

WORK OF WOMAN IN ARBITRATION IN LITIGATION OF DISPUTE AND CONFLICT: A LEGAL JURISPRUDENTIAL STUDY

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ABSTRACT

Justice is one of the holistic norms in Islamic law, and one of its great purposes; therefore, its provisions are harmonious to achieve this goal among human beings. There is no difference among them based on colour, gender, language, or money. All are equal in rights and duties.

When judiciary was the cornerstone of justice among adversaries, through the judicial judgment sentenced for proceedings before him, justice should have been done in certain actions supporting the judge's work, like arbitration in litigation of dispute and conflict without discrimination between man and woman.

So, this study was to point out the legality of woman's work in arbitration in litigation of dispute and conflict, through stating the jurisprudence views on the issue, and indicating its applicability in Jordanian Sharia courts in accordance with Jordanian Personal Status Law no. 15 of 2019 relating to this issue.

Keyword: Arbitration, Litigation, Conflict, Legislator.

INTRODUCTION

The Concept of Arbitration and its Nature

First: The concept of arbitration in language

Arbitration is the noun of arbitrate, it is said: arbitrate; to arbitrate arbitration, its infinitive form is to arbitrate is one infinitive, and it means prevention. The first arbitration is preventing injustice. Al-Jurjani identified arbitration as attribution of a matter to another positively or negatively, Arbitration is judgment, and the judge is the ruler, and he is executer of the judgment. To arbitrate a matter: to order to judge between them, or to legalize his judgment between them.

Second: The concept of arbitration terminologically

The definitions of “arbitration”, by old scholars, have multiplied as follows: Hanafi defined it as: “*Appointing a judge to rule between two opponents, its pillar is the expression it denotes, with the other part approval*”.

Maliki defined it as: “*Appointing a judge, they both agree, to rule between two opponents*”. Shafii mentioned a definition for arbitration and said: “*those two opponents assign a man from people to judge between them in their dispute*”.

According to Hanbali arbitration is “*Appointing a righteous judge, they both agree, to rule between two opponents*”.

Al-Zuhayli, from contemporary scholars, defined it and said: “*Those two opponents appoint another person to resolve the dispute between them guided by legitimate provision*”.

In law, Khaled Omar defined it as “*An agreement between two parties, before or after the dispute arises, to display the dispute to an arbitrator or arbitrators from others to adjudicate the dispute decisively as a substitute for the judiciary*”.

In view of previous definitions, we notice that they are very close in meaning, however, old scholars have limited their definitions to optional arbitration, while contemporaries have used some legal expressions, as the case may be, intending judicial arbitration in their definition.

I believe that Dr. Al-Zuhayli's definition has the elements of arbitration met in terms of its parties and its nature, but he spoke of optional rather than judicial arbitration, and therefore, I concluded that arbitration is:

That the judge elects two rulers to reconcile between spouses with specific conditions to ensure justice in judicial judgment depending on their reports (Al-Fairuzabadi & Taher, 2005).

The Nature of Arbitration

Scholars have disagreed on the nature of arbitration contract. Is the arbitration contract a power of attorney? Or assumption of governance?

Maliki and Hanafi, and in a narration by Imam Ahmad, said that arbitration is an assumption of governance, and so, the arbitrator is a ruler, and his opinion is spouses binding, and some of the most important evidence of this team is:

1. Allah said: “*If you fear a breach between them send for an arbiter from his people and an arbiter from her people. If both wish reconciliation, Allah will bring success between them.*” [Surah An-Nisa: 35], and the significance in the verse is that Almighty described the arbitrators as rulers, and did not address the spouses because they appointed others, but addressed others by sending rulers for them. So, if almighty wanted to address them, he was going to address by power of attorney.
2. Ali bin Abi Taleb, may God be pleased with him, told the arbitrators “*You should bring the spouses together if you see you should do so*”, and the significance is that Ali, may God be pleased with him, made the judgment between spouses absolute without restrictions
3. Whereas Sahfii and Hanbali believe that arbitration is a power of attorney by the spouses to the arbitrators, and so his judgment is not binding to them. The owner of “*The Persuasion*” said: “*They are attorneys of spouses in that issue, they don't send anything without their satisfaction and power of attorney, so they do not have the power to separate them without their approval, so the man allows his attorney with what he believes in whether it is divorce or reform, and the woman allows her attorney with what he believes whether it is khula (divorce) or reform, and their beliefs remain active*” (Al-Husayn, 1979).

In view of the texts of the Jordanian Personal Status Law, we don't have an explicit text of the Jordanian legislator, indicating what the arbitration is. Is arbitration a power of attorney of both spouses? Or, it is a judge's judgment based on arbitrators' decision? However, it is understood, from the paragraphs of article (126), of the Jordanian personal status law that the decision of the two arbitrators is binding for the judge, who act as rulers not attorneys. So, the arbitrators are the ones who decide the separation between spouses over appropriate compensation, which they decide if they cannot reform, then they submit their decision of what they found to the judge, and so the judge issues his judgment according to the arbitrators' report, which will be binding to the spouses (Mohammad, 1983).

Based on the foregoing, the researcher is likely to consider the views of the first team in that the arbitrators are rulers not attorneys in the litigation of dispute and conflict, as their work in these litigations is like the judge's work who issues judgment binding for both parties.

Study Problem

The study problem is in answering the following questions:

1. How legitimate is the woman's work in arbitration in litigation of dispute and conflict legitimately?
2. How legitimate is the woman's work in arbitration in litigation of dispute and conflict legally?
3. And if the answer is yes, how far can it be applicable in Jordanian Sharia courts?

Study Objectives

1. Stating the jurisprudence views on the issue of woman's work in arbitration.
2. Stating the position taken by Jordanian legislator in connection with the woman's work in arbitration in litigation of dispute and conflict.
3. Stating commitment of Jordanian Sharia courts to the legal text and implementing it on the ground.

Study Approach

This study is based on the inductive method by tracking the views of scholars and legal texts relating to woman's work in arbitration, and then analysing these views and texts by adopting the descriptive analytical approach to achieve the desired objective of this study.

Study Plan

The study plan was as follows:

1. A preface in stating study concepts.
2. The concept of arbitration and its nature.
3. The concept of dispute and conflict.
4. First Demand: The extent of woman's work legality in arbitration legitimately.
5. Second Demand: The extent of woman's work legality in arbitration legally.
6. The conclusion which includes:

The Concept of Dispute and Conflict

First: The concept of dispute and conflict in language

1. Dispute (v.) is the infinitive of dispute, and it is predominance of animosity and enmity. The enmity between two was called dispute because each party of the animosity meant a side which is different from the other's side.
2. Conflict in language: to conflict: to remove something from its place: gouge, and they say: a man in conflict: he is dying, and conflict with someone: argue and contend with him, and conflict is contest and argument, and conflict with someone in a conflict: if you argue with him in a conflict, and there is a conflict between them: means adversity in right.
3. And we notice that both terms dispute and conflict are close in meaning, since they both indicate adversity, animosity and enmity (Razzaq & Mosanaf, 1999).

Second: The concept of dispute and conflict terminologically by tracking the scholar's books, I didn't find a meaning for dispute terminologically, and their statements don't go out of the linguistic sense of dispute and conflict. Al-Imam Al-Qurtubi has quoted that Zaid bin Aslam said: *"Dispute is conflict"*. Also, scholars mention dispute as a reason to separate between spouses. Al-Imam Al-Razi says, in his interpretation of the word dispute (Sheqaq) contained in the Quran (the book of Allah): *"If you fear a breach between them"* [Surah An-Nisa: 35].

He says: *"Each of them does what is hard for the other, and the second is that each of them is in a side in their enmity and contrast"*.

Whereas the term *"conflict"* was disputed among specialists; each of them defined it according to the science he was talking about (Wahba, 2006).

In this study, there is no difference between dispute and conflict between spouses, neither in language or terminologically. They are often the cause of the dissolution of marital relationship between spouses.

However, in legal terms, the Jordanian Personal Status Law did not distinguish between dispute and conflict; the two terms were given as the reason for the separation claim. The Jordanian legislator, however, showed the cases that are considered to be dispute and that justify the request for separation through the article (126) of the Jordanian Personal Status Law no. (15) Of 2019; we can conclude that dispute and conflict are defined as: (A situation of deep and on-going enmity between spouses makes it impossible for married life to continue) (Zain & Abdullah, 1990).

The First Demand

The legality of woman's work in arbitration legitimately

Before starting to state the legality of woman's work in arbitration in litigation of dispute and conflict, it is a must to state that jurisprudential opinions in this issue are related to two issues:

1. The first issue: The Judgement of woman's taking up a justice position; so, who authorized her taking up a justice position, authorized her arbitration too, and who stated the prevention, did not authorize her to work in arbitration.
2. The second issue: The conditions of the two arbitrators legitimately.

The First Issue

Scholars were divided into two teams in this issue:

1. The First team: Did not authorize woman's work in arbitration at all, and this is according to Maliki, Shafii, Hanbali and a group of Hanafi schools.
2. The Second team: Authorized woman's work in arbitration and this is mentioned in Hanfi, Ibn Al-Qasem from Maliki, some Shafii, Ibn Hazm from Thaheri, and Imam Ibn Jareer Al-Tabari.

Evidence of First Team

Almighty said: *"Men are in charge of women by right of what Allah has given one over the other and what they spend [for maintenance] from their wealth"* [Surah An-Nisa: 34] and the significance in the holy verse is that the command here is general for the man in his house and family, and a fortiori in the presidency of the country. The reasoning was mentioned in the verses that Almighty preferred men than women with their mind and opinion, which are of the requirements of the presidency and ruling.

The reply for that evidence is that the topic of the holy verse is the family, so, we should not get off its topic which is the family curatorship, and the evidence is the reason of the verse's revelation. It was mentioned that its revelation was that the wife of Saa'd bin Al-Rabee' was recalcitrant so he slapped her, and she came to the prophet complaining him, so, the prophet wanted to avenge from him that he hit his wife, so the almighty saying was revealed.

Dr. Al-Mosawi mentioned a beautiful reply, in his article (The woman's right in occupying the position of judge, in the Islamic jurisprudence (Fiqh) and the statutory law), when he said: The mentioned verse is strange from the execution of judgment, and there is no evidence for it in what we are discussing because it was mentioned between a husband and a wife, that it confirms the husband's responsibility to administer the family because he is the one who should pay the expenditure legitimately, and so, the source of the verse is the family, and there is no connection to the social position. This is on the one hand, but in the other hand, it is unreasonable to confirm the wardship of each man over all community women, also, it is not intended that the position of judgment is to confirm wardship over others, to say that it is an evidence for the wardship of the woman over the man.

What was quoted from Abi Bakrah that he said During the battle of Al-Jamal, Allah benefited me with a word, when the prophet (may Allah's peace be upon him) heard the news that the people of the Persia had made the daughter of Khosrau their Queen (ruler), he said, *"Never will succeed such a nation as makes a woman their ruler"*, and the significance is as Al-Sana'ni mentioned:

"Binding of woman's curatorship over people with prosperity is a revilement for him, and the conjugation of revilement with the verb is prohibiting it, as we can say don't make a woman your ruler, or you shall never prosper".

However, the second team replied that the hadith came for a specific incident, namely that Khosrau's daughter assumed power after her father's death, so, it is not specific for us as Muslims, but the unprosperity is specific for them only and the text of the hadith is general and fit for all time

and all place, and that the term “*people*” came indefinite in the negative context, and the term implies generality, means “*any people*”, and it was also based on the fundamental norm “*The wording is based on the general meaning not on the specific reason*”.

Dr. Ali Al-Salabi replied on a question directed for him about the suspicions on this hadith and said: The hadith was mentioned in a historical occasion, in which the messenger (may Allah’s peace be upon him) told his companions that Persians were living in a state of political collapse, moral degradation ruled by autocratic monarchy. Then they assigned their command order to Khosrau’s daughter. So, the hadith was a description for the debilitating state of the Persians and a visionary reading in the ways of state foundation and dissolution, it is telling about a situation and not a legislation, which is indicated by hadith jurisprudence. The general text is not taken as an incontestable norm, because if it is taken as a whole, it will oppose the apparent meaning of Qur’an. The Qur’an told the story of a woman who led her people as best as leadership and ruled them the best as a ruler.

Consensus

Consensus of the nation’s scholars that the woman cannot be a judge, and of what Ibn Qudamah said is that “*The rightly-Caliphs, and came after them, appointed many men in judiciary and hadn’t appointed any woman*”.

And it was replied on this inference that consensus is not taken for granted. Where do we know that Ibn Jarir and Ibn Hazm were unprecedented of what they went to.

Evidence of the Second Team

1. They inferred that judgement is a matter of guardianship, it is like testimony, and woman is eligible for testimony in anything other than prescribed punishment (hadd) and retribution (qisas). And of what Ibn Hamman mentioned “*The masculinity is not a condition unless in judgment in prescribed punishment and bloods, so woman can judge in anything except in them*”.
2. Deductive analogy (Qiyas) to legal counsel (Fatwa); In Al-Moghni “*It was narrated by Ibn Jareer that masculinity is not a condition, because woman can be mufti, so she can be a judge*”.
3. Reasonableness: That the origin of anything is permission unless there is a evidence of prevention. So, who can separate adversities can be a judge, and woman is able to separate between litigants, understand pretexts and issue the judge, and so prevention is collapsed.

The Second Issue

Scholars (may Allah bless their soul) have agreed on a set of conditions that must be met by the two arbitrators when they are elected, which are:

1. Islam: scholars have agreed that arbitrators must be Muslims, so none of the arbitrators can be non-Muslim if the spouses are Muslims.
2. Conscious and adolescence: because their work needs opinion, reasoning, and vision.
3. They must be of the spouses’ relatives because Almighty said: “*send for an arbiter from his people and an arbiter from her people*” [Surah An-Nisa:35], because the probability of reforming by them is greater, because of their knowledge of the spouse’s conditions and insider’s knowledge, and their concern for the interests of the spouses, and the compassion towards them.
4. Justice: the scholar’s terms in identifying justice were varied, although all of them are in one sense. Hanafi

identified “unbiased” by saying: “*who avoided grievous sins, performed the obligatory practices, and his good deed predominated his evils, is unbiased*”. Maliki think that justice is doubt trait that prevents its prescribed person from heresy and what blemish him customarily, whereas Sahfii said: “*Justice is avoiding all grievous sins and avoiding insisting on pardonable sins*” Al-Hanabila said: “Justice is avoiding distrust, absence of accusation, doing what is desirable and leaving what is detestable”.

5. Freedom: means he must be a free person not slave, but we skip talking about it because of the absence of slavery currently.

Maliki, Shafii and Hanbali stood apart with stipulation of masculinity of arbitrators, whereas Maliki and Hanbali stood apart with stipulation that arbitrators must be scholars, expert in the provisions of Islamic law related to recalcitrance.

After displaying the views of both teams, on the two issues, it is clear to us that the disagreement of scholars in the issue refers to the following matters:

1. The disagreement in jurisprudence adaptation of arbitration, is it kind of a general guardianship or kind of delegation?
2. The disagreement in understanding the texts, as in the hadith “Never will succeed such a nation as makes a woman their ruler”, so, whoever conferred guardianship as califate has permitted woman’s judiciary and arbitration, and who understood that guardianship is general, has prevented woman’s judiciary and arbitration.
3. The disagreement of scholars in the conditions of arbitrators, so, whoever stood apart with stipulation of masculinity of arbitrators are the same who prevented woman’s work in arbitration, and who said that stipulation of masculinity is unnecessary are the ones who allowed woman’s work in arbitration.

Considering scholar’s views in the issue in all its aspects: the nature of arbitration contract, the litigation of woman’s assuming the position of judgment, and the conditions of arbitrators, the researcher is likely to be with the scholar’s view that allowed woman’s assuming the position of judgment. Since arbitration is a judicial act and is less in degree than the position of judgment, her work is allowed a fortiori. Also, the aim of achieving the purpose of arbitration is to reform between spouses, by the knowledge of arbitrators of the legal provisions related to marriage and divorce and owning a range of skills such as the ability skill to conduct the message to the addressee in a clear way, the skill of persuasion and influence on others, the skill of finding suitable solutions for the enmity between spouses to maintain the family entity. It is known that these skills are no longer exclusive to man than woman, so whenever the conditions and skills of arbitrators are available for this lofty work, justice had to be done between man and woman to carry out arbitration work between spouses and giving the woman her right to do this obvious task, and the absence of what prevents that legally according to the previous mentioned scholar’s evidence.

The Second Demand

The legality of woman’s work in arbitration legally

The tracker of the Jordanian Personal Status Law no. (15), of 2019 notices that the Jordanian legislator singled out a separate chapter for the dispute and conflict proceeding including range of paragraphs for the article (126), which included range of subjects related to dispute and conflict proceedings starting with prosecuting the proceeding and ending with the arbitrators’ decision.

Also, we notice that the Jordanian legislator has differentiated, in procedures, whether prosecuting the proceeding was brought by the husband or the wife through paragraph (A) and (B) of the same article (126).

Also, the previous two paragraphs provided, in the end, that it is a must that the judge refers the orders to two arbitrators in case the court didn't succeed in reforming between spouses, and we notice that the Jordanian legislator gave the judge discretionary power to elect the arbitrators, controlled by their conditions mentioned in the paragraph (C) of the same article, which states that: *"The arbitrators should be unbiased able to reform, one of them from wife's relatives and the other from the husband's relatives, if possible, but if not, the judge assigns two arbitrators who are experienced, unbiased, and able to reform"*. In view of the previous legal text, we note that the Jordanian legislator skipped the stipulation of masculinity in paragraph (c) of article (126), and is not provided in it at all, informed that article no. (132) of the Personal Status Law no. (61) of 1976 provided the stipulation of masculinity in article no. (132) as the view of the first scholar team who did not allow woman's work as an arbitrator; where it dictated the following: *"It is stipulated that the two arbitrators must be two unbiased men able to reform"*, accordingly, paragraph (c) of article (126) is amended for article (132) of the Personal Status Law no. (61) of 1976. So, Turning aside from the word (two men) indicates that Jordanian legislator turned aside from prevention to the second team view allowing woman's work as an arbitrator; otherwise, the annulment was not useful. The legal annulment indicates clearly that woman can be an arbitrator in dispute and conflict litigations.

In view of the reality of the Jordanian Sharia Courts to find out the extent of activation of woman's work in arbitration, we note that the judge, in dispute and conflict litigation, does not ever elect a woman to do this work that does not infringe a legal provision as we pointed out in the previous demand, and the absence of a text in the law that prevents the woman from practicing this possible task according to her mental and physical potential. So, the man according to this task does not excel the woman in anything, since arbitration requires opinion, vision and hearing an evidence, which can be done by both, even the arbitration between spouses might need a woman since one of the parties of enmity is a woman, and the wife may need a woman's arbitration to reveal some privacy related to the litigation subject.

The question remains before the supreme judge, and according to the reality of the Jordanian Sharia Courts, as why are cases of arbitration in dispute and conflict litigations not referred to woman if they are subject to the conditions of arbitrators laid down by the Jordanian legislator?

Between considering the legal text that does not prevent woman from taking up arbitration in dispute and conflict litigation, and the reality of Sharia courts that woman was not elected the woman to arbitrate in dispute and conflict litigation, the problem lies in the application of legal text and the disablement of woman's right legally and legitimately.

The researcher believes that this right should be granted to woman for the following reasons:

1. There is nothing legally and legitimately that prevents woman from engaging in arbitration in dispute and conflict litigations.
2. Follow up on granting the woman this right like the one applied in the statutory judgment according to the Jordanian arbitration law no. (31) of 2001, in letter and application.
3. In consistent with article no. (6) of the Jordanian constitution (The constitution of Jordan 1952 and its amendments that state that: *"All Jordanians are equal before the law and must not be subjected to any form of*

- discrimination in respect of their rights and duties, whatever their ethnic origin, language or religion”.*
4. The function of arbitration as established in the Jordanian Sharia courts, with its content and form, is a purely administrative function, in which the qualified woman with her abilities can scrutinize and activate her experience to accomplish the task that is legally entrusted with.
 5. The privacy of certain cases of dispute and conflict which often require a female component of legal legitimate arbitration, to ensure the fairness of the report issued by the two arbitrators when examining the causes of the conflict between spouses.
 6. Banning of woman's access to judicial position, by some old scholars, was in view of the judge's work at that time, when he was assiduous and deductive for provisions individually, unlike his current work which is limited to the application and implementation of the provisions of the law which have been codified by judicial bodies, which woman can also do. So, a fortiori she can act as an arbitrator in dispute and conflict litigation, which is a functional act of the judiciary.

CONCLUSION

After this Theoretical Tour of this Study, I came up with Number of Results

1. There is nothing legitimately that prevents woman from engaging in arbitration in dispute and conflict litigations.
2. There is nothing legally that prevents woman from engaging in arbitration in dispute and conflict litigations.
3. There is no election of woman for arbitration in dispute and conflict litigations in the Jordanian Sharia courts.

RECOMMENDATIONS

Based on previous results, the researcher recommends the following:

1. Promoting the role of woman in the field of legitimate arbitration, by bringing up and discussing the matter with the deciders of distinguished judges in Supreme judge department.
2. The Jordanian legislator must explicitly provide a text, in the conditions of the two arbitrators, of undistinguishing between man and woman when electing the two arbitrators.
3. The Sharia judge in the Jordanian Sharia courts must elect the woman for arbitration in the dispute and conflict litigation and not exclude her from this right.

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