

CONDITIONS AND QUALIFICATIONS OF A MEDIATOR-ARBITRATOR IN THE RESOLUTION OF FAMILY DISPUTES

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Abstract : The Islamic law of *tahkim* (med-arb) has stipulated certain qualities which must be observed to qualify as a mediator- arbitrator. However, having understood that mediation is actually a method developed under the framework of *tahkim* and the person who conducts it is by right an arbitrator, it poses the question of whether a mediator-arbitrator is required to possess qualifications similar to those of arbitrator. This paper seeks to examine and analyse the conditions and qualifications of a mediator and an arbitrator from the Islamic law perspective. The study adopts content analysis approach. It is therefore conducted based on and with reference to the Islamic law method of med-arb (*tahkim*) as discussed by Muslim jurists in classical texts. The findings show that in Islamic law of *tahkim*, a mediator and an arbitrator share almost similar roles in resolving marital disputes. A mediator and an arbitrator supposedly reflect each other in character and qualifications in many ways if not all.

Keywords: Islamic Law, Arbitrator, Disputees, Mediator

Introduction

In deciding the qualification of the mediators-mediators and whether they should have the same qualification(s) of an arbitrator, account must be taken of two facts. First, mediation in Islamic law is part of the one process called *tahkim*. Second, the

person who conducts mediation during the first

stage of *tabkim* by right is the one who conducts arbitration in the second stage of *tabkim* if mediation fails to bring about reconciliation. This, as it may seem, is the most logical argument to suggest that mediators- mediators qualify as arbitrators. Those are not the only rationales in considering the shared qualifications. Taking into account the conceptual framework of *tabkim*, it is probably more appropriate to pay regard to the higher position of an arbitrator, as it will directly cover the lower one, ie a mediator.

Bearing this in mind, the qualifications of an arbitrator as discussed among jurists of the four schools of law are similar to that of a *qadi*. Notwithstanding that, the question is whether an arbitrator has to obtain full qualifications or absolute authority/absolute legal capacity (*al-abliyah al-mutlaqah*) of a *qadi*.¹ This means that even though the four Sunni Schools of Law unanimously agree that a *hakam* must be qualified as a *qadi* they differed in defining specifications, limitations and the extent to which the qualifications or the characters of a *qadi*-competent must be met.²

The Shafi'i School suggests that the conditions may not be followed in the absence of a competent person or if the condition is unable to be fulfilled.³ The Hanbalis meanwhile is of the view that a *hakam* is not required to possess all the qualifications of a

¹ *Al-Mawsu'ah al-Fiqhiyyah* (n 64) 237

² Al-Zuhayli (n 67) 481; *al-Mawsu'ah al-Fiqhiyyah* (n 64) 237

³ Al-Ramli (n 63) 392; see also *al-Mawsu'ah al-Fiqhiyyah* (n 64) 237.

qadi.⁴ The Hanafī School in the beginning stipulated a relatively general entry to the qualifications by allowing a testimony-competent (*al-abliyah al-syahadah*) person to act as an arbitrator.⁵ Later, the conditions were refined to have full legal competence, be a devout Muslim and be free from physical defects. The Malikis unanimously agreed that a person who is legally qualified as a *qadi* is also qualified as an arbitrator.⁶ However, if an arbitrator is not required to possess the qualifications of a *qadi*, then a mediator can possess an even lower qualification. A departure from the mostly agreed qualifications is apparent in the Hanbali School's view.⁷ The School considers that a *hakam* is not required to possess all the qualifications of a *qadi*,⁸ 'as they consider *tahkim* to be similar to *wakalah* (agency) ie to be based on representation and not on legal competence.'⁹ The next important question is what are the qualifications of a *qadi* in Islamic Shari'ah?

In general, there is agreement among the jurists that mediators-arbitrators must have qualities such as justice/impartiality (*'adalah*) and be knowledgeable on the law and the principle of disobedience (*nushuz*). However, they are in

⁴ *Al-Mawsu'ah Al-Fiqhiyyah* (n 64) 237.

⁵ See Al-Tarabli (n 86) 25; Ibn Nujaym (n 65) 24; al-Sarkhasi (n 82) vol 16, 111; al-Hummam Mawlana al-Syaykh Nizam, *al-Fatava al-Hindiyyah* (Dar al-Kutub al-'Ilmiyyah 2000) vol 3, 373.

⁶ Burhanuddin Abi Al-Wafa' Ibn Farhun, *Tabsirah al-Hukkam fi Usul al-Aqdiyyah wa Manahij al-Abkam* (Dar 'Alam al-Kutub 2003) vol 1, 50.

⁷ Bahuti, *Kashshaf al-Qina'* (n 80) 309; *al-Mawsu'ah al-Fiqhiyyah* (n 64) 237.

⁸ *Al-Mawsu'ah Al-Fiqhiyyah* (n 64) 237.

⁹ Bahuti (n 80) 309; *al-Mawsu'ah al-Fiqhiyyah* (n 64) 237; Zahraa and Hak (n 21) 14.

disagreement on conditions such as being male and free.¹⁰

The qualifications or conditions of a mediator-arbitrator as laid down in Islamic law are as follows: the arbitrator-mediator must be a Muslim; have attained the age of majority and be of sound mind; be of just character; be of male gender; be a *mujtabid* (a learned scholar); and be free from physical defects.¹¹

These qualifications will be discussed in the light of the role and duties of mediators-arbitrators in family disputes. Besides paying attention to the principle requirements, this research also seeks to pay greater attention to the important role of mediators in mediation. It aims to establish and promote additional qualifications required of a mediator-arbitrator but with more emphasis on the qualification and skills as a mediator. This will be highlighted in the discussion on qualifications that follows.

The Hanafis also require that these qualifications must be preserved and maintained throughout the med-arb process, from the appointment until the issuance of award.¹² The Shafi'i and Maliki¹³ also insist that a failure to maintain the qualifications will disqualify and invalidate the appointment and any awards.

¹⁰ *al-Mawsu'ah al-Fiqhiyyah* (n 89) 310.

¹¹ As outlined in Hak and others (n 66) 78; Zahraa and Hak (n 21) 15.

¹² Ibn Nujaym (n 65) 24; *al-Fatava al-Hindiyyah* (n 124), vol 3, 373; 'Ali Haidar, *Durar al Hukkam* (Dar al-Kutub al-Ilmiyyah 1991) vol 4, 523; Hak and others (n 66) 78.

¹³ Sheikh Abi Barkat bin 'Urfah Al-Dasuqi, *Hashbiyah al-Dasuqi 'ala al-Sharh al-Kabir* (Dar al-Fikr nd) vol 4, 136-137; Ibn Farhun (124).

Islam

Islam or being a Muslim is the primary requirement to take up any religion-related role. Similarly in *tabkim* a mediator-arbitrator is required to be a Muslim.¹⁴ The reasons are that a non-Muslim is not allowed to give testimony against a Muslim¹⁵ and, a verse in the Qur'an explicitly denies non-Muslims authority over Muslims:

And never will Allah grant the unbelievers a way (to triumph) over the believers¹⁶

However, *tabkim* between *dhimmis* (non-Muslim citizens) is allowed according to the Hanafi School¹⁷ based on the understanding that the *dhimmis* are allowed to witness among themselves and they are permitted to give evidence on matters concerning their own affairs and therefore they are eligible for appointment as arbitrators to arbitrate among their people. However, *tabkim* that is conducted by a *dhimmi* for Muslims parties is invalid.¹⁸ Similarly in a case where one of the disputing

¹⁴ For the Shafi'is see Al-Sharbini (n 24) 345; Al-Ramli (n 63) 392; Al-Nawawi (n 53) vol 18, 143, 454; for the Hanbalis see Al-Buhuti (n 116) 185; Ibn Qudamah, *al-Mughni* (n 52) vol 10, 265-266; for the Malikis see Ibn Farhun (n 124) 51; Malik Ibn Anas, *al-Mudammanah al-Kubra* (Dar al- Kutub al-'Ilmiyyah 1994) vol 2, 267; Muhammad Ibn 'Abdullah Al-Khurashi, *al-Khurashi 'ala Mukhtasar Saidi Khalil* (Dar al-Fikr nd), vol 3, 8-9.

¹⁵ Zahraa and Hak (n 21) 16; *Al-Fatava al-Hindiyyah* (n 123) 373.

¹⁶ The Qur'an, al-Nisa': 141. If one of the disputing parties is a Muslim and the arbitrator is a *dhimmi*, the vast majority of jurists are of the opinion that such *tabkim* is not valid. See, *al-Fatava al-Hindiyyah* (n 124) 373-374; 'Ali bin Muhammad bin Habib Al-Mawardi, *al-Abkam al-Sultaniyyah wa al-Wilayah al-Diniyyah* (Maktabah Dar Ibn Qutaibah 1989) 89.

¹⁷ For example see Ibn 'Abidin (n 65) 126; Ibn Nujaym (n 65) 24-25; Al-'Ayni (n 70) 67; *Al-Fatava al-Hindiyyah* (n 123) 373-374; Zaidan (n 63) 293.

¹⁸ *Al-Fatava al-Hindiyyah* (n 123) 397.

parties is a Muslim and the arbitrator is a *dhimmi*, a vast majority of jurists are of the opinion that such *tabkim* is not valid.¹⁹

However, *tabkim* for *dhimmis* by a *dhimmi* is valid even though he (the *hakam*) converted to Islam before issuing the award. This means, the award issued by him after the conversion is valid. This is similar with a case of Muslim arbitrator arbitrating between *dhimmis*,²⁰ while the position of an apostate is similar to non-Muslim.²¹ Evidently, scholars' opinions on this qualification relate with authority in religion. Religion is regarded as a prerequisite and it authorises a Muslim over non-Muslims in matters relating to or involving Muslims. The importance of the mediator-arbitrator to be Muslim is because a Muslims is believed to possess better knowledge about Islamic law than non-Muslims.²² However, taking into consideration the scholars' discussion on this matter, the issues of conversion and time frame of the process may not be applicable in mediation as compared to arbitration. The actual process of arbitration is observed to be different than of mediation. Arbitration deals with decision-making task. Therefore, to appoint someone who has knowledge in Islamic *Shari'ah*, such as a *dhimmi*, is not convincing for fear that the award is not Shari'ah-compliant.

¹⁹ *ibid*, 397-398.

²⁰ *ibid* 397.

²¹ *ibid* 398.

²² Hak and others (n 66) 80.

Full Legal Capacity and Sound Mind

The Hanafi, Shafi'i and Hanbali Schools explicitly provided that a mediator-arbitrator must possess full legal competence. The legal competency of a person is determined through three conditions, based on the qualifications required of a *qadi*.²³ They are attainments of the age of puberty (*bulugh*), maturity (*rushd*), and a sound mind. A minor and insane person are disqualified from assuming the role as a mediator-arbitrator on the ground of lacking legal capacity and their inability to be responsible for their own acts or those of others.²⁴ Appointment of such a person will be void and hence the arbitral award will not be enforceable.²⁵ Furthermore, other additional attributes such as being 'judicious, intelligent, devoid of forgetfulness, and free from absentmindedness'²⁶ would be useful for mediators-arbitrators. While the similar qualities help a mediator-arbitrator to arrive at a sound judgment, it may help them to gain trust (rapport) from the parties as well as to build their character and reputation as peacemaker.

²³ Burhan al-Din Abi Al-Hasan bin Abi Bakr Al-Marghinani, *Al-Hidayah syarh Bidayah Al-Mubtadi* (Dar el-Hadith 2008) vol 3, 343; for the Shafi'is and the Hanbalis see al-Sharbini (n 53) vol. 4, 379; Abu Zakariyya Muhyi al-Din Al-Nawawi, *Radd al-Talibin* (Dar 'Alam al- Kutub 2003) vol 8, 122; Al-Ramli (n 63) vol 8, 242-244.

²⁴ Al-Dasuqi (n 131) 136-137; Taqiyyuddin Abu Bakr Ibn Muhammad Al-Husayni, *Kifayah al-Akhyar* (Dar al-Kutub al-'Ilmiyyah 2001) 727; Al-Mawardi (n 134) 89.

²⁵ Al-Dasuqi (n 131) 136-137; Ibn Farhun, *Tabsirah al-Hukkam*, (Dar al-'Alam al-Kutub 1986) vol 1, 51; Al-Mawardi (n 134) 89; 'Ali Haidar, *Durar al Hukkam* (Dar al-Kutub al-'Ilmiyyah 1991) vol 4, 523-524.

²⁶ Al-Husayni (n 142) 727.

Justice/Impartiality ('Adalah) and Trustworthiness

Principally in Islamic law the concept of justice (*'adalab*) is central in any decision-making related tasks. The four Sunni's Schools of Law agree that *'adl* (being just) is the basic condition for a mediator and an arbitrator.²⁷ Allah in His revelation of surah an-Nisa' verse 135 ordered mankind to do justice in all of their affairs:

O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts) lest ye swerve and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do.

As this verse is generalised to apply to all mankind,²⁸ judges (*qadis*), mediators and arbitrators are included, as they are directly involved in a decision-making process. The characteristics of a just media- tor-arbitrator have been described in detail in scholarly discussions. A just *qadi*, arbitrator and mediator is characterised *inter alia*, as a person with 'irreproachable character and personality, known for his moderation, total avoidance of all major sins, and habitual avoidance of minor sins, as well as

²⁷ The agreement of scholars on *'adl* is regardless of whether they are on the opinion that the third party is a *hakam* (arbitrator) or a *wakil* (representative). Al-Sharbini (n 24) 345; al-Ramli (n 63) 392; Al-Nawawi (n 53) vol 18, 140-141; Al-Shirazi, *al-Muhazẓab* (Dar al-Qalam 1996) vol 4, 251; Ibn Qudamah (n 52) vol 10, 265; al-Bahuti, *Kasyyaf al-Qina' 'an Matan al-Iqna'* (np 1997) vol 4, 185; Abi Walid Sulaiman bin Halaf bin Sa'ad Al-Baji, *al-Muntaqa Sharh Muwatta' Malik* (Dar al-Kutub 'Ilmiyyah 1999) vol 5, 405.

²⁸ Abi Bakar Ahmad bin 'Ali al-Razi Al-Jassas (n 115) vol 3, 272.

honourable behaviour in both religious and worldly matters.²⁹ The mediators-arbitrators are not only expected to be just (*`adl*) in their judgements but to appear just during the trial. According to a *hadith*, whoever sits as a judge must be totally just in their behaviour towards the disputing parties.³⁰ Interestingly, Al-Jassas³¹ further elaborates and scrutinises that he (the judge) must be just even in the way he looks (glances) at them, his position, his gesture and that he must not raise his voice to one of the parties as he does not do to the other.³² In fact, it is very important that mediators-arbitrators are also ‘trustworthy, influential and impressive in their talk, acceptable and able to arbitrate justly, and their aim is to make peace between the married couple’,³³ as required in the Hanafi School.³⁴ All the characters and qualities required are to help the mediators-arbitrators to achieve a just and fair outcome for the benefit of the disputing parties.

Further explaining the importance of justice and impartiality, the Malikis and Hanbali Schools consider that a

²⁹ Al-Mawardi (n 134) 89. See also Al-Baji’s elaboration on how to recognise such a person, Al-Baji, vol 7, 155-156, quoted in Zahraa and Hak (n 21) 17.

³⁰ Al-‘Asqalani (n 14) Hadith No. 1200, 449; Abi al-Hasan Ahmad bin Muhammad bin Ahmad Al-Quduri, *Mukhtasar al-Quduri fi al-Fiqh al-Hanafi* (Dar al-Kutb al-Ilmiyyah 2006) 225.

³¹ Al-Jassas (n 115) 271.

³² For a more detailed explanation and description on how a hakam should behave or fairly treat the disputing parties see, for example, Al-Bahuti, (n 145) vol 5, 273-275; Al-Husayni (n 142) 730, 732.

³³ Zahraa and A. Hak, (n 21) 17.

³⁴ Mahmud Ibn Amr Al-Zamakhshari, *al-Kashshaf*, (Mustafa al-Babi al-Halabi wa Awladuhu, 1972) vol 1, 525.

corrupt person or sinner (*fasiq*)³⁵, child (*siby*), insane (*majnun*), spendthrift (*safih*)³⁶ and a bankrupt are not ‘just’ persons. Therefore, awards issued by them are invalid. With regard to *fasiq*, some scholars prohibit a *fasiq* from arbitrating a dispute as ‘such a person is prohibited from having a legal power, due to suspicion over his character.’³⁷ However, the Hanafi School permits a *fasiq* to arbitrate even though they prefer not to delegate to him this role.³⁸ In mediation, the objective of the process is to reconcile the disputing parties. In cases where reconciliation is not possible the mediators-arbitrators are there to help the parties with future arrangements – for example, over their properties and finances as well as their children’s upbringing. In relation to this, the appearance and reputation of the mediator- arbitrator is significantly important in as much as to gain trust from the parties as well as to establish a good relationship during the process. This is particularly true when mediating family issues which involve intimacy and privacy, which rely heavily on the mediator-arbitrator’s ability to offer the parties a safe place in which to disclose private and confidential matters and to have confidence in the mediator- arbitrator to assist in resolving their disputes. Therefore, practically and logically, a just (*‘adl*) mediator

³⁵ Zahraa and Hak (n 21) 17.

³⁶ Awards issued by a (*safih*: spendthrift) are invalid (null and void) even though it is permissible (*mubab*) in the School.

³⁷ Zahraa and Hak (n 21) 17; Al-Dasuki (n 131) vol 2, 344; Al-Husayni (n 142) 727; Yahya Zakariyya Al-Ansari, *Fath al-Wahhab bi Sharh Minhaj al-Tullab* (Dar al-Fikr nd) vol 1, 207.

³⁸ Ibn Nujaym (n 65) vol 7, 44; ‘Ali Haidar (n 65) 530, 531, 640; Ibn ‘Abidin (n 65) 126.

will gain trust more easily than a *fasiq* mediator, thereby facilitating a successful process.

The Gender of the Mediator-Arbitrator

One of the characters of a *qadi*-competent as agreed among the majority of schools is being of male gender. However, the strictness of such condition remains an area of debate for scholars. Maliki Schools do not allow a woman to arbitrate. If she is appointed and gives an award, the award would be void.³⁹

However, Al-Syarbini of the Shafi'i School laid down a different condition or requirement between a *qadi* and a *hakam*. While a person appointed as a *qadi* is required to be male,⁴⁰ a *hakam*, on the other hand, is not required to be male.⁴¹ A *hakam* quoted as including women in the meaning of scholars (*fubaqa'*) whose rulings are accepted.⁴² The strongest (*azhar*) opinion in the School also does not being put male as one of the conditions.⁴³ The Shafi'i's view is supported by the Hanafis. The School bases

³⁹ Al-Baji, *al-Muntaqa Syarb al-Muwatta' Malik*, (Dar al-Kutub al-'Ilmiyyah 1999) vol 5, 405; Al-Husayni (n 142) 727-728; Malik Ibn Anas, *al-Mudawwanah al-Kubra*, (Dar al-Kutub al-'Ilmiyyah 1994), vol 2, 266-267. They rely on a verse in the Qur'an which translates, 'Men are the protectors and maintainers of women'. Al-Quran: al-Nisa':34. See Muhammad Sa'id Ramadan Al-Buti, *Qadaya Fiqhiyyah Mu'asirah* (Maktabah al-Farabi 2006) 167-179; Zaidan, (n 19) 421; See also Zahraa and Hak (n 21) 20.

⁴⁰ It was reasoned in al-Sharbini that women are '*naqisat*' in intellect and religion. Al-Sharbini (n 24) vol 4, 501-502.

⁴¹ Al-Sharbini (n 24) vol 3, 345.

⁴² Muhammad Sa'id Ramadan Al-Buti, *Qadaya Fiqhiyyah Muasirah* (Dar al-Farabi 2006) vol 1, 176.

⁴³ Zaidan (n 19) 421; Al-Sharbini (n 24) vol 3, 261. Although, Al-Qalyubi views that if they are in the position as *hakams*, they are required to be male as stipulated in the second opinion. *Hashiyah al-Qalyubi*, vol 3, 307 cited in *al-Mamsu'ab al-Fiqhiyyah* (n 89) 310.

its view on the right of women to give testimony (*shahadah*). Al-Kasani relates the competency of a *qadi* to the competency of a witness (testimony) and concludes that being male is not considered as one of the requirements of a *qadi*.⁴⁴ He and Al-Marghinani also opine that a woman is permitted to judge in all cases except *hudud* and *qisas*.⁴⁵ If a woman is allowed to take the office of a *qadi*, she should then be allowed to arbitrate.⁴⁶ This view is further emphasised in Al-Fatawa al-Hindiyyah⁴⁷ that a female arbitrator is permissible in disputes concerning property and in issues specifically related to women:

It is permissible for the (opposing parties) to make a woman as an arbitrator between them except in the case of *hudud* and *qisas* for what we have already mentioned that arbitration is established upon the witness qualifications and the woman is able to witness but not in *hudud* and *qisas*.⁴⁸

Meanwhile, other Maliki jurists⁴⁹ allow women to become arbitrator. However, they reach their conclusion from a different perspective. An arbitrator is equal to an agent, not a judge; a woman is allowed to act as an agent, therefore she is also allowed

⁴⁴ Al-Kasani, *Bada'i Sana'i fi Tartib Syara'i* (Dar al-Kutub al-Ilmiyyah 1986) vol 7, 3; Al-Buti (n 160) 177.

⁴⁵ Al-Marghinani (n 141) vol 3, 150.

⁴⁶ Al-Kasani (n 162) 3.

⁴⁷ *Al-Fatava al-Hindiyyah* (n 123) 398; see also Ibn Nujaym (n 65) vol 7, 44; see also Al-Zuhayli (n 67) 482-483, 757. He states that whoever fulfils the requirement of testimony competent may take up the role as *hakam* and this includes a woman.

⁴⁸ Zahraa and Hak (n 21). 20.

⁴⁹ Ibid, 20-21. See also Al-Baji (n 145) vol 7, 218-219; Al-Bahuti (n 80) 309; Muhammad al-Zuhri Al-Ghamrawi, *al-Siraj al-Wahhaj 'ala Matn al-Minhaj* (Dar al-Fikr nd) 401.

to arbitrate. Al-Dusuqi⁵⁰ refers to other Malikis' scholars who permit a woman as arbitrator in property and injury matters.⁵¹

Contemporary Muslim scholars Zaidan⁵² Al-Buti⁵³ and Surty⁵⁴ also recognise women's role and their opinion in the decision-making process. Bringing clear examples from the practice during the Prophet's and Companions' time, Al-Buti argues the absence of any sufficient evidence from the Islamic traditions which say women do not have right in *Shura* or which disallow their involvement in matters that are also adjudged by men.⁵⁵ Equally, women's role in *Shura* was acknowledged during the time of Caliph Umar⁵⁶ and by the massive activities involving the issuance of verdicts and opinions by the Prophet's wife, cA'isyah. She was incomparably one of the experts among the Companions and one of the main points of resort concerning matters relating to Islamic jurisprudence.⁵⁷ Umar himself had consulted cA'isyah regarding women's issues as well as on the conducts and treatments of the Prophets with his family. He also

⁵⁰ Al-Dasuqi (n 131) 136-137.

⁵¹ Al-Baji (n 145) vol 7, 218; See also Zahraa and Hak (n 21) 20-21.

⁵² Zaidan (n 19) 421.

⁵³ Al-Buti (n 160) 171-184.

⁵⁴ Surty, for example, records that Nabigha al-Dhubyani advised Nu'man bin Mundhir to follow the decision of a woman; Hind al-Ayadiyyah, Sahr bint Luqman, Khusayla bint 'Amir bin al-Zarid were some prominent female hakams; See also a long lists of *tabkim* activities recorded in Muhammad Ibrahim HI Surty, *Studies on the Islamic Judicial System* (Qur'anic Arabic Foundation 2012) 57; Ibn Manzur (n 19) 953.

⁵⁵ See also al-Bukhari, Abu 'Abd Allah bin Muhammad bin Ismail, *Sahih al-Bukhari* vol 3, 182.

⁵⁶ Al-Buti (n 160) 175-176.

⁵⁷ Al-Asqalani (n 81).

asked the opinion of his own daughter, Hafsa.⁵⁸ These show that in some issues, especially relating to or involving women, women's opinions were given full recognition.

Mediation does not involve decision making where a mediator is simply required to facilitate communication exchanges between the disputing parties and to assist achieving a *sulh* settlement. On the contrary, arbitration or the second stage of *tabkim* deals with a decision-making task particularly on separating or uniting the parties.⁵⁹ For this reason, being male and just become obligatory requirements. However, a female mediator-arbitrator is necessary to deal with some intimate issues which are too private to disclose or discuss in front of a male mediator-arbitrator. Certain issues are also more easily understood by a female mediator than a male counterpart. Therefore it is suggested that the gender of the mediator-arbitrator should not hugely affect the med-arb process so that a woman should be allowed to pair up with a male mediator-arbitrator. What is important is the end result and that the mediators arbitrators are capable to carry out the task and gain trust from the disputing parties.

The absence of unanimous objection by scholars in the area where woman's participation is permissible could be taken as an indirect approval for a woman to take up the role. Moreover, as will be seen later in the next chapter and for the purpose of this

⁵⁸ Al-Buti (n 160) 176.

⁵⁹ Al-Shirazi (n 145) 251.

research, the objection to a woman becoming a mediator-arbitrator in disputes relating to the family will only worsen the situation in the UK as conciliation and mediation or arbitration by women has been widely practised. Gender is not an issue in this area. If such a position is taken so as to bar women in the role of mediator-arbitrator, it will indubitably jeopardise and hamper the continuity of the Islamic system of dispute resolution in the UK.

Ijtihad (Juristic Reasoning)

Ijtihad is defined as ‘the total expenditure of effort by a jurist to infer, with a degree of probability, the rules of Islamic Shari’ah from their detailed evidence in the sources.’⁶⁰ Again, the requirement of an arbitrator to be a *mujtahid* or of the same standard is largely related to the arbitrator’s duty of awarding a decision. Therefore, in order to be competent as an award giver in matters relating to Islamic law, as well as family law, the arbitrator is required to be a *mujtahid*, and a learned person in his subject areas.

However, as mentioned above, one of the contentious qualifications in the scholarly discussion is the requirement of being a *mujtahid*.⁶¹ A Hanafi scholar Al-Kasani,⁶² for example,

⁶⁰ Quoted in Zahraa and Hak (n 21); Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Ilmiah Publishers Sdn Bhd 1998) 367.

⁶¹ For Hanbali see Ibn Qudamah (n 52) vol 14, 14-16; for Hanafi see Al-Kasani (n 162) vol 7, 3; Ibn Nujaym (n 65) vol 6, 428; for Maliki see Muhammad bin Muhammad al-Hattab al-Ru’ayni, *Mawahib al-Jalil li Sharh Mukhtasar Khalil*, 66-68. See also Zuhayli (n 67) 481.

views *ijtibad* as a preferred and favoured condition but not a licence or requirement. The Shafi'i's scholars⁶³ have not stipulated being a *mujtahid* as one of the requirements to arbitrate or mediate rather, according to Al-Shirazi, the person needs to be knowledgeable in the *Shari'ah* (*faqih*)⁶⁴ and understand why they were appointed.⁶⁵ The Shafi'i School outlines these conditions based on the strongest view in the School that the third parties are like agents and that being a *mujtahid* was required, taking into account that they are agents authorised on behalf of the judge.⁶⁶ The Maliki School requires someone with knowledge in the area adjudicated upon and disallows those who do not have sound knowledge on law and principles of *nushuz*.⁶⁷ The Hanbali rule that the third party must be knowledgeable in matters relating to marriage, reconciliation and dissolution⁶⁸ since they have to handle such matters.

From another perspective, discussions and opinions on this quality regard the arbitrators as representatives (*wakil*), and Al-Shirazi and Al-Nawawi permit them to be laymen.⁶⁹ The mediators-arbitrators' tasks do not involve decision making. It is thus sufficient for a mediator to be knowledgeable (*faqih*) in

⁶² See more explanation in Al-Kasani (n 162) 3.

⁶³ Al-Sharbini (n 24) vol 4, 346; Al-Nawawi (n 141) 122; Al-Ramli (n 63) 392.

⁶⁴ Al-Shirazi (n 145) 251; Al-Nawawi (n 84) vol 18, 141.

⁶⁵ *ibid.*

⁶⁶ Al-Sharbini (n 52) vol 3, 261; Al-Qalyubi (n 161) vol. 3, 307.

⁶⁷ Al-Dasuki (n 131) vol 2, 344; *al-Mawsu'ah al-Fiqhiyyah* (n 89) 310.

⁶⁸ Ibn Qudamah (n 52) 49-50.

⁶⁹ Al-Shirazi (n 145) 251; Al-Nawawi (n 84) vol 18, 141.

Islamic law as well as in family matters. This is in order to safeguard them from mediating issues that are prohibited in the religion and, equally importantly, to advise the parties what is right in the law. This is supported by Ibn Qudamah⁷⁰ who views that a person who knows the source of *hukm* in his area its branch and knows how to derive decisions from there is considered as a *mujtabid* in his area. This view is probably more practical and realistic, as it compresses the scope of expertise of a person so that he may still be regarded as a *mujtabid* in a limited sense.

A *mujtabid* is not required to possess all knowledge in all areas. In the event of a lack of knowledge on matters in dispute, a mediator may refer or consult an expert for opinions.⁷¹ The Malikis similarly raise this issue where if the award is issued after consultation with other scholars' advices and opinions, the award is valid and enforceable.⁷²

Furthermore, besides concentrating on becoming a *mujtabid*, it is submitted that the mediators- arbitrators focus on acquiring skills and expertise in other areas such as conflict resolution, psychology and human behaviour etc. It is important for the mediators-arbitrators to prepare a conducive and safe environment for a mediation process. Referring to the jurists' arguments on the qualities of a *mujtabid*, their arguments basically

⁷⁰ Ibn Qudamah (n 52) vol 14, 16.

⁷¹ Ibn Qudamah, *al-Mughni* (Dar 'Alam al-Kutub 1997) vol 14, 16; Zuhayli (n 67) 484.

⁷² Al-Dasuki (n 131) *Hashiyah Al-Dasuki 'Ala Sharh Al-Kabir* (Dar al-Kutub al-Ilmiyyah 1996) vol 6, 3; *al-Mansu'ah al-Fiqhiyyah* (n 89) 310.

concern the duty of an arbitrator to pass judgement.⁷³ In that case, it is impractical if the mediators-arbitrators are restricted by such rigid conditions and qualifications. It is sufficient for the mediators-arbitrators at this stage to acquire lower qualifications and knowledge in *Shari'ah* than a *qadi*, but with specific expertise in family matters, current law and regulation and the ability to conduct a negotiation process and to effect a reconciliation. So long as the objective of a med-arb process is achieved, a non-*mujtahid* could also carry out the task.⁷⁴ Applying the Shafi'i School reasoning which does not prevent a non-*mujtahid* arbitrator from arbitrating matrimonial disputes,⁷⁵ the requirement of a mediator-arbitrator in family disputes should be less rigid than the requirement of an arbitrator. Al-Duri,⁷⁶ for example, on outlining the conditions of *hakam* established among the schools of law records the absence of requirement of *ijtihad* in their opinions.

In addition and most importantly, mediators-arbitrators in family disputes need to have acquired knowledge in family law and familial matters to cater for the uniqueness and special characteristics of family disputes.⁷⁷

⁷³ Al-Zuhayli (n 67) 754; for the Shafi'i, Hanbali and Maliki see Al-Ayni (n 70) 4-5; Zaidan (n 63) 293; Sunan Abi Daud, vol 3, 299, No Hadith 3573.

⁷⁴ Zuhayli (n 67) 484.

⁷⁵ Al-Sharbini (*Mughni al-Muhtaj* (Dar al-Ihya al-Turath al-'Arabi 1994) vol 4, 379; Al-Nawawi (n 141) 122; Al-Ramli (n 63) vol 8, 242-244.

⁷⁶ Al-Duri (n 102) 91-111.

⁷⁷ Nora Abdul Hak, 'Qualities of a Mediator in Family Disputes; The Shari'ah Perspective', *Asia Pacific Mediation Forum (APMF) Conference*, Kuala Lumpur, 16-18 June 2008.

Free from Physical Defects

Many scholars discuss the issue regarding the physical abilities of mediators-arbitrators as one of the criteria to allow their participation in the process. The Hanafi requires a mediator-arbitrator to be free from physical defects.⁷⁸ The mediator-arbitrator needs to acquire physical abilities, ie ‘faculties of a clear speech, hearing and eyesight.’⁷⁹ Further, the mediator-arbitrator is also required to be ‘attentive, able to write and pronounce the text of the award for the people to hear and comprehend his award clearly.’⁸⁰ Scholars have warned that inattentiveness towards circumstances in dispute may lead to an erroneous decision.⁸¹ In this case, if the mediator-arbitrator falls short of or has defects in any of these physical qualities, his office might be subjected to uncertainties and contentions.⁸² Zahraa and Hak elaborate on this:

If he is dumb, or his expression is not clear enough to be understood, or deaf and cannot distinguish between confirmation and rejection, his arbitration might be subject to uncertainties. Furthermore, the arbitrator should have the faculty of visual perception in order to distinguish between the plaintiff and the defendant, and between the witness and the attested person and be able to identify and examine the physical evidence.⁸³

⁷⁸ Al-Tarablisi (n 86) 25; Ibn Nujaym (n 65) 24; Al-Sarkhasi (n 82) vol 16, 111; *Al-Fatama Al-Hindiyyah* (n 123) 397; Zahraa and Hak (n 21) 14.

⁷⁹ Zahraa and Hak (n 21) 18.

⁸⁰ Zahraa and Hak (n 21) 18.

⁸¹ Al-Husayni (n 142) 727; Al-Nawawi (141) vol 10, 291.

⁸² Al-Khassaf (n 63) 586.

⁸³ Zahraa and Hak (n 21) 18. See also Ibn Abi Al-Dam, *Kitab Adab al-Qada'* (Dar al-Fikr 1982) vol 1, 153; Khassaf (n 63) 586; Al-Husayni (n 142) 729.

The issue of physical abilities was discussed by scholars under the chapter of *qadi* and not *tabkim*.⁸⁴

Examination of this requirement is necessary and useful considering that med-arb involves direct and open communication between the mediator-arbitrator and the disputants. This poses the question of whether or not physical defects hugely affect the mediator-arbitrator's ability – first, to carry out the duty assigned and second, to achieve the objective of the process. The main concern involving a mediator-arbitrator lacking the required physical attributes is the med-arb process itself. A negotiation based process will heavily rely on the ability of the third party, ie the mediator-arbitrator, to physically communicate with the parties. From a psychological point of view, the parties' appearance, communication, facial expressions and body gestures will reveal the degree of conflict between them. Crucially, it will contribute towards the mediator-arbitrator's observation of the case. Clearly, persons with physical abilities are able to examine the position. Although it might be acceptable to appoint a person lacking the required physical attributes rather than a person lacking the spiritual attributes (*fasiq*) to carry such a religious duty. Against this background, it is argued that only defects in speech, hearing and eyesight that could considerably impede communication between all parties and therefore should be avoided. Mahdi and Nora

⁸⁴ Al-Sharbini (n 24) vol 4, 502; Ibn Qudamah (n 52) vol 14, 13; Ibn al-Qasim al-Bajjuri *Hashiyah al Syaikh Ibrahim al-Bajjuri 'ala Syarh Ibn Qasim al-Ghazi 'ala Matan Abi Shuja'* (Dar al-Kutub al-Ilmiyyah 1999) vol 2, 257; Al-Bahuti (n 145) vol 5, 619-620.

suggest that a blind person should not be hindered by his or her disability to judge or affect reconciliation or award a decision as the Prophet (pbuh) used to appoint a blind Companion, Ibn Umm Maktum, to hold an important position in the government. The researcher is not to deny the capability of a blind person to perform their duty. However, the spirituality level of the Companions and their wisdom as a result of their inner quality may have helped in their judgement. Our level today is comparatively far lower compared to where they were and it is hard to find anyone close to them. Because of this, the researcher is not very keen on the idea but does not disagree totally. Where one of the mediators-arbitrator suffers from any physical defects or disabilities, the presence of comediatorarbitrator without such disability is therefore necessary to facilitate a smooth process and ensure a fair and just negotiation. This still means that a person with physical defect or lacking physical attributes, on their own, is not sufficient. Notwithstanding the concerns, Amin states that a physically defective mediator-arbitrator should not become an issue if they were chosen and appointed by the disputing parties or with their prior consent.⁸⁵ It is submitted that the requirement that the arbitrator must not lack the required physical attributes should be read to mean not lacking the required physical attributes so as to impede the arbitrator's ability to reach a legally sound award.

⁸⁵ SH Amin, *Commercial Arbitration in Islamic and Iranian Law* (Tehran Vahid Publications 1988) 80-81. 13

Conclusion

Mediation in Islamic law has one aim – that is to save saveable marriages. The focus of discussion on this paper has been in suggesting that the third parties are arbitrators. However, they need to acquire skills and qualifications as mediators. This is one of the main important findings in this chapter, particularly considering that mediation or the first stage of *tahkim* is the most significant part in the whole *tahkim* process. Because greater efforts need to be channelled towards reconciling estranged relationships or resolving conflicts rather than issuing awards, mediators-arbitrators skilled in conducting mediation and negotiation are therefore favoured over those who are less skilled.

Likewise, mediation in Islamic law has one aim – to save saveable marriages. This is one of the main important findings in this study, particularly considering that mediation or first-stage med-arb is the significant part in the whole *tahkim* process. Therefore, because greater efforts need to be channelled towards reconciling estranged relationships and resolving conflicts, Muslim jurists pay considerable attention to the profile of the mediator in terms of qualifications and skills. Indeed, the law places just as high regard upon the spiritual and moral qualities of the person as it does with the intellectual qualities.[*]