

Mediation in Family Disputes: An Appraisal of the Role of Arbitration Councils

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ABSTRACT

Arbitration is a form of alternate dispute resolution (ADR) in which the matters are settled outside the court. In Family matters, arbitration plays a vital role in overcoming the differences between spouses. In the Family Laws of Pakistan, a body is designed for the arbitration of disputing couples which is termed as arbitration council. Although it is stated in section 7 (4) of Muslim Family Law Ordinance and section 10 of Family Court Act that the chairman of the council will constitute an arbitration council and an attempt for the reconciliation will be conducted but the criteria for the representatives of the council and implementation of their decisions are not determined. In this work, doctrinal and non-doctrinal mood of research is conducted to evaluate the satisfaction of female litigants dealing with the process of arbitration council. The paper is divided into four parts. The first part discusses the authority and process of arbitration council in Islamic law. The second part describes the process of arbitration council in Pakistani law. The third part elaborates the empirical data collected from the female litigants in the Pakistani courts. The fourth part of the paper provides the results of arbitration process from the courts and its adequacy, The paper suggests that in Pakistan the process of arbitration in divorce cases is not satisfactory. Therefore, in divorce cases, suited criteria for appointment of arbitrators and arbitration process should be determined.

Keywords: *Arbitration Council, Arbitrators,, Muslim Family Law, Pakistani Law, Reconciliation.*

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Introduction

In Pakistan, the procedure for family courts is provided in Family Courts Act 1964. The purpose of this enactment was to provide “better remedies”¹ to the women and children. The Constitution of Pakistan also provides that women should be treated with respect.² Among other procedural process the court had determined special procedure for settlement of differences between the partners. The purpose of the reconciliation is to protect the partners and resolve their differences in a dignified manner. It is observed that the women suffer more than the man if the partners untie their knot. For that reason, an arbitration council is established to ensure the reconciliation between spouses.

However, a proper mechanism is not determined for the arbitration council. The reconciliation process is left in hands of family court judges and the process of arbitration is conducted according to their ruling.³ Moreover, it was held in case of Muhammad Yaqoob⁴ that “it is not necessary that attempts at reconciliation should be clearly stated in the [Courts] Order”. As a result, the arbitration conducted by the family courts is not that much meaningful. The arbitration council is also not effective, and the chairman of the council is mostly a political figure who usually is not interested in the arbitration process.

This article is divided into four parts. The first part discusses the concept of arbitration in Islamic Law. The second part discusses the arbitration process in family matter especially when divorce is initiated by either party. The third part depicts the status of existing laws regarding arbitration in family courts of Pakistan and the lacunas which exist in legislative part. The last part of the work reveals the percentage of the female litigants in Pakistan, who are satisfied with the process of arbitration conducted in Pakistani Courts.

Literature Review

The following books, reports and articles are directly on the

1 Interpretation of preamble of the Family Court Act 1964 in case of Adnan Afzal v. Capt. Sher Afzal (PLD 1984 SC 187, 193).

2 Constitution art 25(3), 26 (2), 34, 35, 37 (e)

3 *Abdur Rauf v. Anwar Khatoon* (PLD 1976 Lah. 1598, 1600)

4 *Muhammad Yaqoob v. Irshad Bibi* (PLD 1976 Lah. 1473, 1476).

concept of alternative dispute resolution and its related family issues i. e. Neelam Tyagi, *Matrimonial Disputes, Scope and Benefits of ADR* (Springer, Singapore, 2021). Anil Malhotra and Ranjit Malhotra, *Alternative Dispute Resolution in Indian family law, Realities, Practicalities and Necessities* (Delhi: 2018). Dr. Qazi Attaullah and Dr. Lutfullah Saqib, *Tracing the Concept of ADR in Shariah and Law: A Comparative Study* (Hamdard Islamicus vol. 07 no.03). *Alternative Dispute Resolution, Teaching Ethical, Holistic Client Representation in Family ADR*, (Law Reform Commission first Edition July 2008). Salman Ravala, *Alternative Dispute Resolution in Pakistan* (Published May/June 2008). Md. Sefat Ullah, Department of Law, Green University of Bangladesh, *Application of ADR in Family Court: A Critical Analysis Under Legal Framework and Practice in Bangladesh*, (Green University Review of Social Sciences, Volume 04, issue 01, june-2018). Arif A. Jamal, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, Chapter 4: *ADR and Islamic Law: The Cases of the UK and Singapore* (Published: 2018) pages: 120–138. Anne Ardagh, *Repositioning the Legal Profession in ADR Services, The Place of Collaborative Law in the New Family Law System in Australia*, (journal: *Law and Justice*, Journal issn:1445-6230, volume:8, issue:1, January 2008). Mohamed M. Keshavjee. *Alternative Dispute Resolution (ADR) and its Potential for Helping Muslims Reclaim the Higher Ethical Values (Maqāsīd) Underpinning the Sharia*, chapter, first online: 09 April 2016). Abidā Hassan, Dil Muhammad Malik, *Status of ADR in Existing Laws of Pakistan: A Brief Study*, (Global Regional Review, vol. 5, no. 3 - 2020). Abdul Malik and Farah Salwani Binti Muda, *The Concept of Reconciliation (Sulh) in Islamic Family Law and Matrimonial Dispute Settlement Practice in Nigeria* Olufadi Lanre, (*Peak Journal of Social Sciences and Humanities* vol. 3(1), pp.1-7, february, 2015). Hamid, N. A. A., Hassim, M. H., AB Wahab, N., Aziz, (2019), *Alternative Dispute Resolution (ADR) via Sulh Processes*, (*International Journal of Law, Government and Communication*, volume: 4 issues: 17, December 2019) pp.25-33. Ratno Lukito, *Religious ADR: Mediation in Islamic Family Law Tradition*, (*al-jami'ah journal of Islamic Studies*, Sunan Kalijaga State, Islamic university (UIN) Yogyakarta, Indonesia vol 44, no 2 (2006). Md. Deedarul Islam Bhuiyan, Department of Law, Sonargoan University,

Dhaka, Bangladesh, Alternative Dispute Resolution Process in Family Matters Under Legal Framework of Bangladesh: Challenges and Ways out, *International Journal of Law, Humanities & Social Science*, volume 3, issue 3 (April 2019), p. p.85-105. Laura Ashworth, Islamic Arbitration of Family Law Disputes in New Zealand, A Dissertation Submitted in Partial Fulfilment of the degree of bachelor of laws: The University of Otago, Dunedin, New Zealand, (October 2010). Abida Hassan and Dil Muhammad Malik, Informal Dispute Resolution in Islamic World Jordan, Egypt, Saudi Arabia and Pakistan, *Habibia Islamica*, (january to june 2020). Anne K. Womer, Dispute Resolution in Muslim Minority Communities: The Theory, Practice, and Potential of Islamic Mediation, A Thesis presented to the faculty of the graduate school of the university of Texas at Austin (August, 2009).

The above-mentioned books, articles, reports and over all material on this topic can be divided into three categories. In the first category, content written by lawyers, jurist and scholars cover only conventional perspective of the main area, while in the second category scholars discussed the legal perspective in respect of their regional status. In the last category, shariah experts and Islamic jurists discussed shariah standpoint on comparative basis and few of them elaborated shariah's perspective by specifying particular school of thoughts.

Beside this, there are few books and articles regarding the mechanism to resolve the family disputes under the ADR but all these books and articles do not provide the clear picture of the Islamic perspective and legal status in Pakistan. Therefore, the current study is different from previous studies as mentioned hereinabove and focuses on Islamic perspective of arbitration in matrimonial affairs, and further proposes an appropriate mechanism of arbitration and reconciliation in Muslim family law to resolve the family disputes effectively.

Research Methodology

In this work, doctrinal and non-doctrinal mood of research is conducted by analytical and comparative technique to evaluate the satisfaction of female petitioners dealing with the procedure of arbitration council. It will consist a comparison of Islamic Law with other related

conventional Pakistani Law. Critical methodology will be used to examine the appropriate mechanism of arbitration council to reconcile family issues. It will suggest an appropriate legal mechanism that will be useful for both of the parties under the umbrella of Muslim family law. The primary sources are utilized in the construction and writing of this article. However, the secondary sources are also consulted as a tool of research. The views and opinions of the classical Muslim jurists from different schools of thought are also critically analysed. Chicago referencing style will be adopted for the research.

Arbitration (*Taḥkīm*) in Qur'ān and Sunnah

The authorities for arbitration are recognized from Qur'ān and Sunnah. The Holy Qur'ān clearly states that if there is dispute between the spouses, arbitrators should be appointed for reconciliation.

﴿وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَأَبْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقُ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا﴾

“If you fear a split between them (the spouses), send one arbitrator from his people and one from her people. If they desire to set things right, Allāh shall bring about harmony between them. Surely, Allāh is All-Knowing, All-Aware”¹

Ibn Kathīr writes in the explanation of the verse that if any dispute arises between the spouses, the judge will refer them to a reliable person to resolve their indifferences. If the matter is not resolved by him, then the judge will appoint trustworthy persons from each side of their families and they will try their best to enjoin the partners.² Syyed Qutb comments while elaborating the verse as; there should be the last measures taken to reconcile between the husband and wife. The arbitrators should be appointed from both sides on the condition that they are closely interlinked with the partners. It is also a condition for the reconciler that he

1 Qur'ān 4: 35

2 Ibn Kathīr, *Tafsīr Ibn Kathīr*, (Lahore: Darussalam Publishers & distributors, 2000), vol.2, p. 447.

must possess trust by the partners as the secrets of the disputed families will be exposed to him.¹

It is stated in *Tafsīr Ibn Kathīr* that Ibn ‘Abbās said: “Allāh commands that a righteous man from the husband’s side of the family and the wife’s side of the family are appointed, so that they find out who among the spouses is in wrong. If the man is in the wrong, they prevent him from his wife, and he pays some restitution. If the wife is in the wrong, she remains with her husband, and does not pay any restitution. If the arbitrators decide that the marriage should remain intact or dissolved, then their decision is upheld. If they decide that the marriage remains intact, but one of the spouses disagrees while the other agrees, and one of them dies, then the one who agreed inherits from the other, while the spouse who did not agree does not inherit from the spouse who agreed”

Subsequently, it is instructed to the Muslims that they should provide justice in whatever they have entrusted to them. Allāh Almighty says in Holy Qur’ān,

﴿إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تَوَدُّوا الْأَمْنَةَ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا﴾

“Surely, Allāh commands you to deliver trusts to those entitled to them, and that, when you judge between people, judge with justice. Surely, excellent is the exhortation Allāh gives you. Surely, Allāh is All-Hearing, All-Seeing”.²

Sayyid Qutb writes in his *Tafsīr* that according to the verse, the justice should be provided by the Muslims in all affairs of their life and the duty of providing justice is not restricted among the Muslims, but it could be provided to the non-believers as well.³ Ibn *Kathīr* transcribes the verse that it commanded by Allāh that the Muslims should do justice while deciding the cases.⁴

1 Sayyid Qutb, *In the Shade of the Qur’ān*, (UK: The Islamic Foundation, 2003) vol. III, p.139.

2 Qur’ān 4:58.

3 Sayyid Qutb, *In the Shade of the Qur’ān*, vol. III, p.194.

4 Ibn Kathīr, *Tafsīr Ibn Kathīr*, vol.2, p. 494.

For the establishment of justice in society, Allāh also ordered the prophet ﷺ to ensure justice among the parties. He Almighty gives him the discretionary power to listen the matters of people or neglect them if he is not willing to. In the same manner, Allāh also instructed in the Holy Qur’ān

وَإِنْ حَكَمْتَ فَأَحْكُم بَيْنَهُم بِالْقِسْطِ ۚ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ

“If you judge, judge between them with justice. Surely, Allāh loves those who do justice.”¹

The verse clearly states that when a person is entrusted for a decision, it would be his duty to conduct fair trial.

The process of arbitration is also addressed in the saying of the prophet ﷺ, he says “Whoever judges between two disputing parties (by way of *tahkīm*) and both of them agree with arbitrator) whereas he does not do justice between them, Allāh will curse him”.² The prophet ﷺ practiced the *tahkīm* himself and in some cases presented as an arbitrator between the two parties. During his time of Makkah, the people of Madena invited him for the arbitration of their dispute.³ In the battle of al-Ahzab, the tribe of Banu Qurazah wanted to settle the dispute through arbitration, the prophet nominated Sa‘ad bin Mu‘adh as arbitrator.⁴ Subsequently, in the case of Ban al-‘Anbar, the prophet ﷺ agreed with the arbitration of al-A‘war bin Bahemah on the issue of distribution of zakat.⁵

In a similar vein, once the prophet ﷺ heard that Hni (his companion), is given the title “Abe al-Hakam” (father of arbitration). The prophet inquired from him about his arbitration and asked: “Verily! Allāh is the arbitrator and unto Him is the ultimate judgement. Why were you nicknamed Abe al-Hakam? He answered: Whenever my people have differences in certain issues, they came to me and I conduct arbitration,

1 Qur’ān 05:42.ā

2 Mansūr Ibn Yūnus Idrīs Al-Bahūtī, *Kashshāf al-Qinā ‘an Matn al-Iqnā*, (Beirut: Dār al-Fikr, 1982), vol.6, p.309.

3 Abu Muhammad Ibn ‘Abd al-Malik Ibn Hishām, *Sirah al-Nabī*, (Egypt: Dar al-Hidayah, n. d), vol.2, p.121.

4 Ibn Hajar al-‘Asqalanī, *Fath al-Bari*, (Beirut: Dar al-Ma‘rif, n. d), vol. 7, p.411-2.

5 Ibn Hajar al-‘Asqalanī, *al-Asābah fī Tamayz al-Sahabābah*, (Egypt: Dar Nahdah, 1972), vol.1, p.95.

both of the parties are pleased by my award. The prophet ﷺ happily replied: what a good gesture! Do you have a child? The man answered that he has three children- Shuraih, 'Abdullah and Muslim. The Prophet ﷺ further inquired about the eldest among them and he answered: Shuraih. The Prophet ﷺ therefore said: You are Abu Shuraih".¹

***Tahkīm* at the time of companions**

The practice of *Tahkīm* is also found from the precedents of the companions. They followed the exercise of *Tahkīm* in their disputing matters. It is found that in many incidents at the time of companions, they have appointed arbitrators for resolving the disputes. In the case of Umar (r. a) and Ubayy Ibn Ka'ab, when an issue arise between them on the matter of date farm. They nominated Zayd bin Thebit as an arbitrator to resolve their dispute.² Subsequently, in the dispute between "Uthmen and Talha, they appointed Jubair Ibn Mat'im as their arbitrator.³ In addition, in the case of a clash between the husband and her wife, arbitration was practiced by Ali bin Abe Talib.⁴ It is evident from the above examples that arbitration was practiced at the time of the companions.

Arbitration in Family Disputes

In Islamic law, the arbitration in family matters is found in *Qur'an* and Sunnah of the prophet ﷺ. The Qur'ānic verse 4:35 clearly mention the procedure of arbitration among the spouses. If the judge observe that a conflict arose between the spouses to an extent that a marriage breakdown is feared, the judge will appoint arbitrators for both parties i. e. one from each side.⁵ The arbitrators will try their utmost effort to reconcile between the spouses. There are some general conditions for the arbitrators in Islamic law i. e he should be a Muslim, sound mind, male, justiciable and

1 Related by An-Nasā'ī and quoted in Al-Juhanī, n.84 at 73.

2 Muhammad b. Ahmad b. Abi Sahl Abu Bakr al-Sarakhsi, *Al-Mabsūt*, (Beirut: Darul Fikar, 2000), vol.21. p.62

3 Ibn Qudāma, *Al-Mughni*, (Riyadh: Maktaba Al-Riyadh Al-Hadisah, 1981), vol.9, p.108.

4 Abū al-Qasim Ali al-Samnāni, *Raudahal-Qudāt wa Tarīq al-Najāt*, (Oman: Dar al-Furqān, 1984), vol.1, p. 162.

5 Muhammad Ibn al-Abbas Al-Ramlī, *Nihāyat al-Muhtāj*, (Beirut: Mustaffā al-Bābī al-Halabī wa Awlādūhū, 1967), vol.6, p.392.

trustworthy, free from physical defects, expert in the field, from the family and age of majority.¹

Regarding the qualification of the arbitrators, the Muslim Jurists differed in their opinions. The Shafīs are of the opinion that for the appointment of the arbitrator, the judge and arbitrator have same requirements.² Subsequently, the Hanafis says that a person whose testimony is admissible in the court is qualified to be an arbitrator.³ In their view, it is permissible to appoint a woman as arbitrator. However, the Malikis stipulates that if a person is qualified to be appointed as a judge, he is also qualified to be an arbitrator.⁴ Accordingly, the Hanbalis do not consider the requirement of an arbitrator same as a judge. They consider arbitration similar to representation (*wakalah*).⁵ And the wakil (representative) has not same qualification as a judge. It is evident from the majority of the jurists that the judge and arbitrator have the same qualification.

Qualification of two Arbitrators in Divorce cases

It is evident from the Qur'ānic verse 4:35 that if a dispute arises between the parties, arbitrators should be nominated from each side to resolve the dispute. It is important to discuss the qualification for the arbitrators who will conduct the reconciliation process. The Muslim jurists differ in their opinion on the issue of qualification of an arbitrator appointed for the arbitration between the partners. The Shaf'īs stipulate that the two arbitrators appointed in the family matter should be Muslim, *mukallaf* (responsible), *aadil* (just), *hura* (free) and *Ahal* (capable of carrying out the task). Subsequently, the arbitrators should be male and each one will be nominated from the family of disputed couple.⁶ In his

1 Mas'ad 'Awwād Hāmdan Al-Burqānī al-Juhanī, *Al-Tahkīm fī al-Sharīah al-Islāmiyyah*, (Madīnah: Maktabah Dār al-'Imān, 1994), p.134.

2 Al-Shirbīnī, *Mughnī al-Muhtāj alā Ma'rifāt Ma'ānī al-Minhāj*, (Beirut: Dār Ihyā al-Turāth al-'Arabi, 1944), vol.8, p.242-44

3 Muhammad b. Ahmad b. Abi Sahl Abu Bakr al-Sarakhsī, *Al-Mabsūt*, (Beirut: Darul Fikar, 2000), vol.16. p.111

4 Al-Dasūqī, *Hāshiyah al-Dāsūqī 'ala al-Sharh al-Kabīr*, (Beirut: Dār al-Fikir, n. d), vol.4, p.136-7

5 Mansūr Ibn Yūnas Idrīs Al-Bahūtī, *Kashshaf al-Qinā' an Matn al-Iqnā'*, (Beirut: Dār al-Fikr, 1982), vol.6, p.309.

6 Al-Shirbīnī, *Mughnī al-Muhtāj 'alā Ma'rifāt Ma'ānī al-Minhāj*, op. cit, vol.3, p.261

book *al-Umm* he states that the arbitrators should be appointed from the families and it is necessary for the judge to nominate the capable person for arbitration.¹ Conversely, Ghamrevi is of the opinion that it is not necessary for the arbitrator to be a male.²

According to Malikī School, the arbitrators appointed for divorce cases should be a Muslim male. They do not permit a woman to conduct the arbitration of the partners. In addition, this school does not permit a non-Muslim, minor and slave for the arbitration process. They also expect from the judge to appoint an arbitrator having enough knowledge of *shari'ah*.³ Hanafī School are of the opinion that the arbitrators should be trustworthy, influential and acceptable for both the parties. They argue that if the arbitrators are influential, they will easily reconcile between the married couple.⁴ While the Hanbalī School states that the arbitrators should be competent in resolving marital disputes and also, they should be expert in the *fiqh*. It would be recommendable if the arbitrators are from the families of the couple. However, there is no harm if they are selected from outside of the family.⁵

It is observed from the discussion that the arbitrators should be capable of conducting the process of reconciliation. The purpose of appointing arbitrators is to reunite the married couple and it would be possible when the arbitrators are influential. Subsequently, it is also found that the woman can also be appointed as arbitrator and in certain circumstances the woman is observed in a better position to reconcile between the couple. This is evident that the woman could be appointed as mediators/conciliator, social welfare officers and counsellors for the partners.

1 Al-Shāfi'i, *al-Umm*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1993), vol. 5, p.286.

2 Muhammad al-Zuhrī Al-Ghamrāwī, *al-Sirāj al-Wahhāj 'alā Matn al-Minhāj*, (Beirut: Dār al-Fikr, n. d), p.401.

3 Muhammad Ibn 'Abdullah Al-Khurashī, *al-Khrashī 'alā Mukhtasar Saidi Khalil*, (Beirut: Dār al-Fikr, n. d), vol.3, p.8-9

4 Muhammad Ibn 'Ali Ibn Muhammad Al-Zamakhsharī, *Fath al-Qadīr al-Jāmi' baina Fannī al-Riwāyah wa al-Dirāyah min 'Ilm al-Tafsīr*, (Beirut: Dār al-Ma'rifah, 1995), vol.1, p. 560.

5 Ibn Qudāmah, *al-Mughnī*, vol.8, p.169-171.

Role of arbitrator in divorce cases

The arbitrators in divorce cases are appointed for the purpose of reconciliation between the spouses.¹ They are in responsibility to re-join the partners. The intention of the arbitrator should be that he is doing so for the sake of Allāh and it is known that if an arbitrator has good intension, he will be helped in the process of reconciliation by Allāh.² It is mentioned in Qur’ānic verse 4:35, “If they desire amendment Allāh will make them of one mind”. It could be commented that if the reconciliation fails, it shows their dubious or vicious intention. The verse clearly shows that it is the first duty of the arbitrators to try their best for the resolution of discord.³

The statement of their responsibilities is clarified from others *tafāsīr* of *Qur’ān*. Al- Razi comments in his *tafāsīr* that the primary duty of the arbitrators is to reconcile between the partners.⁴ Al-Bahr al-Re’iq also stipulate the same responsibility.⁵ Al- Ghazālī sates the episode of Umar (r. a), he sent an arbitrator for resolving a dispute between the partners. The arbitrator failed in their reunion, Umar (r. a) blamed him for his failure, he tried again, and he was successful at this time in reconciliation.⁶ Subsequently, among the responsibilities of the arbitrators, they should share the information received from the parties between the parties. They should treat the partners fairly and their fairness will lead towards the reconciliation of spouses.⁷

1 Abu Ja’far Muhammad Ibn Jarīr al-Tabrī, *Jāmi’ al-Bayān ‘An Ta’wīl al-Qur’ān*, (Beirut: Mustafā al-Halbi, 1968), vol. 8, p.129.

2 Ibid, p.33.

3 Syyyid Sābiq, *Fiqh al-Sunnah*, (Egypt: Dar ul-Kutub al-Islami, n. d) vol.3, p.264.

4 Fakhr al-Dīn Al-Rāzī, *al-Tafāsīr al-Kabīr li al-Imām al-Fakhr al-Rāzī*, (Cairo: n. d, 1938), vol.10, p. 93

5 Ibn Nujam, al-Bahr al-Rā’iq, (Pakistan: al-Maktabah al-Mājahiyah, n. d), vol. 7, p.25.

6 Imām Abī Hamid Muhammad Al-Ghazālī, *Ihyā’ ‘Ulūm al-Dīn*, (Beirut: Dār al-Ma’rifah, n. d), vol. 2, p. 49.

7 Abū al-Waīd Muhammad Ibn Ahmad Ibn Rushd, *Bidāyat Al-Mujtahid wa Nihāyah al-Muqtasid*, (Beirut: Dār al- Fikr, n. d), vol.2 p.102.

Appointment of arbitrator in Family Dispute

The Muslim jurists differ in their opinion regarding the appointment of arbitrators. According to Shāfa'ī¹, Hanbalī² and Mālik³, if the dispute between the partners reached to a severe situation then the judge should send a trusted person to supervise their matter in a dignified manner. However, they differ in their authority, Hanbalī says that the arbitrator should compel the couple to behave each other in a dignified manner.⁴ While Shefine says that he will only observe the matter and inform the judge regarding their issue.⁵ The Hanafī⁶ and Zehire⁷ are on the opinion that the appointment of a trusted person is not necessary and if they are not able to resolve the matter, the judge will immediately send the other two arbitrators.

Another issue which should be highlighted that whether the appointment of arbitrators is obligatory. Shāfa'ī says that if there is an issue arose between the couples, the appointment of arbitrator is compulsory. They based their opinion by arguing that if the arbitrators are appointed, it would help them in their reconciliation.⁸ Rida in his *Tafsīr* also endorsed the appointment of arbitrators and views that their appointment is obligatory.⁹ Conversely, there is another opinion of Shāfa'eī that view the appointments on a suggestion.¹⁰

It is also important to elaborate the issue of the authority on the appointment of arbitrators. The interpretation of the phrase “if you fear” in

1 Muhammad bin ʾidrīs Al-Shāfi'ī, *Mukhtasar al-Muzanī*, (Beirut: Dār al-Kutub al-'Almiyyah, 1993), vol.8, p.198-9.

2 Mansūr Ibn Yūnas, *al-Raud al-Murbi*, (Beirut: Dār al-Arqām bin Abī al-Arqām, 1990), vol.1, p.399.

3 Muhammad bin 'Abdullah bin 'Alī Al-Khurshī, *al-khurshī*, (Beirut: Dār al-Fikr, n. d), vol.3, p.8.

4 Ibn Quddāmah, *Al-Mughnī*, (Cairo: Al-Matbab al-Islami, 1983), vol.8, p.170.

5 Al-Shirbīnī, *Mughnī al-Muhtāj 'alā Ma'rifāt Ma'ānī al-Minhāj*,..., vol.3, p. 261.

6 Abū Bakr Ahmad bin Ali al-Rāzi, *Ahkām al-Qur'ān*, (Beirut: Dar al-Ihyā al-Turāth al-'Arabī, 1985), vol.2, p.190.

7 Ibn Hazam, *Al Muhalla*, (Egypt, Dar al-Ihyā al-Turāth al'Arabi, 2005), vol.9, p.246.

8 Ahmad Mustafā al-Miraghi, *Tafsīr al-Miraghi*, (Egypt: Mustafa al-Babī al-Halabī wa Awlāduhū, 1969), vol. 5, p.31.

9 Al-Sayyid Muhammad Rashid Ridā, *Tafsīr al-Manār*, (Egypt: al-Hai'ah al-Misriyyah al-'Ōmmah, 1972), vol.5 p.64.

10 Al-Shirbīnī, *Mughnī al-Muhtāj, op. cit.*, vol.3, p.261.

verse 4:35 of Qur'ān is interpreted differently. Four opinions are found on the matter of the authority of their appointment. In the first view, Hanafe's and Mālike's school of thoughts says that the words in the verse refers to the judge or his deputy.¹ Some of the Shāfaī and Mālikī are of the opinion that the phrase in the verse refers to the relatives of the couple. Ibn al-arabi elaborates the verse that the appointment of the arbitrators may come from the judge or the relatives or the couples themselves.² Subsequently, according to others the phrase in the verse specifically relates to the relatives of the couples. They opine that if the differences arose between the spouses, and the wife does not want to return to her husband's house, then the relatives will resolve the discord.³ From the interpretation of the verse, the fourth view says that the words in the verse relates to the righteous people (*al-selihen*).⁴ Al-Reze in his Tafsīr also supported this opinion.⁵

In a nutshell, the appointment of arbitrators is important and from the above discussion it could be argued that every rightful person could be appointed as arbitrator. From different interpretations of the verse, it was found that it is the responsibility of the Muslims to put their best efforts in reconciliation between the partners. They have put the reconciliation between the partners as collective duty of the people in community. It is also recommended that the religious and pious people should be appointed for the arbitration. However, it is the opinion of the majority of the Muslim jurist that judge is responsible for the appointment of the arbitrators.

Arbitration Council in Pakistan

The legislation of Family law in Pakistan has endorsed that if a person wants to divorce his wife, he would be bound to send a notice of

1 Mālik Ibn Anas, *al-Mudawwanah al-Kūbrā*, (Beirut: Dār Sādir, n. d), vol.2, p.367-71

2 Abū Bakr Muhammad Ibn 'Abdullah Ibn al-'Arabī, *Ahkām al-Qur'ān*, (Beirut: Dār al-Ma'rifah, 1972), vol.1, p. 423.

3 Ibid.

4 According to al-Tabarī the verse addressed to every Muslim and it is for everyone to appoint two arbitrators if they fear shiqāq between the married couple occurs and this command is not only for certain category of people. See al-Tabarī, *Jāmi' al-Bayān*, *op. cit.*, vol.8, p. 328-9.

5 Al-Rāzī, *al-Tafsīr al-Kabīr*, *op. cit.*, vol.10, p. 92.

talaq to the chairman of union council and he will appoint an arbitration council for arbitration.¹ According to the West Pakistan Court Act 1964 “At the pre-trial, the Court shall ascertain the points of issues between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible”² The court should make efforts to reconcile between the parties and should save the partners from a decision which could effects their future life.³ Although the law clearly states that the divorce cannot be possible without attempting the reconciliation process. But there are questions raised on the appointment of arbitrators and the practical procedure followed by the chairman. Law and Justice commission of Pakistan has also published unsatisfactory report regarding reconciliation process in family courts.⁴

Authority of chairman arbitration council is determined in case of *Sheema Farooq*⁵. The court determined the authority of Arbitration Council. It was stated by the court that Arbitration Council is constituted only for the purpose of bringing about reconciliation between the wedded couple. Similar view was given by the court in case of delegated right of divorce. The Court commented that if a person delegates the right of *talaq* and the case come to arbitration council. It is the duty of the council to make reconciliation and they have no right to talk about the legality of the *talaq*.⁶ On a question of legality of *nikahnama* which was raised before the Arbitration Council, the court stated that this kind of question should not be placed before the council.⁷

Another important matter came to the court that if the Arbitration is biased and issue certificate of *talaq* then what will be its legal capacity.

1 Muslim Family Law Ordinance 1961, sec 7 (4).

2 The West Pakistan Family Courts Act 1964, sec 10 (3).

3 Munir, M. A. (2006). Family Courts in Pakistan in Search of Better Remedies for Women and Children. *Lawasia J.*, 191.

4 Law and Justice Commission of Pakistan, *Amicable Settlement of Disputes, Report No 35* (2004) <http://www.asianlii.org/pk/other/PKLJC/reports/35.html> [last accessed on 18th November 2019]

5 *Mst Sheema Farooq v. Chairman, Union Committee, Ward No.4 Lahore Cantt* (1996 CLC. 673).

6 *Mehnaz Mehboob v. Ishtiaq Ur Rasheed* (2006 YLR 335).

7 *Alia Perveen v. Executive District Officer (Revenue) Sheikhpura* (2004 CLC. 652)

The court stipulates in the case¹ that if the arbitration council is not constituted and proper proceeding is not followed then the certificate of the talaq will be not be legally considered and the talaq will not take effect. The question of biasness of arbitration council has also raised question on the members of arbitration council and their social responsibility and status. The law is also silent about the consequences, if the council decides a case without following the proper proceedings. In addition, the court also stated that the family Court had exclusive jurisdiction to decide as to how and in what manner such proceeding should be conducted.²

Regarding the reconciliation process, it was held by the “Lahore High Court that the mere recording, in the presence of the parties’ council, of the fact that reconciliation was not possible is not a satisfactory compliance of the relevant provisions of the law”.³ For that reason, a survey is conducted from the female respondents, who were initiating their divorce in Pakistani Courts. The area selected for the survey is Islamabad and Peshawar. The researcher approached 100-woman respondents who initiated their divorce to know whether the arbitration council have played its role in conciliation process? The respondents were asked whether they are satisfied from the process of arbitration council. The following table shows the unsatisfactory level of women who initiated their divorce.

Unsatisfied women’s proportion in Pakistan

Opinion of respondents	Frequency	Percentage (%)
Strongly Agree	17	17.0
Agree	32	32.0
Neutral	4	4.0
Disagree	30	30.0
Strongly Disagree	16	16.0
No Response	1	1.0
Total	100	100.0

The survey discloses that less than one third (32%) of the respondents agreed, more than one fourth (30%) disagreed, less than one

1 (1995 MLD 110)

2 Muhammad Ali Haider v. Syed Nair Abbas Maqvi (2011 YLR 1240).

3 *Sadiq Ali v. Bashiran Bibi* (1979 CLC, 647, 649).

fifth (17%) strongly agreed, 16% strongly disagreed, 4% were neutral while the remaining 1% did not answer the question. The decisions made through arbitration in family courts are sometimes biased and the parties are not satisfied with the mediation process. It could be seen in the data obtained that less than half (49%) of them were not satisfied with the mediation process. Therefore, it can be stated that the arbitration method is not satisfactory for the women who initiate their divorce in Pakistan.

Conclusion

In view of the discussion, it is observed that arbitration process in family disputes is important. Islamic law encourages to conduct reconciliation process in family matters. Pakistani law also instructs the court to conduct arbitration between the spouses. For this process arbitration council is established which deals with the divorce cases. The law is silent regarding the appointment of the arbitrators and the compulsory procedure of reconciliation process in family matters. Even the chairman of the council is a political leader, who does not know the legal process for conducting arbitration. The arbitration process is envisaged in the hands of judges. Even in some cases the arbitration council merely mention their attempt for reconciliation but in practice they have not conducted. It is also observed that in some cases the chairman arbitration council is biased in his decision. From the data collected from the female respondents, it was revealed that majority of the female litigants are not satisfied with the arbitration process conducted by the family courts of Pakistan. It is recommended that for an effective arbitration process, a proper body should be established comprising of religious scholars, lawyers, and elders of the community.