

The Representation of Women in Arbitration in Iranian Legal System

By

Mahdi Haddadi

Assistant Professor of University of Tehran

Abstract

After Islamic revolution in Iran, women's judgment competency has been always discussed by connoisseurs. Based on article 4 of Iranian Constitutional Law, all civil, criminal, financial, economic, cultural, military, and political and other laws and regulations should be in accordance with Islamic rules. On this article and concerning the Islamic rules and opinions of Islamic jurisprudents on judges' conditions, Iranian lawmaker believes that women are not competent for judgment, while it has not ruled that arbitrators must be males neither in Civil Procedural Law (concerning internal arbitrations) nor in the Law of International Commercial Arbitration. Therefore women can be also selected or assigned by dispute parties or court as arbitrator.

Keywords: *judgment, arbitration, women, Iranian laws, Islamic rules*

1. Introduction

In both domestic law and international commerce law, referring to arbitration to resolve disputes from concluding commercial contracts are increasingly growing. Almost in all legal systems, dispute solution through arbitration is accepted alongside governmental judicial regime. One the main fundamental of a dispute solution is the arbitrator. An arbitrator is some selected to resolve a dispute between two or more people. Undoubtedly, the parties have the right to assign arbitrator(s), even so national laws and the rules of an arbitration center from which assigning an arbitrator is demanded limit parties freedom in different ways to choose an arbitrator. An arbitrator should be competent. In doing so, national legal systems determine the competencies of people to become arbitrators (Khazaei: 1).

In the past, in most European countries, women could not be elected as arbitrators and even now in some countries where arbitration has a close relationship to governmental judiciary; women are not able to be selected as arbitrators. In Islamic countries, there are limitations for judgment by women since according to Islamic rules; women have no right to judge and issue an award. Since an arbitrator issues an award so a woman cannot be selected as an arbitrator (Baamir, 2010: 80).

In Iran, women's judgment has been accompanied with numerous tensions and disputes. Some believe that women cannot judge fairly and others believe that women's sensitiveness is a weak pint in arbitration and judgment. According to most Shi'a jurisprudents, judgment by women is not supported. In legal ratifications, women are not competent for judgment and they are not able to issue an award while in recent years many graduates from law schools are women. Although in Iranian laws, women's competency for judgment is negated and current laws do not permit to employ women judges, the question is that is in Iranian laws, the conditions of arbitrators as same as judges'? Is it possible to select women as arbitrator in both national and international arbitrations by parties? In the case no arbitrator is designated by a party, is it possible for Iranian court or arbitration center based in Iran to assign women as arbitrator(s)?

Present paper attempts to study women's arbitration competency in Iranian laws briefly and to answer above questions.

Women's judgment

Judgment means to resolve (Ragheb Esfahani, 1404 Hijri: 674). Judge is someone who resolves a dispute by issuing an award. There are types of judges in Islamic jurisprudential resources and Iranian laws: assigned judge and selected judge (arbitrator). Here, we address to the former and the latter is examined in next section.

Women's judgment before Islamic revolution

Before Islamic revolution in 1979, there was no condition for judge to be a man in the first law on employing judges approved in 1923. It was in 1969 when five women received judicial certifications and the procedure continued to Islamic revolution (Mehrpour, 2000: 314).

Women's judgment in the Islamic Republic of Iran

Upon Islamic revolution victory, women's affairs were radically changes including changes in the situation of female judges in judiciary system and changes in attitudes toward the conditions of judges (Kadivar, 2005: 33).

By establishing Islamic republic system and the necessity to respect Islamic regulations (article 4 of the Constitutional Law), women were prevented from judgment, employing female judges was stopped and the situation of working women in judiciary system was transformed. According to article 163 of the Constitutional Law, Parliament determine conditions and attributes for judges in accordance with Islamic jurisprudential rules. Thus, the Constitutional Law has clarified the conditions of judges based on ordinary laws.

In 1979, the transient government changed the rank of women judges to official (administrative) ranks. Afterwards, being a man was adopted as a condition for judges in the law on conditions of judges 1982. On this basis, women in judiciary system either left their jobs or accepted to do non-judicial works. Two years later, by adding a clause to the law on the conditions of judges, racial changes were happened in the situation of female judges. This clause reads that "women with judicial rank competent in this clause can work in special civil courts and offices to supervise children as advisors and have their own judicial rank." It was a new attention to women's acquired rights while it also showed the impossibility of working women as judges.

Gradually, because of different needs and pressures on expanding women activities in judiciary system, the added clause was amended in 1995: "Judiciary head can employ competent women with judicial rank in such position as administrative justice court, special civil courts, research judge, legal studies officers and codification of judicial laws, children supervision offices, and legal administration advisors."

Although a big step was taken to promote the situation of women in Judiciary, their judicial status to issue award was not changes. Three years later, in accordance with the law of family courts 1997: "if possible, each family court should investigate the case by the attendance of woman judicial advisor and the awards should be issued upon consultancy with woman judicial advisor."

As seen, women have no right to issue award in Iranian judicial system and their present in courts is limited to advisory positions. It is due the Islamic jurisprudential insight over rules in Iran. In other words, after Islamic revolution in Iran, it was considered that the judicial system should be based on Islamic jurisprudence. In judicial system of Islam, judgment is based on Islamic jurisprudence. In such system, the judge refers to sources of Islamic jurisprudence (Holy Quran, Tradition, Concurrence and Wisdom) rather than sources of law and issues his awards on this basis. In judicial system is based on Islamic jurisprudence being a man is a necessary condition for judges (Marashi, 1996: 17 – 18). But in judicial systems accepted worldwide, judgment is based on the laws ratified by Parliament and the judge has no responsibility to determine whether they are religious or not. Also, the judge cannot oppose them. Under such judicial system, there is no argument on banning women from judging since women are not going to act as their religious jurisprudence.

Women's arbitration

As mentioned, Iranian legal system and its rules should be based on Islamic rules especially Shi'a jurisprudence emphasized in the Constitutional Law (article 4). On this basis, Iranian legal system does not allow women to judge. Now, we see whether competent women can resolve disputes as an arbitrator or they are derived of such right?

Doing so, we study the opinions of Shi'a jurists briefly and then we address to Iranian laws.

2. Women's arbitration in the view of Shi'a jurisprudence

a. Definition of arbitrator

There are different attitudes and definitions on arbitrator. One of the acceptable definitions is: arbitrator is someone selected by dispute parties irrespective of arbitrator's assignment by Imam particularly or generally (Moosavi Ardebili, 1423 Hijri: 107 – 108). Arbitrators can be more than one person; namely, the parties have selected two or more people for arbitration.

b. Legitimacy and permission of arbitration

The legitimacy and permission of arbitration in Islamic laws is initially documented by Holy Quran: "And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever knowing and acquainted [with all things]" (Al-Nisa Chapter, 35). This verse shows arbitration legitimacy and permission in family disputes which can be extended to other similar disputes (Joneidi, 1999: 24). Additionally, there are other verses which show arbitration and conciliation (verses 59 & 65 of Al-Nisa Chapter and verses 9 & 10 of Al-Hujraat Chapter).

On the other hand, in many narratives one can see arbitration prescription. Most of these narratives are cited especially by Sunni jurists, including has been cited that the Prophet accepted award by Saad Bin Maaz in arbitration between him and Bani Rhorayzeh. The most important narrative in Shi'a jurisprudence on arbitration is cited from Imam Sadiq by Abi Khadijeh as reads: "elect someone from you as judge who knows a part of our verdicts. I will also assign him as judge. Therefore take your claims in front of him (Hor Alameli: 4). It can be understood well that when parties select someone as arbitrator, Imam also assigns him as arbitrator (Moosavi Khoei, 1407 Hijri).

Obviously, there is no relative comprehensive text in Islamic judgment not mentioned discussions on arbitration and its conditions. Certainly, it shows the concurrence among Islamic jurists on the legitimacy of arbitration albeit in brief (Joneidi, *ibid*: 25).

c. The condition of being man for arbitrator

Many Shi'a and Sunni jurists believe that the conditions of arbitrator are identical to judge. It means that all necessary conditions for judge including general conditions such as maturity and wisdom as well private conditions such as being a Muslim, justice and individual legal reasoning (by a Muslim jurist) (Ijtihad) and being man are also necessary for arbitrator. "What considered as condition by Imam for judge is also condition for an arbitrator" (Mohaghegh Ali, 1409 Hijri: 861). It is similar to many statements in other resources (Alameh Helly, 1410 Hijri: 138; Shahid Aval, 1411 Hijri: 68; Shahid Sany, 1410 Hijri: 68; Mohaghegh Ardabiliy, 1403 Hijri: 17). To the same reason, many Islamic jurists have avoided mentioning the conditions and have limited themselves to this statement.

However, some Islamic jurists believe that the conditions of an arbitrator are not identical to a judge (Ansary, 1415 Hijri: 47; Husseini Ameli, 1418 Hijri: 5).

Thus, the verdicts by Islamic jurists are categorized in three areas: a group believes that being man is a condition for both judges and arbitrators; some believe that they are not conditions for them; some believe that it is a condition for judge not an arbitrator (Hedyatnia Ganji, 2006: 150).

3. Women's arbitration in Iranian arbitration laws

The record of Iranian arbitration law backs to 1910. In the legal procedure law 1910, the first arbitration laws were included. Then, chapter eight of Civil Procedure Law in 1939 was allocated to arbitration regulations. These regulations were maintained with minor changes in 2000 through chapter 7 of General and Revolutionary Courts Procedure Law (in civil issues). Although mentioned arbitration regulations were devised for internal arbitration and they did not distinguish between national and international arbitrations, it could also include international arbitration. However, exerting such regulation on international arbitration is not without problems since principles of international commercial arbitration are not considered in this law (Seifi, 1998: 37). Concerning the need by Iranian legal regime to adapt international commercial arbitrations, Iranian Parliament ratified International Commercial Arbitration Law in 1997. It is highly similar to UNCITRAL Model Law. However, some parts are not a full reflection of this law and they are adapted to domestic conditions. The aim of its improvement was to provide better and newer regulation than arbitration regulations mentioned in the chapter 7 of General and Revolutionary Courts Procedure Law. Thus, arbitration rules of chapter 7 are only for internal arbitrations.

Dispute solution arbitration is conducted by a third party whose competency is confirmed by parties (Shiravi, 2012: 141). In judicial procedures, judges are assigned by Judiciary authorities and there is no need that the judge to be selected by parties while arbitrators should be selected by them. In the case the parties do not select arbitrators, they will be selected by court or arbitration centers. On the other hand, both dispute parties and legal system would like to assure that the dispute will be investigated by those arbitrators who enjoy the minimum necessary conditions. On this basis, we can examine women arbitration in two cases: are the parties facing with limitations in selecting an arbitrator and they are forced to select male arbitrators? Are courts or authorities facing with limitations in assigning arbitrators and they are forced to assign male arbitrators?

a. Selecting women arbitrator by dispute parties

One of the main principles of arbitration is contractual freedom in referring dispute to private person(s). However, it is faced with limitations in national legal systems and parties are not free to select any one the desire. Furthermore, in organizational arbitration, arbitration center determines conditions for arbitrators and those people who lack such conditions are not confirmed as arbitrators. In different countries, conditions are determined for arbitrators and parties cannot neglect them. These conditions are so important that lack of them can invalidate issued awards. There are different conditions in different countries. The most important conditions mentioned for arbitrators in national legal systems include competency, nationality, impartiality, independence and particular conditions such as legal knowledge or specialty (Shiravi, *ibid*: 158).

Concerning judgment by women, it was determined that in Iranian legal system, women are not allowed to judge and they cannot issue any award as judge. Since Iranian legal system is based on Islam especially Shi'a and it was determined in previous sections that according to Shi'a jurisprudents, the conditions of arbitrators are identical to judges' and women have not right to arbitration, the question is that this limitation is in Iranian laws on arbitration and parties cannot select a woman as an arbitrator or Iranian laws have not followed Islamic jurisprudents' opinions in this regard.

Chapter 7 of General and Revolutionary Courts Procedure Law (in civil issues) have detailed items on internal arbitration such as arbitrators' independence in determine the procedure law and decision making on the nature of dispute and parties' freedom on substantive law. However, lawmaker has said nothing on arbitrators' conditions especially whether he should have the same conditions of judge or not. Only in article 466, it is clarified that below persons cannot be selected as arbitrators: 1. Legal incompetent people. 2. Those ones who are forbidden from arbitration by the award of the court. Also, article 470 reads that parties cannot select the judges and staff of the Judiciary as arbitrator. In submitting the bill on

Dispute Solution Council and Arbitration institution to Parliament in 2005, Judiciary tried to express the condition of an arbitrator among which there was no condition on being man. Later, Iranian Parliament abandoned the article on arbitrator from this bill and it only ratified Dispute Solution Council. Thus, in internal arbitration based on Chapter 7 of General and Revolutionary Courts Procedure Law (in civil issues), no limitation is seen on female arbitration.

In international commercial arbitrations, the Iranian Law on International Commercial Arbitration (1997) should be considered as the criterion. As mentioned, this law considered UNCITRAL Model Law as the focal point and pattern while should be adapted to Iranian internal conditions. However, the changes are not paramount and the main principles of arbitration are particularly paid attention. In fact, Iranian Law on International Commercial Arbitration has two remarkable traits: one is to use common norms going in international arbitration theory and practice and another one is to remedy deficiencies in Chapter 7 of General and Revolutionary Courts procedure law (in civil issues).

Concerning above points, since in UNCITRAL Model Law, except than impartiality and independence no other conditions are mentioned for arbitrators, Iranian lawmaker has acted as this sample and it has reflected its provision in its own law identically. Guardian Council which monitors and confirms the laws ratified by the Parliament in terms of no contradiction to the Islamic rules and the Constitutional Law has not seen it necessary that the conditions of judges and arbitrators should be similar. Therefore, Iranian Law on International Commercial Arbitration has created no limitation of women arbitration and the rights of dispute parties to choose an arbitrator.

b. Assigning women arbitrators by an authority or court

As seen in previous section, in accordance with Iranian arbitration laws, parties can select competent women as arbitrators and there is no limitation in this regard. Is the relevant authority especially court is facing with any limitation in assigning an arbitrator instead of parties? Can women be selected by authority or courts?

When each party refuses selecting a single arbitrator or selecting a joint arbitrator or arbitrators cannot agree on selecting a head arbitrator, the issue of selecting an arbitrator can be assigned to a court or authority. Here, authority or court do not enjoy abstract freedom to select anyone they like, such limitations are exerted through *lex arbitri*. Arbitration centers have also conditions on selecting arbitrators (Shiravi, *ibid*: 164).

From Chapter 7 of General and Revolutionary Courts Procedure Law (in civil issues) (article 469) and International Commercial Arbitration Law (articles 11 and 12), one can be inferred that the only conditions should be obeyed by authority or courts to select and assign arbitrators include: conditions announced by dispute parties, the nationality of arbitrators, impartiality, independence and other conditions may be exerted by arbitration center. Therefore authority or courts are facing with no legal limitation of assigning women arbitrators.

Thus, it is observed that there is a far distance between Iranian lawmaker and Shi'a jurisprudents' opinions on the conditions of arbitrator especially women arbitration and in contrary to judgment, it has paved the ground for women operation in arbitration.

4. Conclusion

After studying the issues on women judgment and arbitration on Iranian legal system, one can draw below results:

1. Iranian legal system before Islamic revolution in 1989 accepted women competencies for judgment. In the meantime, women's arbitration was possible at that time.
2. After Islamic revolution and establishment of the Islamic Republic of Iran, all laws must be adapted to Islamic rules based on Principle 4 of Iranian Constitutional Law.

3. According to most Sunni and Shi'a jurists, judgment is a special position for men. Therefore, based on laws ratified after Islamic revolution, women are not able to be judge and issue awards.
4. According to most Sunni and Shi'a jurists, the conditions of judges and arbitrators are identical. Therefore, women cannot be selected or assigned as arbitrators.
5. Despite of Islamic jurists' opinions on arbitration, Iranian laws are not identical to famous Islamic jurists' opinions. Therefore, one can select or assign women as arbitrators in both internal and international commercial arbitrations.

Such initiative by Iranian lawmaker is undoubtedly an important forwarding step on the procedure of lawmaking on arbitration in Iran which would move Iranian arbitration system toward a more complete and acceptable system based on international benchmarks and norms.

References:

- Ansary, Morteza (1415 Hijri), *Alghaza & AlShahdat*, 1st edition, Qom, Bagheri.
- Ardabili (Moqadas), Ahmad (1403 Hijri), *Majma Alfaede and Alborhan*, Qom, Modaressin Community.
- Baamir, Abdulraman Yahya, (2010), *Shari'a Law in Commercial and Banking Arbitration : Law and Practice in Saudi Arabia*, England, Ashgate Publishing limited.
- Hedayatnia, Farajollah (2006), *Women Judgment in the Light of Secondary Verdicts*, *Women Strategic Studies Quarterly*, Vol. 32, 126-165.
- Helly (Mohaghegh) Abu Jafar Najmaoldin (1409 Hijri), Sahar Al-Islam, 2nd edition, Qom, Amir,
- Helly, Ahmed Bin Edris (1410 Hijri), Alsarayer, 2nd edition, Qom, Islamic Publications Institute.
- Holy Quran.
- Hor Alameli, Mohammad Bin Hassan, *Vasayel Al- Shi'a*, Dar Ahya Altras, Birut.
- Hussieni Ameli, Seyed Javad (1418 Hijri), *Meftah Alkarama*, Dar Altras, Beirut.
- Joneydi, Laya (1999), *a Critical and Comparative Study of International Commercial Arbitration Law*, Tehran, Faculty of Law and Political Science Publications, University of Tehran.
- Kadivar, Jamileh (2005), *The Barriers of Women Judgment in Iran*, *Economic and Political Information Journal*, Vol. 217 – 218, 32-39.
- Khazaei, Hussein, *Arbitrator in Domestic law and International Commerce*, from www.davari.org.
- Maki Amel, Mohammad Bin Jamalodin (1411 Hijri), *AlMoa AlDameshghieh*, 1st edition, Qom, Darlofekr Publications.
- Maki Ameli, Zeyonldin Bin Ali (1410 Hijri), *Sharoh ALMoa*, Davary Publications, 1st edition
- Marashi, Seyed Mohammad Hussein (1996), *Women Arbitration in Islam*, *The Judiciary ' s Law Journal*, Vol. 17 – 18, 17-24.
- Mehrpour, Hussein (2000), *Discussion on Women Rights*, Tehran, Etela'at Publications.
- Moosavi Ardabili, Seyed Abdulkarim (1423 Hijri), *Feghh AlGhaza*, 2nd edition, Qom, Mofid University.
- Moosavi Khoei, Seyed Abulghassem (1407 Hijri), *Mabani Takmaleh AlMahnaj*, Qom, Lotfi.
- Ragheb Isfahani, Hussein Bin Mohammad (1404 Hijri), *Mofradat Fi Gharib Al-Koran*, 1st edition, Dafter Nashr Alketab.

Seifi, Seyed Jamal (1998), International Commercial Arbitration Act of Iran: Towards Harmony with the UNCITRAL Model Law, *International Legal Journal*, vol. 23, 35-81.

Set of Laws (1979), Laws Expurgation Department (the Laws of First Parliament).

Set of Laws (1982), Laws Expurgation Department (the Laws of Second Parliament).

Set of Laws (1985), Laws Expurgation Department (the Laws of Third Parliament).

Set of Laws (1995), Laws Expurgation Department (the Laws of Fourth Parliament).

Set of Laws (1997), Laws Expurgation Department (the Laws of Fifth Parliament).

Shiravi, Abdulhussein (2012), *International Commercial Arbitration*, Tehran, SAMT Publications.