

The Commands, Benefits, And Impacts Of Arbitration In Human Settlements: A Review In The Light Of Islamic Shariah

Muhammad Arif¹, Dr.Muhammad Ibrahim², Muhammad Saeed Awan³, Muhammad Faisal⁴, Muhammad Sabir⁵, Bibi Hanifa⁶

Abstract

This review explores the commands, benefits, and impacts of arbitration in human settlements within the framework of Islamic Shariah. It analyzes the linguistic and terminological meanings of "حکم" (arbitration) and compares arbitration (Tahkim) with judgment (Qada) and reconciliation in Islamic law. The study highlights the rulings of arbitration, emphasizing that the decisions made by arbitrators hold the same authority as those made by judges. It also outlines the benefits of arbitration, such as its cost-effectiveness, speed, ease of access, and adherence to Shariah principles. Additionally, the article discusses how arbitration helps avoid prolonged judicial processes and provides confidentiality in family matters. The findings reinforce the significance of mutual consent in appointing arbitrators, showcasing arbitration as a more accessible and flexible alternative to traditional judicial methods in resolving disputes.

Keywords: Arbitration, Tahkim, Qada, Islamic Shariah, dispute resolution, judicial process, mutual consent, reconciliation, cost-effectiveness, confidentiality.

Introduction:

The Need for and Importance of Commands Related to Arbitration in Human Settlements:

Islam is a religion of nature. It has always guided its followers towards a code of life that is easy and practical to implement. This is why whenever the Prophet Muhammad (ﷺ) was given a choice between two matters, he would choose the easier one for action .

Humans cannot fulfill their basic needs without communal and social life. In the pursuit of interests within community and social life, conflicts with one another have been a part of human existence since the first generation. These conflicts led to disputes in settled life, and the need to resolve them gave humans the awareness of arbitration. From here, the process of arbitration in communal life began, and people became familiar with it. When disputes in settlements began to be resolved without bloodshed, people started to feel secure regarding their lives and wealth.

¹ Ph.D Scholar, Department of Islamic and Religious Studies, Hazara University, Mansehra, KPK, Pakistan, email: arif.hu1981@yahoo.com

² Assistant Professor, Department of Islamic and Religious Studies, Hazara University, Mansehra, KPK, Pakistan, email: ibrahim.pak@hu.edu.pk (Corresponding Author)

³ Ph.D Scholar, Department of Islamic and Religious Studies, Hazara University, Mansehra, KPK, Pakistan, Email: saeedmalik313@gmail.com

⁴ Ph.D Scholar, Department of Islamic and Religious Studies, Hazara University, Mansehra / Assistant Professor Govt. College Balakot, KPK, Pakistan, Email: mmfaisal1978@gmail.com

⁵ Ph.D Scholar, Department of Islamic and Religious Studies, Hazara University, Mansehra, KPK, Pakistan, Email: msabir@hu.edu.pk

⁶ Assistant Professor Islamic Studies GGDC Qalandarabad, Mansehra, KPK, Pakistan, Email: bibihaneefa@gmail.com

Allama Masudi, while discussing the importance of arbitration, writes:

In ancient times, people believed that their welfare and interests lay in power, but this did not last long. The force was eventually replaced by reconciliation and arbitration when tribal leaders and wise individuals realized that their well-being was not in the acquisition and use of power. The pursuit of power led to wars and calamities. Particularly, since the option of arbitration existed for the resolution of disputes, it allowed people to preserve their blood and safeguard their wealth. Additionally, this option helped in establishing better relationships with others.¹

Then, when people saw that in settled life, arbitration was the easiest way to resolve conflicts, they realized that by appointing a mediator, a disputed matter could be resolved in a short time, not through force but through mutual consent and reconciliation. The demands of justice were also fulfilled, and there were no extraordinary costs or expenses involved. They viewed this process with appreciation, and until the establishment of judicial systems along with organized governments, arbitration remained the only means for achieving justice².

In the post-historical periods, the Greek society was the first to benefit from arbitration which initiated the resolution of population-based, personal, and group conflicts in their lives. Through arbitration, they found ways to address religious, demographic, economic, and social issues. Over time, the form and nature of arbitration evolved across different periods. Initially, both the plaintiff and the defendant were subjected to various harsh trials. For example, they would be required to put their hand in boiling water, hold or walk on burning coals, and so on. Sometimes, the parties were made to fight, and the decision was given in favor of the one who prevailed.³

Among the Arabs, there was no organized personal or public government before Islam to strengthen settled life and prevent social crimes with force. Each tribe had a leader who would resolve the tribe's internal and external matters according to the customary practices. Since the leader was considered insightful and wise for his time, people had no choice but to accept his decision. Occasionally, a dispute would arise between two tribes, and a leader from a third tribe would be appointed as an arbitrator to settle the matter. Sometimes, a dispute arose between two individuals within the same tribe over leadership, which was resolved by appointing a leader from a third tribe as arbitration. At times, priests were also consulted to help resolve disputes. Historians have mentioned several prominent individuals in the line of well-known judges, including Hajib bin Zurara, Aqra bin Habis, Qis bin Sa'ida, Aktham Sufay, and Abdul Muttalib bin Hashim.

Dr. Shehnaz writes:

Before Islam, during the era of ignorance, it was a common practice in human settlements that to resolve disputes, the parties would appoint someone as arbitrator and wait for their decision. If the arbitration's decision was unacceptable to one of the parties, they would appoint arbitration. If this decision was also not accepted, they would choose a third-person arbitration, and this process would continue until they found an arbitration whose decision was acceptable to both parties. This method persisted until the time of the prophethood.⁴

Al-Ajlani says:⁵

In the beginning, people used to resolve their disputes through the method of arbitration, which they had learned during the pre-Islamic period. They were free to either accept or reject the decision of the arbitration. There was even an instance when one of them presented their case before the Prophet Muhammad ﷺ but was not pleased with His decision. As a result, the following verse was revealed:

"فلا وربك لا يؤمنون حتى يحكموك فيما شجر بينهم"⁶

By your Lord, they will not be true believers until they accept your decision in the matters in which they dispute.

With the Prophet ﷺ assuming the role of judge and the support of divine guidance, the pre-Islamic practice ended. In that system, if one did not accept the decision of a judge or arbitration, they would go to another and then a third until a favorable ruling was found. With the establishment of the Islamic state, it became mandatory for the people to have

their disputes resolved through the Prophet ﷺ, and they were required to submit to whatever decision was issued by this supreme court.

When we examine arbitration closely, it offers two forms of benefit:

1. The disputed matter is resolved.
2. Unlike in the judge's court, the matter is settled through reconciliation, which helps remove enmity and resentment from hearts.

Moreover, arbitration simplifies the resolution process, which aligns with the ease that Islam promotes. Allah Almighty has said:

"يريد الله بكم اليسر ولا يريد بكم العسر"⁷

Allah desires ease for you, not hardship.

It is evident that ease lies in arbitration, for both parties, wherever they may be, can appoint an arbitrator for a minimal fee to resolve their dispute. This convenience is not available in the formal judicial system.

In a formal court system, a judge sets a specific date for the hearing. The court has an office where one must wait for their turn. This involves struggle, inconvenience, and a waste of time and money.

Linguistic Analysis of the Word "حکم" (Arbitration):

The word "حکم" is derived from "تحكيم," which is a verbal noun from the verb form *باب تفعيل*. For example, "حکم يحكم تحكيماً," which means to appoint someone as a *حكم* arbitrator, that is, to ask them to decide between two disputing parties. It also carries the meaning of "examining or testing." The Prophet Muhammad ﷺ said:

"حکم اليتيم كما تحکم ولدك"⁸

Test an orphan just as you test your own child—i.e., before giving the orphan their wealth, ensure they can manage it and will not squander it.

Additionally, the word "حکم" can also mean "to prevent." A judge is called a "حکم" because they prevent the oppressor from committing injustice. In Arabic, a mediator is referred to as "حکم" or "محکم," while the disputing parties who appoint the mediator are called "محکم" or "حکم."⁹

The explanation in *Qamoos al-Muheet* states:

The word "حکم" (with a damma on the first letter) means judgment, and its plural is "أحكام." The source of the word *حكم* is both "حکم" and "حكومة." The term "حاكم" refers to the one who enforces the *حكم*. For instance, when it is said, "حاكمه الى الحاكم," it means taking a matter to a judge for resolution. "حكمه في الأمر تحكيماً" means he appointed someone to judge the matter. When the word comes from *باب افتعال* and *تفعل*, it indicates that the matter was judged or decided upon. The word "احكمة" and "حكومة" are also derived from this root.¹⁰

Another linguistic analysis of "حکم" includes related terms like "حَاكِمٌ", "حَكِيمٌ", "حُكْمٌ", and "حَكْمٌ", all of which are derived from the same root and are central to this discussion. The last term, "حكم," is the focal point of this discussion. The word "حکم" is frequently used, and its widespread usage has given it many connotations and interpretations. For example, among scholars of *أصول الفقه* (principles of jurisprudence), the word carries one meaning, while for jurists, it carries another. Zaidan writes:

Among the scholars of *أصول الفقه*, *حكم* refers to the communication of Allah related to the actions of those accountable (*مكلفين*), whether it entails obligation, choice, or a description of cause, condition, or prevention.¹¹

Later, Zaidan explains:

For scholars of *أصول الفقه*, *حكم* refers to the direct communication from Allah, i.e., the divine texts themselves. For jurists, *حكم* refers to the outcome or effect of that communication. For instance, the verse "لا تقربوا الزنى" (Do not go near adultery) is the *حكم* for the scholars of *أصول الفقه*, while for jurists, *حكم* refers to the effect or outcome of this divine communication, which is the prohibition of adultery (*حرمة الزنى*).¹²

In the Islamic era, the term "حکم" became a technical term used to clarify a specific meaning. Scholars from various fields used this word with multiple connotations to explain their

respective sciences. In this discussion, our primary goal is to understand the meaning of this term during the pre-Islamic era, as Allah Almighty says:

" أفحكم الجاهلية يبغون - ومن احسن من الله حكما لقوم يوقنون¹³ "

Do they seek the judgment of the pre-Islamic period (جاهلية)? But who is better in judgment than Allah for a people who have certainty?

Alama Zamakhshari writes:

The type of حكم (judge or arbitrator) they desired was akin to the decisions made by Af'a Najran or similar judges from the era of ignorance (جاهلية). In their foolishness, they wanted Muhammad ﷺ, the Seal of the Prophets, to act as one of those judges from the era of ignorance.¹⁴

The Qur'an, in its phrase "أفحكم الجاهلية يبغون" (Are they seeking the judgment of the pre-Islamic period?), emphasizes the rejection of the حكم (judge) from the period of ignorance, teaching us to avoid and abstain from such judgments. Therefore, it is crucial to first understand the nature of حكم during the era of ignorance, from which the Qur'an instructs us to steer away.

The author of Qamoos al-Muheet explains the term حكم in the following words:

حُكْم, with a damma on the first letter, means "judgment," and its plural is أَحْكَام. It is used in phrases like "حكم عليه" and "حكم بينهم." The word حاكم refers to the one who enforces the حكم, while the plural is حُكَّاء. When it is said, "حكمه الى الحاكم," it means to take a dispute to a judge for resolution. The term "حكمه في الامر تحكيما" implies appointing someone as a judge. This term, when used in the forms of افتعال or تفعل, signifies that the matter has been judged according to the appointed حكم.¹⁵

There is a vacuum in the understanding of the meaning of حكم that somehow does not go away. To alleviate this thirst, sides are changed, but such changes cannot walk two steps. What greater proof of this matter could there be than that the word حكم, upon hearing or reading it, does not naturally lead anyone's mind towards stopping and prohibiting?"

The Terminological Meanings of حكم Arbitration:

The scholars of Islamic jurisprudence have defined حكم in various phrases. مجلة الأحكام العدليه has defined حكم as follows:

It is called تحكيم when two parties to a dispute mutually agree to appoint someone as a mediator to resolve their conflict and claims.¹⁶

Allama Al-Bar Qaani has explained its meaning as follows:

Translation: When the disputing parties appoint someone to resolve their conflict, that mediator assumes a position like a judge regarding the rights of the parties involved, while for others, the role of the mediator is akin to that of a reconciliatory.¹⁷

The explanation of the above phrase is as follows:

The essence of تحكيم is that the parties voluntarily choose a third person as a judge to decide their claims instead of going to a judge.¹⁸

The Rulings of the Arbitration: In the Light of Islamic Shari'ah:

To understand the Shari'ah rulings of the arbitration in human demographics, it is essential to clarify the difference between the rulings of the arbitrator and the judge so that readers can easily comprehend the Shari'ah rulings of the arbitration. Below, the Shari'ah rulings of both are presented to elucidate the Shari'ah rulings of the arbitration.

The Difference between Qada (Judgment) and Tahkim (Arbitration) and the Rulings of the Arbitration:

Scholars have delineated the differences between Qada (Judgment) and Tahkim (Arbitration) in various aspects. Two important aspects are as follows:

The Source of Authority for Both the Judge and the Arbitrator: The judge is appointed by the Imam or his deputy under delegation, while the arbitrator is appointed by the disputing parties who have referred to him.

With Respect to Jurisdiction: The judge is a deputy of the governor or the Imam, thus having a general jurisdiction that is broader than that of arbitration.¹⁹

The Difference between Judge and Arbitrator According to Islamic Shari'ah and the Rulings of the Arbitrator:

The difference between the arbitrator and the judge can be clarified through the following points.

- 1) In human demographics, the authority of the judge applies to all people who fall within the boundaries of his office, while the powers of the arbitrator (حکم) are limited only to the parties involved because they have delegated him the authority to make decisions. If the parties did not grant him this authority, he would not be entitled to make any decisions.
- 2) In human demographics, the consent of the parties is necessary for the appointment of the arbitrator, whereas there is no need for anyone's consent in the appointment of the judge, as the appointment of the judge is in the hands of the ruling authority. Whether someone is happy or not, the judge remains a judge. In contrast, the arbitrator only has authority when both parties are willing to accept his status.
- 3) In the case of the judge's decision, its effects extend to other people beyond the parties involved in human demographics. For example, if it is a case of murder and the judge orders the payment of blood money, this burden falls on the 'Aqilah (the extended family) according to Shari'ah. This is not the case in arbitration, as its essence resembles a settlement, and in the case of a settlement, the burden of paying blood money does not fall on the 'Aqilah.
- 4) In arbitration, two arbitrators can serve simultaneously. If a disagreement arises between them while deciding, it cannot be decided based solely on one's opinion. It is necessary for both arbitrators to agree on a ruling. In the case of a judge, it is not permissible for two people to act as judges on the same issue because the judge has general authority, just as there is only one ruler in a state or one imam in congregational prayer. Just as there cannot be two imams in prayer and two rulers in a state, similarly, two judges cannot be appointed to settle one decision.
- 5) When dealing with matters of arbitration, the ability to act as an arbitrator is essential, while the judge's rulings are not conditional on such a requirement. For example, if the arbitrator were to apostatize and then revert to Islam, his previous decision would become void, necessitating a new arbitration. The judge's rulings are not conditional on such criteria.
- 6) Before delivering his decision, any party can dismiss the arbitrator, whereas no party can dismiss the judge or invalidate his decision.
- 7) The arbitrator's authority is not limited to his city or region; with the mutual consent of the parties, he can arbitrate anywhere. In contrast, the judge's authority is limited to the areas under his jurisdiction.
- 8) If the arbitrator dismisses a witness's testimony due to suspicion, a second arbitrator or judge can accept that testimony. However, if the judge rejects someone's testimony, no one can accept it because the judge's ruling on the rejection of testimony is binding on all people.
- 9) The arbitrator cannot refer his case to another arbitrator unless permitted by the parties. The judge can refer a case to his deputy.
- 10) The arbitrator will inform the parties of his decision before the conclusion of the arbitration session because a decision becomes unacceptable after the session concludes, while the judge is not bound to deliver his decision within the session.²⁰

The Difference between Reconciliation and Arbitration and the Rulings of the Arbitrator:

- 1) Reconciliation is a contract that is only completed by the parties in dispute. Generally, since both are claimants, they agree that each will completely or partially relinquish their rights. Thus, their disagreement comes to an end without the need for a third party. In contrast, arbitration is conducted with the involvement of a third party who has

specific conditions to resolve the dispute. This person acts as a judge and resolves the disagreement and conflict between them.²¹

- 2) In human demographics, reconciliation is completed with the consent of the parties or their representatives, while in arbitration, the arbitrator issues a decision like a judge, regardless of whether the opposing party agrees or not.
- 3) Once the reconciliation contract is executed, no party can challenge or object to it because it was established with the consent of both parties. In contrast, a challenge to the decision of the arbitrator in arbitration can be made according to established rules if one party is dissatisfied with the decision.
- 4) In arbitration, there is no inherent binding nature; therefore, until the arbitrator decides, each party has the right to withdraw. However, once reconciliation is established, it becomes binding, and no party has the right to withdraw unless both parties agree together.²²

Effects and Benefits of Arbitration: An Overview considering Islamic Shari'ah:

In the Islamic code of life, there is always a positive motivator behind any fundamental principle to prevent a void in society that could cause individuals, groups, and governments to face difficulties in fulfilling their rights and duties. Sometimes, the interest of one in society can turn out to be detrimental to another, leading to tensions in relationships. The primary objective of Islamic Shari'ah is to ensure that the rightful owner receives their rights and does not suffer from a sense of deprivation. It is evident that Islam prioritizes ease for its followers at every opportunity, so that people do not encounter difficulties in implementing Islamic teachings. If the court of a judge were the only institution for resolving disputes, people would face challenges. Allah Almighty says:

”يريد الله بكم اليسر ولا يريد بكم العسر“²³

Allah Almighty desires ease for you in the implementation of religion and does not want difficulty.

This is why Islam places special importance on arbitration to resolve the difficulties that arise in marital life, as such issues often occur. If individuals must go through the court of a judge and do not have timely resolutions, instead of resolving issues, they may risk exacerbating them. This clarifies that the significant philosophy behind the legitimacy of arbitration for solving the economic and social issues of the Muslim community is to facilitate public access to justice. However, this can sometimes affect governmental authority, as public matters may be resolved outside the official court, leading to potential bitterness between the parties due to the lack of governmental oversight.

A major wisdom behind the legitimacy of arbitration is that it aims not just to resolve an issue but to resolve it through reconciliation. When an issue is settled with reconciliation, the rightful party receives their due, and the atmosphere of brotherhood between the parties is not compromised. In contrast, a judge issues a decision without considering whether anyone is satisfied or dissatisfied, and no one has the opportunity for reconciliation because there is always an authoritative force behind the judge's decision. Thus, even if a decision is made, feelings of resentment may persist.

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anyone is satisfied or dissatisfied, and no one has the opportunity for reconciliation because there is always an authoritative force behind the judge's decision. Thus, even if a decision is made, feelings of resentment may persist.

Below are briefly outlined the benefits and effects of resolving issues through arbitration instead of the judicial system established by the state.

1) Escape from Lengthy Judicial Systems:

Due to the length and legal complexities of the current national judicial system, it takes a considerable amount of time for any case to be decided. In contrast, significant issues are resolved in a short period through arbitration, which is why people prefer resolving issues via arbitration.

The issues resolved through arbitration are generally settled in a conciliatory manner, after which the parties do not challenge each other's decisions. In contrast, in the case of judicial decisions, the opposing party often appeals the decision to a higher court. This can result in prolonged cases, leading to a waste of time and resources for both parties.

2) Financial Savings:

While pursuing a case through the judicial system requires a significant amount of time, it also incurs financial costs. Paying heavy attorney fees, ensuring attendance at every hearing, and hosting relatives who come for the case are burdensome, especially for the poor.

If a person who has been wrongfully killed leaves some inheritance for their orphaned children, that inheritance often goes to waste in legal battles. Consequently, these orphaned children neither bring their father's killer to justice nor manage to retain their inheritance. In contrast, the costs associated with arbitration are significantly lower and more manageable for the parties involved.

3) Ending Hostilities:

When a decision is made through the judicial system, the opposing party is often unwilling to accept the ruling, which can exacerbate hostilities instead of finishing them. In a fit of revenge, legal and moral boundaries may sometimes be crossed. However, arbitration decisions are based on reconciliation and compromise, allowing both parties to forgive each other and maintain amicable relations.

As Mufti Muhammad Shafi writes:

"The suggestion to send two arbitrators for mutual reconciliation is not limited to disputes between spouses but can and should be applied to other disputes, especially when the disputants are relatives. This is because while judicial decisions may temporarily resolve a dispute, they often leave behind bitterness and animosity in the hearts of the parties, which later manifests in very unpleasant ways."²⁴

4) Ease of Access to Arbitrators:

In arbitration, the parties can openly present their positions and issues before the arbitrators, while in the judicial system, parties must arrange for their lawyers. If one party's lawyer is more persuasive and deceitful, they may deceive the judge with false arguments, leading to an unfavorable decision against the affected party. In contrast, arbitrators usually have prior knowledge of the causes of the dispute because they are residents of the area and understand specific local traditions, customs, and public sentiments. They also consider the actions and cunning of the parties involved, making it more likely that justice will be achieved.

5) Adherence to Shari'ah:

Some issues arise that people wish to resolve according to Islamic Shari'ah. In such cases, the parties appoint a religious scholar as an arbitrator, granting them the authority to make decisions based on Shari'ah. The scholar then finds a solution to the issue according to Islamic principles, which is acceptable and satisfying to both parties.

6) Concealment of family issues:

Some family issues are such that people do not want to make them public and wish to resolve them discreetly. Generally, people feel embarrassed about such matters becoming known to others. If the path of the court is taken for such issues, it is evident that the matter cannot remain confidential. In contrast, if arbitration is chosen instead of the judicial system, and issues are resolved through it, appointing specific individuals as arbitrators, the dignity of those individuals and their families can be largely preserved. If the issue cannot be resolved within the home, it can at least be settled within the family .

Shari'ah has mandated that in the case of disputes between spouses, their family members should sit together to resolve the matter. As Allah Almighty has stated :

"و ان خفتم شقاق بينما فابعثوا حكما من ابله وحكما من ابلها أن يريدوا اصلاحاً يوفق الله بينما أن الله كان عليماً خبيراً"²⁵

"If you fear that they will separate, send an arbitrator from his family and an arbitrator from her family. If they both desire reconciliation, Allah will cause it to be reconciled. Indeed, Allah is Knowing and Acquainted ".

In the interpretation of this verse, Mufti Muhammad Shafi writes :

Sometimes, disputes may prolong either because of the woman's stern nature or due to the man's faults and unwarranted harshness. In any case, it is essential for household matters to come out, but traditionally, the supporters of both parties speak ill of each other and make accusations, leading to resentment and escalating into a family feud. This blessed verse provides a pure method to close the door to this great corruption by addressing the authorities, the relatives of both parties, and the community of Muslims. It proposes that the authorities appoint two arbitrators to facilitate reconciliation—one from the man's family and one from the woman's family—thereby resolving the parties' grievances and closing avenues for accusations while paving the way for reconciliation²⁶.

7) Difference between local and non-local

Issues are resolved at the local level through arbitration in such a way that the elders and prominent individuals of the area come together to address the problem. In contrast, the judicial system requires people to travel to cities, as courts are generally located there. As a result, the parties involved perceive the court as non-local and arbitration as a local platform for resolving disputes. This is why parties feel a sense of belonging when solving their issues through arbitration and can easily express their innermost thoughts, whereas this convenience is lacking in the judicial system.

Conclusion

- 1) In Islamic law, there are legal rulings for both the judge (قاضى) and the arbitrator (حكّم).
- 2) The decisions made by the arbitrator hold the same status and effectiveness as those made by the judge in Islamic law .
- 3) The appointment of an arbitrator must be made with the mutual consent of both parties; it cannot be done if one party opposes .
- 4) Compared to judges, obtaining justice through arbitration is cheaper, easier, and quicker .
- 5) One can present their position confidently and according to their wishes through arbitration, whereas other methods may involve facing difficulties.

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