is that it covers both civil and criminal disputes. The court, in appropriate cases, refers the parties for settlement through arbitration mediation, conciliation or any other mode of peaceful resolution. The consent of the parties is a further requirement. The ordinance also provides that a list of ADR experts shall be prepared by the Chief Justice of High Court in consultation with District Judge and President of the District or sub-divisional Bar Association. The list shall include personnel of legal fraternity.⁸⁶ The parties may nominate a *salis* of their own choice whose name may not be appearing in the list and the court may refer the dispute to him.⁸⁷ The *Salis* is bound to make efforts for amicable settlement of dispute within the time fixed by court.⁸⁸

9.3 Arbitration in Area-specific Pakistani Laws (Sharī‘ah Based Shari Nizām-e-Adal Regulation, 2009)

The unrest that ruined Mala and Division in general and the district of Swat in particular during (1994-2009), has several causes. What actually led to the promulgation of *Shari Nizām-e-‘Adal Regulation 2009*, and what didn’t, we would avoid its discussing here. It would be sufficient, for the purpose of this work, to admit that the unrest of the valley was the apparent cause of this special piece of legislation. Unusually, the President (not the Governor) assented to it on April 13, 2009. Its objective was stated to be “To provide for *Nifāz-e-Nizām-e-Sharī‘ah* through Courts in the provincially Administered Tribal Areas for the North-West Frontier Province”.⁸⁹

The Regulation provides for appointment of “*Musleh*”. The word has an Arabic origin and literally means “peace-maker or reformer”.⁹⁰ *Muslehin* is its plural. The term has not been defined in the definition clause. It is also quite astonishing that no rules have been framed so far, despite a special provision for it, where the term could have been explained.⁹¹ No other law has used this word nor has some law attached any meaning to it. Had the framers of the Regulation been able to give some explanation to the term as the framers of Small Claims and Minor Offences Courts Ordinance, 2002, have given to the term *Sali*?, no ambiguity would have arisen. Unfortunately, no judgment of the apex courts or even of the trial courts has ever surfaced to cloth this word with appropriate meaning. There are so many reasons for this treatment with the Regulation. The Khyber Pakhtunkhwa Judicial Academy Peshawar has conducted three seminars on the

success and failures of the Regulation during 2012 and 2014. The reasons could be found in the relevant reports.⁹² The reports have been shared with the Provincial Government. A copy of the last report has also been submitted to honorable Chief Justice Peshawar High Court. The participants of the seminar have shown great concern over the lethargic observance of the relevant provision of the Regulation which calls for resolution of disputes through ADR techniques.⁹³ The recommendations of the seminar for the proper implementation of the said provision are available on the Academy's website.

In the situation like above, the only available tool to interpret the term *musleh* is its construction with reference to the context. By this way, it would become possible to explore whether it means a mere peace-maker or arbitrator only, or covers almost all the three modes of ADR; arbitration, mediation and conciliation. A literalist approach would reveal that a *musleh* will perform as a reformer only. He can only make efforts for *sulh* compromise. The *sulh* may be the outcome either of mediation or conciliation, meaning thereby, the referee may act as mediator or conciliator. This approach gets support for many reasons; first, it is corroborated by the rules of Arabic language and literature. The rule prescribes that a word cannot be used in its metaphoric and literal meanings simultaneously. The literal meaning of *musleh* is the person who tries to restore peace by affecting a compromise. Thus he can be either a mediator or conciliator. Its use in the meaning of arbitrator is metaphoric. Recourse to metaphoric meaning could be made only at the time when, with reference to the context, the use of literal meaning becomes impracticable. Secondly, the above stance is also supported by the proviso attached to the provision where the phrase *sulh* is appearing at the end. Thirdly, the word *sulh* has been used in the context of *hudūd*. The intention of the framers is evident. They intended to extend the application of the provision to criminal cases with the exemption of *hudūd*, hence they used *sulh*. *Sulh* is the factor that differentiates *had* punishment from *Ta'zīrī* punishment. Fourthly, the word is again appearing in the end of subsection 3 and subsection 5, which directly and expressly conveys that the reference was only for *sulh*; the outcome of mediation or conciliation

9.4 Local Government Ordinance 2001 and the Subsequent Repealing Acts:

The Ordinance aims at the devolution of powers to the gross root level by insuring the participation of civil representatives instead of bureaucrats. In Pakistan, such efforts are usually made by military regimes for decentralization of powers. In other words it seeks to restore the old *Panchayat* system with necessary modifications. Now all the provinces have their own local government Ordinances. Almost all of them contain provisions for *Musalihati Jarga* and *Insaf Committes*.⁹⁴ The court may refer the dispute to the *Jarga* through *Nazim* of union council.⁹⁵ The NWFP Local Government Ordinance 2001, provides for amicable resolution of disputes through alternative modes such as mediation, conciliation and arbitration. Section 103 of the Ordinance is reproduced below.

9.5 The Contract Act 1872:

In contracts, the very first outcome offer and acceptance is an agreement. The validity of an agreement requires the inclusion of all essentials; as it requires the expurgation of all unwanted facts, particularly those which contravene other statutes. So an agreement that restrains the parties from legal proceedings is void.⁹⁶ Such restraint would, nevertheless, be good if it has been caused by an arbitration clause in the agreement. It is for this reason that two exceptions have been attached to Section 28.

9.6 Family Laws (Law and Sharī'ah Approach) :

Though there are numerous local and national enactments pertaining to family issues in Pakistan, but the laws, mostly referred to in judicial proceedings, are: (1) The Muslim Family Laws Ordinance 1961. (2) The West Pakistan Rules framed under The Muslim Family Laws Ordinance 1961.⁹⁷(3) The Family Courts Act 1964. (4) The West Pakistan Family Courts Rules 1965 framed under The Family Courts Act 1964.⁹⁸ (5) Dissolution of Muslim Marriages Act 1939.

The Muslim Family Laws Ordinance 1961 provides for "Arbitration Council". A Muslim husband is formally required to intimate through a notice Chairman of the Union Council about *Talāq*. He shall also provide a copy of the notice to the wife.⁹⁹ The requirement is, nonetheless, directory in nature and non-compliance would be mere irregularity and as such would not affect the validity of *Talāq*.¹⁰⁰ The chairman shall, within thirty days of the receipt of the notice, constitute an arbitration council for reconciliation. The council is bound to take all such steps necessary for reconciliation.¹⁰¹ The reconciliation may be the result of any mode of ADR including arbitration. Arbitration is included because the chairman is required to bring about reconciliation between the parties for which purpose he is to give notice to them to nominate their representatives in order to constitute the Arbitration Council.¹⁰² These representatives are known as "*hakams*" under Islamic law and purport the meaning of arbitrators. The point whether *hakams* have the power to determine the issue one way or the other or he can not go beyond reconciliation, has been viewed differently by Pakistani courts, but eminent judges of the apex courts, as discussed above, confine the authority of the court appointed *hakams* to reconciliation only.

The Family Courts Act 1964 provides for "Pre-trial Proceedings". It means the efforts of the court for possible reconciliation, before the commencement of the trial.¹⁰³ The phrase "reconciliation" contemplates adoption of all measures that are necessary for bridging the gaps between the spouses. Family Court is to act as arbitrator in exercising judicial powers to effect compromise with a view of saving matrimonial life from further wear tear.¹⁰⁴ Again, no specific procedure has been given for conciliation. The matter has been left to the discretion of the court. So, the court could not be precluded from utilizing the mode of arbitration if it sees an acceptable outcome. The court can adopt any procedure.¹⁰⁵ Section 10 of the Act seems to be not in consonance¹⁰⁶ with the norms of Islamic law as forwarded by the commentators of the *Qurān* and jurists of Islamic

jurisprudence. The section does not expressly carry the word “arbitrator” (*hakam*); the word which is directly appearing in the relevant verse. Though there has been a great deal of discussion between the jurists whether the authority of the court-appointed *hakam* extends to the determination of the dispute one way or the other, including separation (*talāq*) or their authority is confined to reconciliation only. Quite good majority of them, including Saeed b. Musayyeb, Saeed b. Jubair, Imām Sha’abi, Imām Malik and Imām Awza’ai.¹⁰⁷ Imām Shafai and Imam Ahmad, in one of their opinions, is in the favor of the full authority of the *hakam* appointed by the court. Imam Al-Baghawi says that this opinion is the most appropriate.¹⁰⁸ Interestingly, there is consensus of opinion on the authority of *hakam* for separation if authorized by the disputing spouses for the same.¹⁰⁹ Besides, the Section is also silent on the number arbitrators which is, according to the verse, should be two, and should come from the families of the spouses. To remove all these shortcomings, necessary amendments should be introduced to the Section.

Conclusion:

Arbitration, though very much akin to court proceedings, is an alternative mode of consensual settlement of disputes, and as such, it is rightly included in the family of ADR. The award, being binding, resembles a court judgment but on the other hand, arbitration proceedings are free from procedural requirements and judicial restraints. Further, unlike formal adjudication, the disputants have the resolvers of their own choice. No statute including Arbitration Act 1940, has defined the term “arbitration”. A universal definition is still needed. The comprehensive law on the subject is Arbitration Act 1940. Numerous other laws including the Constitution of Pakistan 1973 have provisions for arbitration. The latest enactments on the subject are; Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 and Arbitration (International Investment Dispute) Act 2011.

Criterion for fitness of a case for arbitration is the involvement of public policy in a case, and the criminal or civil nature of a case. A case, not carrying the element of public policy, is always fit for arbitration and the voice versa. In connection with family cases, a comprehensive schedule should be attached to the relevant statutes to clearly separate the issues fit for arbitration from those which are not so fit. The Flaws in the Arbitration Act 1940 should be removed. In this connection, qualifications of arbitrators should be incorporated having regard to the unanimous opinion of jurists of Islamic law. Agreement in respect of future disputes should also be conditionalized with a fresh contract of arbitration at the time of arising of such dispute. Some Other Pakistani laws on the subject contain provisions for statutory arbitration (arbitration imposed by law) which is inconsistent with *Sharī’ah* on one side, and repulsive to the amicability of arbitration as a mode of ADR on the other. The relevant provisions should, therefore, be removed and only consensual arbitrations should be kept intact. Unnecessary grounds of intervention of the court should also be

deleted. Criminal cases, both compoundable and non-compoundable, may be referred for arbitration provided that the arbitrators have the qualifications prescribed for a *qāḍī* under Islamic law. Provided further that such referral is to be kept confined to the fixation of guilt and the execution of punishment should be the exclusive domain of courts. Amendments in sections 10 and 12 of the Family Court Act 1964 should be introduced for express inclusion of arbitration, for fixing the number of arbitrators as two, and they being from the families of the disputing spouses. Besides, the scheme provided by Small Claims and Minor Offences Ordinance 2002, is enough cloudy in respect of arbitration in criminal disputes. The relevant provisions of this law need a revisit in order to iron the anomalies and remove the ambiguities. Same is the case with ADR-related provision of the Shara'i Nizam-e-Adal Regulation 2009, where the unqualified use of term "*musleh*" and then his empowerment like an arbitrator has added to the gray areas of this piece of legislation. The Provision needs to be re-headed as "Mid-Arb Efforts" or an explanation should be attached to it as to clarify that the term *musleh* would mean mediator and conciliator, and would also include arbitrator.

End Notes and References:

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² Qahtan al-Duri, *'aqd al-tahkm fī al-fiqh al-Islāmī wa-al-qānūn al-wad'ī* (Baghdad : al-Jumhuriyah al-'Iraqiyah, Wizārat al-Awqāf wa al-Shu'ūn al-Dīniyah, 1985), 36, 37, 38.

³ Barrett & Barrett, *A History of Alternative Dispute Resolution*, 8.

⁴ [Jawaharlal Nehru](#), (1964), *The Discovery of India* (Calcutta: Signet Press, n.d .), 288. See also George Mathew, Ed, *Status of Panchayati Raj in the States and Union Territories of India 2000*, edited by George Mathew(Delhi: Concept for Institute of Social Sciences, 2000), 3448, also available at <http://www.jstor.org/discover/10.2307/4411085?sid=21105320800861&uid=3&uid=16954968&uid=2&uid=67&uid=3738832&uid=16821864&uid=363776971&uid=62>, last accessed on Feb.11, 2015.

⁵ Imam Raghīb al-Asfahani, *al-Mufradāt fī Ghar'ib-il-Qur'ān* (Egypt Iiskandariah: MaktabahFayyadh, 2009), 175.

⁶The Noble Qur'an, 4:35.

⁷Muhammad Hamidullah, *The First Written Constitution of the World*, section 23 (Lahore: Ashraf press, 1975), 12. The book is also available at <https://archive.org/stream/THEFIRSTWRITTENCONSTITUTIONOFTHEWORLD/THE%20FIRST%20WRITTEN%20CONSTITUTION%20OF%20THE%20WORLD#page/n13/mode/2up>, last accessed on April 16, 2015.

⁸ Abdur Rahman b. Muhammad Ibn Khuldun, *Tārīkh Ibn Khuldun* (Karachi: Nafis Academy Printers, Urdu Trans, 1981), 36

⁹ Robert V. Massey Jr., "History of Arbitration and Grievance Arbitration in the United States," Link –

- <http://www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf>. <http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003>
- ¹⁰ An introduction to arbitration A Lexis® PSL document produced in partnership with Mayer Brown International LLP, available at https://www.mayerbrown.com/files/News/91090633-1b48-4757-925e-36d64efc439f/Presentation/NewsAttachment/e6a6d784-e500-4c7b-8a14-3825509e6328/LexisNexis_2012_intro-to-arbitration.pdf, last accessed on May 13, 2016.
- ¹¹ Lan Brookes, *The Chambers Dictionary*, 10th Edition (Edinburgh: Chambers Harrap Publishers Ltd, 2007), 71, 72. Oxford Advanced Learner's Dictionary, 64. Also see Justice Tanzil ur Rahman, *Qanuni Lughat* (Lahore: West Pakistan Urdu Academy 1983), 63.
- ¹² Muhammad Tahir Mansuri, *Shariah Maxims on Financial Matters* (Islamabad: Islamic Research Institute Press, 2007), 105, 226.
- ¹³ P. Ramanatha Aiyar, *The Law Lexicon*, 80.
- ¹⁴ Ibid.
- ¹⁵ An introduction to arbitration, A Lexis® PSL document produced in partnership with Mayer Brown International LLP, available at https://www.mayerbrown.com/files/News/91090633-1b48-4757-925e-36d64efc439f/Presentation/NewsAttachment/e6a6d784-e500-4c7b-8a14-3825509e6328/LexisNexis_2012_intro-to-arbitration.pdf, last visited on May 12: 2016
- ¹⁶ V.A. Mohta, *Arbitration and Conciliation* (Nagpur: AIR Publications 2001), 65, 66, 67.
- ¹⁷ Imam Raghīb al-Asfahani, *al-Mufradāt fī Ghar'ib-il-Qur'an* (Egypt Iiskandariah: MaktabahFayyadh, 2009), 175.
- ¹⁸ Alaed Din Ali b. Khalil al-Tarablasī, *Mu'dn-ul-Hukkām* (Lebanon: Dar-ul-fikr, n.d.), 24. Also see QazīMujahid-ul-Islam, *al-nizām al-qadā'd al-Islāmīd* (Lebanon: Dar-ul-kutub al-ilmiyyah, 2001), 154. See also Muhammad Amim-ul-Ihsan Al-mujaddidi, *al-Ta'rdjāt al-fiqhiyyah*, (Lebanon: Dar-ul-kutub Al-ilmiyyah, 2009), 53.
- ¹⁹ See section 1790 of the Mujallah. Also see Esa b. Uthman al-Ghuzzi, *Adab-ul-Qadā* (Riadh: MaktabahNizzar Mustafa Al-baz, 2004), 28.
- ²⁰ Ibnī A'abidin, *Hāshiyah Radd-ul-Muhtār* (Quetta: MaktabahRashidiah, n.d), 8:144.
- ²¹ Wahbah al-Zuhaili, *al-fiqh-ul- islamī waadillatuho* (Damascus, Dar-ul-fikr, 1989), 6:756.
- ²² ZainuddinIbnīNujaim, *al-bahr-ur-Ra'iq*(Beirut: Dar Al-ma'arifah, n.d.), 7:24.
- ²³ Ibrahim b. Muhammad IbnīFarhun, *Tabsirat-ul- hukkām*(Beirut: Dar-ul- Kutub al-ilmiyyah 1995), 17.
- ²⁴ The Noble *Qurān*, 4:65.
- ²⁵ The Noble *Qurān*, 5:42.
- ²⁶ The Noble *Qurān*, 49:9-10.
- ²⁷ Sulaiman b. Ash'th, *Sunan AbīDāwud, Kitāb al- 'dab, hadīth no.4955*, reported by Hanī' (Beirut: Muassasah al-risalah, 2013), 1044. Ahmad b. Shuaib, *Sunan al-Nisa' ī, 'dab al-qadat, hadīth no. 5387*, reported by Hanī' (Beirut: Muassasah al-risalah, 2013), 1188

²⁸ Abdur Rahman b.Muhammad Ibn Khuldun, *Tārīkh Ibn Khuldun* (Karachi: Nafis Academy Printers, Urdu Trans, 1981), 36

²⁹ Howard B. Miller, *The Jarndyce*, in California Bar Journal, July 2010. The article is also available at <http://www.calbarjournal.com/July2010/Opinion/FromthePresident.aspx>, last accessed on June 29, 2015. in the novel, the auther narrates the story of the case that remained pending for a century and ended undetermined. “Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means.... Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; ... old Tom Jarndyce in despair blew his brains out ... but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.

We asked a gentleman by us if he knew what cause was on. He told us Jarndyce and Jarndyce ... as well as he could make out, it was over. Over for the day? we asked him. No, he said, over for good ... presently great bundles of paper began to be carried out ... We glanced at the papers, and seeing Jarndyce and Jarndyce everywhere, asked an official-looking person who was standing in the midst of them whether the cause was over. Yes, he said ... and burst out laughing..... Do [we] understand that the whole estate is found to have been absorbed in costs ... And that thus the suit lapses and melts away?”

³⁰ See, Supreme Court of Pakistan Annual Report, April 2010- December 2011, p. 124. The details are also available at http://www.supremecourt.gov.pk/Annual_Rpt/Statistical%20Data%20Analysis.pdf, last accessed on June 30, 2015.

³¹ See, Lahore High Court, Annual Report, 2011, p. 54. The report is also available at <http://lhc.gov.pk/system/files/AnnualReport2011.pdf>, last accessed on June 30, 2015.

³² National Judicial Policy 2009, p. 5, also available at <http://www.transparency.org.pk/documents/Judicial%20Policy.pdf>, last accessed on May 24, 2016.

³³ Daily, The Nation, May 5, 2009.

³⁴ Details are available at WWW.sindhhighcourt.gov, last accessed on April 15, 2015.

³⁵ See Beata Kozubov,ka, “Should family disputes be arbitrated?”, pages 1,2., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154220 (last accessed on Feb. 7, 2015).

³⁶ An introduction to arbitration A Lexis® PSL document produced in partnership with Mayer Brown International LLP, available at https://www.mayerbrown.com/files/News/91090633-1b48-4757-925e-36d64efc439f/Presentation/NewsAttachment/e6a6d784-e500-4c7b-8a14-3825509e6328/LexisNexis_2012_intro-to-arbitration.pdf, last accessed on May 13, 2016.

³⁷ Malak v Sardar, AIR 1929 Lah 394.

³⁸ Avtar Singh, *Law of Arbitration And Conciliation*, 21-23.

³⁹ Beata Kozubov,ka, “Should family disputes be arbitrated? pages 1-2, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154220 (last accessed on Feb. 7, 2015).

⁴⁰ Abu Bakr al-Jassas, *Ahkām al-Qur’ān* (Beirut: Dar Al-fikr, n.d.), 2:270- 271.

- ⁴¹ This view is quite similar to the view of jurists of Islamic law who unanimously hold that arbitration (tahkim) is the sub-branch of regular adjudication and an arbitrator (hakam) must have the qualification of a formal judge (qadi). See Alaed Din Ali b. Khalil, *Mu'īn-ul-hukkām*, 27. Also see Ibni A'abidin, *Hāshiyah Radd-ul-Muhtār*, 8:141. Also see Ibrahim b. Muhammad Ibni Farhun, *Tabsirat-ul- -hukkām*, 50. See also Al-Ghuzzi Esa b. Uthman, *Adab-ul-Qadha*, 35. Abu Ishaq Ibrahim b. Hassan, *Mu'īn al-hukkam 'la al-qadāyāwa al-ahkām* (Tunisia: Dar Al-gharb Al-islami, 2011),1:311. Muhammad b. Ali al -Haskafi, *al-Durr-ul-Mukhtār* (Quetta: Maktabah Rashidia n.d.), 8:141. Also see Sayyed Amir Ali, *Fatawa Alamgiriāh*, urdu trans. (Lahore: Ali Ijaz Printers, n.d.), 5:195.
- ⁴² Victoria Parliament Law Reform Committee, Final Report for the Inquiry into Alternative Dispute Resolution and Restorative Justice, May 2009, pp60-65, available at <http://www.parliament.vic.gov.au/lawreform/article/938> (last accessed on Feb.26, 2015).
- ⁴³ See Beata Kozubov.ka, "Should family disputes be arbitrated?", pages 1,2., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154220 (last accessed on 7th Feb 2015).
- ⁴⁴ The Indian Arbitration Act 1899 was applicable to the Presidency Towns and to the Provinces that have adopted it. Further, its scope was confined to the arbitration by agreement without the intervention of the court. Schedule II of the CPC was dealing with arbitrations beyond the domain of the 1899 Act. Worthy to mention is the fact that the Act 1899, itself, was remake of English Arbitration Act 1899. Many sections were taken verbatim from that Act. The consolidation and amending of the Act traces back to the recommendation of Civil Justice Committee in 1925 and to the reforms recommended by the Special Duty Officer appointed by the Central Government in 1938. See M. Farani, *Manual of Arbitration Laws* (Lahore: National Law Book House, 2008), 35- 36.
- ⁴⁵ See Sec. 48, the saving clause of the Act. An appeal was, however, competent even when the award had been made prior to the passing of the Act but judgment was passed subsequently. See M Farani, 658
- ⁴⁶ Justice Ihsan-ul-Haq, *Manual of Arbitration Laws in Pakistan* (Lahore: Key Law Reports Publications, , 2010), 4-7.
- ⁴⁷ *Messrs Nizari Co-operative Housing Society Ltd. v. Qamruddin M. Khimani and 4 others*, PLD 1982 Karachi 774.
- ⁴⁸ *Adamjee Construction Co. Ltd. v. Islamic Republic of Pakistan and 2 others*, PLD 2003 Karachi 180(b). *Federation of Pakistan, Chambers of Commerce and Industry v. Messrs Al-Farooq Builders, Builders and Constructors*, 2001 SCMR 1243.
- ⁴⁹ *Messrs Ahmad Constructions v. Messrs Neptune Textile Mills*, PLD 1990 Karachi 216.
- ⁵⁰ See Section 2(a) of the Act.
- ⁵¹ *S.M. Hanif (Dacca) Ltd. v. Central Bank of India Ltd.* , PLD 1960 Dacca 255.
- ⁵² *Messrs Nawab Brothers Ltd v. Project Director, Office of the Project Director, Special Projects, Planning and Development Department*, Karachi,1981 CLC 638.
- ⁵³ *M/S Ahmad Constructions v. M/S Neptune Textile Mills and another*, PLJ 1990 Karachi 393. *Messrs Nawab Brothers Ltd v. Project Director, Office of the Project Director, Special Projects, Planning and Development Department*, Karachi,1981

- CLC 638. *Messrs Ahmad Constructions v. Messrs Neptune Textile Mills*, PLD 1990 Karachi 216.
- ⁵⁴ *Punjab Province & another v. Industrial Machine Pool*, NLR 1978 Civil Lahore 658.
- ⁵⁵ *Govt. of N.W.F.P v. Moheebullah*, NLR 1990 AC 785.
- ⁵⁶ Dr Ali b. Muhammad Al-sawaji, *Ittifāqal-tahkīm wa Istiqlaluhū*, 25, 532. Books on the title of ‘aqd al-tahkīm are also available, such as book of Qahtan al-duri and book of Fatima Muhammad al-awwa, available at https://www.google.com.pk/?gws_rd=ssl#q=aqd+al-tahkim
- ⁵⁷ See Para 1, Schedule 1st of the Arbitration Act 1940.
- ⁵⁸ See also Section 8 of the Act.
- ⁵⁹ Umpire ordinarily means a person who is to decide upon disagreement. It has got a technical meaning in arbitral proceedings and denotes a person who settles any differences that may arise between the arbitrators [AIR 1955 Nag 126]. See also Kh. Muhammad Sharif, *Arbitration Act* (Lahore: Mansoor Book House, 2009), 149.
- ⁶⁰ See Para 2, Schedule 1st of the Arbitration Act 1940.
- ⁶¹ See Section 11 of the Act.
- ⁶² See Section 13 of the Act.
- ⁶³ *F.J.Rambarts (Pakistan) Ltd. v. Pakistan Steel Mills Corporation*, 1987 CLC 2198.
- ⁶⁴ Alaed Din Ali b. Khalil, *Mu’īn-ul-hukkām*, 27. Also see Ibnī A’abidin, *Hāshiyah Radd-ul-Muhtār*, 8:141. Also see Ibrahim b. Muhammad Ibnī Farhun, *Tabsirat-ul- -hukkām*, 50. See also Al-GhuzziEsa b. Uthman, *Adab-ul-Qadha*, 35.
- ⁶⁵ John Burke, *Osborn’s Concise Law Dictionary* (London: Sweet & Maxwell 1981), 42. See also Kh. Muhammad Sharif, *Arbitration Act*, 56.
- ⁶⁶ “Making of an award” and “Signing award” are distinct phenomena. The former means that the mind of the arbitrator has been declared in writing and the later denotes that such declaration has been authenticated by signatures of the arbitrators. [See Kh. Muhammad Sharif, *Arbitration Act*, 57.]
- ⁶⁷ *Province of West Pakistan v. Fakir Spinning Mills Ltd.*, PLD 1962 Karachi 386.
- ⁶⁸ See Para 3 and 5, Schedule 1st of the Act, read with Section 14v of the Act.
- ⁶⁹ *J.F.C.Gollaher v. Samad Khan*, 1993 MLD 726.
- ⁷⁰ *Messrs Gandhara Industries Ltd Karachi v. Government of Pakistan*, PLD 1982 Kar. 260. *Nan Fung Textile Ltd. v. Sadiq Traders Ltd*, PLD 1982 Kar. 619. *Karachi Metropolitan Corporation v. Associated Constructors Ltd*, 1984 CLC 1077 (DB).
- ⁷¹ See section 26A of the Act, also see *J.F.C.Gollaher v. Samad Khan*, 1993 MLD 726. *Messrs Pak Malik Constructors Ltd. Pawalpindi v. Government of Pakistan through Secretary Ministry of Defence and another*, PLD 1982 Lahore 57.
- ⁷² *Ghulam Farid Khan v. Muhammad Hanif Khan and others*, 1990 SCMR 763.
- ⁷³ See section 28 and Paras 3,4 of schedule 1 of the Act.
- ⁷⁴ See Section 15 of the Act.
- ⁷⁵ See Section 16 of the Act.
- ⁷⁶ Misconduct has not been defined in the Arbitration Act. The phrase has several hidden ambiguities. It should be used in its technical sense and with reference to arbitration proceedings. Its confinement to moral turpitude, fraud and gratification is not correct. For the purpose of arbitral proceedings, it would be clothed with a generic meaning and would include the failure of the arbitrator to perform judicially and judiciously. Further, misconduct of proceedings refers to mishandling of arbitration that amounts to substantial miscarriage of justice, such as utter haste, unjustified ex-parte

proceedings, non-intimation of the parties regarding date, time and place of proceedings and not providing a reasonable opportunity of audience etc. the phrase “Misconduct himself” refers to personal traits such as bribery and other unlawful gratifications. See, *Messrs Shafi Corporation Ltd v. Government of Pakistan through director General of Defence Purchase, ministry of Defence Karachi*, PLD 1994 Kar. 127. *Kashmir Corporation Ltd v. Pakistan International Airlines* PLD 1995 Karachi 301. *Province of Balochistan v. Sardar Muhammad Usman Khan*, PLD 1987 Quetta 33. *Brooke Bond (Pakistan) Ltd v. Conciliator appointed by the Government of Sindh and 6 others*, PLD 1977 SC 237.

Also see, M. Farani, *Manual of Arbitration Laws* (Lahore: National Law Book House, 2008), 413.

⁷⁷ See section 30 of the Act.

⁷⁸ For convenience, statutes are divided into sections and rules. Sometime the lawmakers have to place lengthy necessary details in a piece of legislation. The sections are usually incapable to accommodate them. They are, therefore, kept in a separate document known as schedule. In some cases, forms, treaties and conventions, referred to in the main body of the Act, are included in schedules. For the clarity of some ambiguity in the section, recourse may be made to provisions of a schedule. In case of clash between section and schedule, the positive provisions of schedule must prevail. In India, the prevalent view is that schedule cannot control the express enactments and in case of inconsistency, the section shall prevail. According to accepted vie in Pakistan, in case of irreconcilable contradiction between the two, the section must yield to the schedule. See, S M Zafar, *Understanding Statutes* (Lahore: PLD Publishers, 2008), 114-117, 611-612. Also see *Mondi's Refreshment Room & Bar, Karachi v. Islamic Republic Of Pakistan* PLD 1983 Kar. 214.

⁷⁹ See Paras 1-8 of First Schedule.

⁸⁰ See Paras 1-5 of Second Schedule.

⁸¹ See the Gazette of Pakistan, Extra-ordinary, Notification no. F. 9(3)/2011- Legis, dated: 19th July 2011.

⁸² Law of Arbitration in Pakistan, article available at <http://www.zklawassociates.com/wp-content/uploads/2012/03/Arbitration-Law-in-Pakistan.pdf>, on 15th April 2015.

⁸³ The term Ombudsman has a Swedish origin that means an agent or representative. The history of this institution traces back to Second Caliph *Umar (RA)*. The concept could not be accepted for almost thirteen centuries. In the beginning of 19th Century, the exiled king of Sweden noticed the significant role of the institution in Turkey and decided to introduce it in his country after his restoration to power. Accordingly, in 1809, the first institution of ombudsman was established in Sweden. See, justice(Rtd) Muhammad Raza Khan, WAFaqI MOHTASIB (FEDERAL OMBUDSMAN) OF PAKISTAN, ANNUAL REPORT 2013, page 12, available at <http://www.mohtasib.gov.pk/>, also visit, <http://www.bankingmohtasib.gov.pk/ombudsman> and <http://www.mohtasib.gov.pk/gop/index.php?q=aHR0cDovLzE5Mi4xNjguNzAuMTM2L3dhZmFxaW1vaC8uL2ZybURldGFpbHMuYXNweD9vcHQ9bmV3c2V2ZW50cyZpZD0xNTE%> (last accessed on April 28, 2015).

⁸⁴ See Preamble Para 1 of the *Small Claims and Minor Offences Ordinance 2002*.

⁸⁵ See Section 2 (a) & (g) of the *Small Claims and Minor Offences Ordinance 2002*.

⁸⁶ See Section 15 of the *Small Claims and Minor Offences Ordinance 2002*.

- ⁸⁷ See Section 15 (3) of the *Small Claims and Minor Offences Ordinance 2002*.
- ⁸⁸ See Section 16 (1) of the *Small Claims and Minor Offences Ordinance 2002*.
- ⁸⁹ See the first paragraph of the Regulation. Text is available at <http://archives.dailytimes.com.pk/national/15-Apr-2009/text-of-the-nizam-e-adl-regulation-2009>.
- ⁹⁰ Adibah Farh and Riadh Karim, *al-Qāmūs* (Beirut: Dar al Kutub al Ilmiah, 2006), 653.
- ⁹¹ See Section 17 of the Regulation. It says, “The Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Regulation”.
- ⁹² Reports are available at: <http://kpja.edu.pk/search/node/mediation%20report>. I have myself participated in all the three seminars and have also written the Concept Note for the last one held in Swat in November 2014.
- ⁹³ Zia-ul- Hassan, *Success and Failures of Shar‘ī Nizam-e-Adl Regulation 2009*, p.14.
- ⁹⁴ See, Section 102 of *The NWFP Local Government Ordinance, 2001* (Ordinance.XIV of 2001).
- ⁹⁵ See, Section 104 *The NWFP Local Government Ordinance, 2001*.
- ⁹⁶ See Section 28 of *the Contract Act 1872*.
- ⁹⁷ See section 11 of *The Muslim Family Laws Ordinance 1961*.
- ⁹⁸ See section 26 of the *Pakistan Family Courts Act 1964*.
- ⁹⁹ See Section 7 (1) (2) (3) (4) of the Ordinance.
- ¹⁰⁰ *Batool Tahir through nominee v. Province of Sindh through Secretary Local Government and 3 others*, PLD 2005 Karachi 358. *Allah Dad v. Mukhtar and another*, 1992 SCMR 1273. *Mst. Zahida Shaheen v. The State and another*, 1994 SCMR 2098. *Mst. Farnain Arooj v. Mahmood Sadiq and another*, 2010 CLC 258 Lahore. *Mst. Maqbool Jan v. Arshad Hassan and another*, PLD 1975 Lahore 147. Also see *Allah Rakha and others v. Federation of Pakistan and others*, PLD 2000 FSC1.
- ¹⁰¹ See Section 7 (1) (3) and (4) of the *Muslim Family Laws Ordinance 1961*.
- ¹⁰² M. Mahmood, *The Code of Muslim Family Laws* (Lahore: Al-Qanoon Publishers, 2013), 122.
- ¹⁰³ See Section 30 of the *Pakistan Family Court Act 1964*.
- ¹⁰⁴ *Mst. Dilshad Sultana v. Noor Muhammad and another*, PLD 1993 Quetta 1 (DB).
- ¹⁰⁵ *Razzaq Hussain Shah v. Qazi with powers of Family Court*, 1986 CLC 1691. *Mir Dost Muhammad v. Government of Baluchistan and 3 others*, PLD 1980 Quetta 1. *Junaid Quraishi v. Family Court*, 2003 CLC 1001.
- ¹⁰⁶ The wording “not in consonance” has been deliberately used so as to differentiate it from “in repugnance with” which means a direct, substantial and explicit opposition to the provisions of Quran and Sunnah.
- ¹⁰⁷ Ibnī Rusd, *Bidāyat-ul-Mujtahid*, 2:122- 123.
- ¹⁰⁸ Abu Muhammad, Al-Hussain b. Masaud Al-Baidhawi, *Ma‘ālim al-Tanzīl/Tafsīr l-Baghawī*, (Multan: Idara Talifat Ashrafia, n.d.), 1:424.
- ¹⁰⁹ Justice Tanzil-ur Rahman, *Majmua Qawnin-e-Islam*, Sec. no. 128, 2:644.