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Revisiting the Current Procedural and Administrative Issues of Industrial Arbitration in Pakistan

Abstract

In a free society there is bound to be industrial unrest, and where expectations are in conflict with low or negative levels of economic growth, serious industrial unrest may be inevitable[1]*. (Weeks, 1979) Nevertheless, particular and useful changes may be feasible by building upon the success.* [2] *(Weeks, 1979) Historically, Pakistan has not used the process of arbitration as an important mean of settling the terms of new contracts between the industrial disputants. The history of arbitration as an industrial dispute solving mechanism in Pakistan goes back as far as 1968. Therefore, the problem with conciliation and the arbitration in Pakistan has been both institutional and operational. Moreover, the arbitration in Pakistan is confined only to interest disputes. Right or grievance disputes are out side the ambit of arbitration. Being included in Pakistani labour legislation quiet recently, arbitration is an optional mean for the settlement of industrial disputes in Pakistan. The reason behind not taking off is perhaps, the financial weakness of the disputants, especially the trade unions. Another reason is that any form of arbitration depends on both sides agreeing to take part in the process. This is not always as simple as it looks. In case of arbitration, there is considerable degree of freedom of actions and independence in the exercise of its decision-making powers because unless there is sufficient measure of independence the parities to a dispute will not agree to submit this for arbitration. The purpose of this article is to analyse the legislative arrangements pertaining to arbitration as a means of settling industrial disputes as an alternative to the strike-based system and to consider whether it has lost its relevance as a mechanism for the settlement of industrial disputes in Pakistan. As in Pakistan, a clear-cut distinction has been made between disputes of rights and disputes of interest and in case of former, there is tendency to follow a judicial method of approaching and solving the problems while in case of later, inter alia, arbitration may be adhered to for their settlement. Therefore, during the course of discussion, only arbitration as means for the settlement of interest disputes shall be focussed.*

Key Words: Arbitration, Arbitrator, Procedure, Award

Introduction

The heterogeneity of the interests renders the emergence of the disputes inevitable in any industrial establishment. The procedure, however, through which such differences are settled, provides a basic indicator of the nature of governance of employment relations in the workplace.[3] (Alexander, 2002-2003) The justice

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meted out by the traditional venues has always been stigmatized by cost, lack of confidentiality/privacy, inconvenience, inordinate delays resulting thereby in backlog of cases and the growing complexity of the law. Therefore, in the face of such pervasive uncertainty the exploration of alternative means of administering justice between two sides of the industry seems to be expedient and logical rather than queuing in the Labour Courts for the issue to be decided.

In view of these facts, a number of mechanisms, including judicial and non-judicial, for preventing or resolving disputes have evolved.[4] (Neale& Bazerman, 1979) Out of this, the ADR is considered the legal alternative to litigation because it provides the opportunity for outcomes that are affordable, understandable and perhaps less bruising to the participants.[5] (Sridhar, 2006) The term ADR encompasses mediation, conciliation, arbitration and combination such as Med-Arb and describes the situation where a third party is involved to assist the parties in a settlement of their disputes.[6] (Chapman, Gipson& Hardy, 2003) Out of this panacean list, the arbitration has been stated to be a special form of adjudication that receives wide use as a means of settling interest disputes in some labour relations systems[7] (Blainpain & Millard, 1982) and dates back to the primitive societies. Mythology, for instance, tells that Juno and Pallas Athene agreed to allow Paris to decide their dispute over which of them was the most beautiful.[8] (Nolan, 1979) Apart from the exigencies demanding recourse to arbitration, the real urge, which prompts appeal to arbitration, is found finally in society's desire to eliminate force as a sanction of right, and to introduce effectively the principles of the ethical order into the settlement of disputes among its members.[9] (Kerby, 1907) Unlike court litigation, great nuggets of wisdom can be found for arbitration as it provides informal and relaxed atmosphere, which prevents breakdown in ongoing relationship in the workplace.[10] (Fitzgerald, 1992) If seen from the point of view of imbalance of power between the parties, like adjudicatory forum, the arbitration has not only the potential of balancing the power difference, if necessary, but also its flexibility allows the arbitrator to apply rules as necessary in order to adjust or maintain any imbalances.[11] (Fitzgerald, 1992)

Unlike conciliation or the mediation, the only demerit, which is attributed to the arbitration, is the loss of control over the outcome of the dispute[12] (Lewis, 1986) but this aspect of the arbitration has been covered, under some jurisdiction, unless otherwise agreed upon between the parties, by allowing the parties to reject or modify the award.[13] (Arbitration, UK) On the contrary, there are some instances where once the parties have made recourse to the arbitration, the arbitrator renders a binding award.[14] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) Albeit, the voluntary character of these mechanisms is their beauty but the provisions, which put the outcome of the arbitration at the whim and caprice of the parties blur the line between conciliation/mediation and arbitration.

Generally, two types of disputes may arise between the union and management. Firstly, disputes over the rights in the past about such issues as the interpretation, application, administration or alleged violation of the existing collecting agreements, which are normally settled by grievance arbitration, and secondly, the disputes for the acquisition of the future rights,[15] (Philips, 1983) which are also called interest disputes or the contract disputes. Although, the segregation of the disputes into disputes of rights and disputes of interest could emerge on industrial

horizon very lately in Pakistan but the decision over the disputes over rights have always been deemed the domain of the judicial forums in Pakistan. Admittedly, for sometime, arbitration as mechanism for the settlement of industrial disputes has been in vogue in Pakistan but that was confined only to war days. So, unlike contemporary jurisdictions like the UK, the idea of arbitration for settlement of individual grievances could not make inroad into Pakistani Industrial jurisprudence on permanent lines. In an earlier work, an attempt was made to analyse various aspects of the issue, however, after the promulgation of Industrial Relations Ordinance, 2002, in the face of various legislative (in the form of enforcement of Industrial Relations Act, 2008, Industrial Relations Act,2012, and Provincial Industrial Relations Acts) as well as constitutional/administrative (in the form of eighteenth constitutional amendment,2010 by virtue of which the subject of labour has been entrusted to the provinces) changes on the frontiers of industrial relationing in Pakistan have rendered it inevitable to revisit the earlier work. It is relevant to mention that till the promulgation of Industrial Relations Ordinance, 2002, the successive governments have been focussing the industrial arbitration myopically and with the enforcement of subsequent legislation and constitutional arrangements, it was expected of the government to take pragmatic initiatives for the emancipation of the unscrupulous litigants. So, it is owing to this factual matrix that the instant revisit has been undertaken.

Before embarking upon the analysis of the law pertaining to arbitration in Pakistan, it seems to be expedient to conceptualize the prevailing models of arbitration around the world. Despite ubiquitous nature of arbitration, the question that begs answering is that what model of arbitration will be efficacious for a particular situation? Ordinarily, every arbitration process is commenced on traditional pattern but it may assume any other shape at any stage of the impasse. For instance, Alan[16] (Alan & Thomas, 1997) argues that arbitration mechanisms may be classified according to the constraints, if any, placed on the decision-making freedom of the arbitrator, or arbitration panel. He adds that in the absence of any constraints 'conventional arbitration' entails the arbitrator imposing an award of their choosing, but typically based on their best judgement of an appropriate or fair settlement' which may or may not constitute some compromise.

In Pakistani labour relations system, generally, two types of disputes are resolved: individual disputes and collective disputes. The former may further be divided into two categories: disputes concerning rights or legal rights while the later may include disputes concerning interests or sometimes called economic disputes. The immediate outcome of this classification is that the role of labour judiciary has been confined to the adjudication of individual disputes. On the contrary, the autonomous procedure like negotiations, conciliation and arbitration is tried for the settlement of economic/interest disputes. It is interesting to note that in case of emergence of an industrial dispute, the parties are enjoined upon to exhaust the classical triad in their sequential order other wise the industrial dispute is not deemed to have exited. As a first step bilateral negotiation are to be ensued in Joint Works Council, a forum within the establishment comprising of the representatives of the employer and the workers. In case of impasse, the parties have to appear before state sponsored conciliators and only in case of frustration of

negotiations before the conciliator, recourse can be made to arbitration but with the consent of both the parties.

Scope of Arbitration in Pakistan

The scope of arbitration in Pakistan is very limited in terms of parties and subject matter. As far as the parties are concerned, the law is very much clear. As Pakistan is a union-management arena therefore, it is the only union, which has the *locus standi* to embark upon the process on behalf of the workers. As to the subject matter, it is confined only to disputes of interest, which, in Pakistani labour jurisprudence, is called industrial dispute. Furthermore, the process of arbitration has been confined to industrial disputes only. As far as the individual disputes are concerned, they have been kept out of the purview of arbitration. For the adjudication of such disputes, the parties have to make recourse to the labour court, which, besides overburdening the labour courts, causes unnecessary delays. It is interesting to note that in all labour laws tried hitherto in Pakistan i.e. Industrial disputes Act, 1947, Industrial relations Ordinance, 1968, Industrial Relations Ordinance, 1969, Industrial Relations Ordinance, 2002, Industrial Relations Act, 2008, Provincial Industrial Relations Acts and Industrial Relations Act, 2012, subject of arbitration, procedure of making reference to the arbitration, procedure of the arbitrators, nature and duration of the award has never been subject to any deviation.

Process of Referring the Industrial Dispute

As stated earlier, the arbitration as mechanism for the settlement of industrial disputes emerged very lately in industrial jurisprudence in Pakistan only to the extent of industrial disputes. In order to refer the dispute to arbitrator, the conciliator has to play a pivotal role. Consequent upon the failure of conciliation proceedings, it is imperative for the conciliator to persuade the parties to agree to refer their dispute to arbitration.[17] (Industrial Relations ACT 2012 and Punjab Industrial Relations Act, 2010) The combined effect of the provisions relating to conciliation and arbitration of industrial disputes reveals that in case of emergence of an industrial dispute, the task of the conciliator has increases manifold. On one side he has to carry on the task of conciliation, where as on the other side, in case of failure, he has to persuade the parties to make recourse to arbitration. This shows that the resolution of industrial disputes in Pakistan depends upon the high level of analytical and probing skills of the conciliator that will enable the parties objectively and intelligently in a joint problem solving strategy in settling their disputes. As stated earlier, since the day of its introduction in Pakistani, the process of initiation of arbitration proceedings has been uniform. Consequent upon the persuasion of the conciliator, the parties are enjoined to make a written request to the conciliator along with the name of the arbitrator to refer the dispute for arbitration.[18] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010)

Selection of Arbitrator

As far as the freedom of choice for selecting an arbitrator is concerned, there is a growing clamour not only from the system's most ardent supporters but also from its severest critics.[19] (Morvant, 1961) Presently, there are two alternative channels

for the disputants: either they can choose an arbitrator from the market or they have to put their choice on any one of the arbitrator borne on the panel of the national Industrial Relations Commission or the Provincial Government.(Industrial Relations Act, 2012 and Industrial Relations Act, 2010) Albeit, the element of parties' autonomy as to the selection of the arbitrator do sounds in Pakistan but despite its abiding popularity in contemporary jurisdictions, the same is imbued with some complexities and difficulties. For instance, an interesting and perhaps revealing contrast is that, as per statutory requirements, the National Industrial Relations Commission and the Provincial Government has to maintain a panel of arbitrators but the said Government has never maintained the same. The omission has down played the efficacy of the process by reducing the choice of the parties. Resultantly, the parties to an industrial dispute have to rely on private service, which turns out to be another irksome task. As the credibility of an arbitrator rests upon, the qualification, reputation, experience level in arbitrating particular issues, or expertise/experience in a particular field,[20] (Reliance Industries & Others v U.O.I, 2014) therefore, the maintenance of such panel helps the parities to put their choice on any one of the arbitrators of such profile. It is worth mentioning that until 2002, the arbitration in Pakistan has been optional. However, after the promulgation of the Industrial Relations Ordinance, 2002, it is optional as well as compulsory.[21] (Industrial Relations Ordinance, 2002) If the industrial dispute relates to any of the Public Utility Services, it is compulsory and in case of rest of the cases, it is optional. It is interesting to note that in case of industrial dispute relating to any of the Public Utility Services, the issue is to be referred by the Federal or Provincial Government to a Board of Arbitrators to be constituted by the relevant Government which tantamount to damage the concept of 'autonomy of choice' of the parties.

The legislative arrangements seem to be defective due to the reason that in one case, no institutional arrangements have been made for the parties but in case of Public Utility Services, institutional arrangements have been made. Thus, the legal provisions do not cater for the requirements of the disputants. In case of the former, the choice has been reduced by not providing a penal of arbitrators and in case of later, the choice has been reduced by not allowing the parties to make recourse to an arbitrator of their own choice. Ridiculously, the government has taken another U-turn by reverting to arbitration as an optional step and the idea of compulsory arbitration has been dispensed with in subsequent legislation. For instance, in Industrial Relations Act, 2008, Punjab Industrial Relations Ordinance, 2009, Punjab Industrial Relations Act, 2010 and Industrial Relations Act, 2012 the concept of compulsory arbitration has been discarded.

As the arbitration is recognized to be an escape valve for emotional upheaval,[22] (Morvant, 1961) it can only play the envisaged role if it is made free of such complexities, which plague the process and which contribute mightily to the confusion and frustration suffered by the establishment and union.[23] (Morvant, 1961)

Another area of immediate concern is the period of nomination of the arbitrators. Apparently, the law does not provide answer to this question. However, one possible interpretation of the provision may that the parties have to do that within 30 days of the submission of their request to the conciliator but it is submitted that

the proposition begs more clarification. Success and efficacy of the arbitration can be enhanced by prescribing timeline for the appointment of arbitrators. As stated earlier that the Pakistani experience of arbitration has been characterised by its voluntary as well compulsory nature. In case of former, the parties have to nominate their arbitrator either out of panel of arbitrators to be maintained by the Federal or Provincial Government or from the market. Nevertheless, if the arbitrator nominated pursuant to statutory command either dies or otherwise becomes ineligible to arbitrate what will be the next course of action? Whether the parties will be given a chance to revise their choice or the Government will impose an arbitrator of its own? Almost similar arrangements prevail in case of compulsory arbitration through Board of Arbitrators and this legislative omission has been persistent in all statutes on the subject.

Procedure of Arbitrator

In Pakistan, one rather regrettable aspect of industrial arbitration is that no normative minima have been prescribed to carry on the process of arbitration. In a developing economy like Pakistan, lack of appropriate experience and poor practice of peaceful collective labour dispute resolution have imposed a need to prescribe basic regulations on the labour disputes arbitration performance. The function of the arbitration service can best be gauged if the same is seen in relation to the whole industrial situation out of which it springs. In Pakistani context, the basic urge behind the incorporation of provisions relating to arbitration was the discouragement of irresponsible use of strike/lock-out and the same was expected to prevent wildcat or lightening strikes.[24] (Labour Policy, 1969) The scholars have long urged that arbitrators must be trained to insure their expertise in the substantive areas of law involved in the cases they handle.[25] (Hoffman & Sharona, 1996) However, the service could not flourish on required lines: firstly, due to its late emergence on the industrial horizon in Pakistan with the result that a special kind of right stuff could not be imbued and secondly, the law provides unnecessary latitude to the arbitrator as far as the procedure to be followed is concerned.

It is worthy to be mentioned that the legislative arrangements pertaining to arbitration encompass the procedure to a limited extent. For instance, if the parties intent to invoke the jurisdiction of the arbitrator, they have to make a joint written request to the conciliator; the arbitrator has to render his award with 30 day of its referral or within such extended period as may be agreed upon between the parties. After the finalization of the award, the arbitrator is required to send a copy thereof to the Federal or the Provincial Government, as the case shall be, for its publication in the Official Gazette and the award of the arbitrator shall be final and valid for a period not exceeding two years or as may be fixed by the arbitrator.[26] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) As far as the representation of the parties before the arbitrator is concerned, the same may be made through a legal practitioner if permitted by the arbitrator.[27] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) The situation has further been complicated by not providing any statutory arrangements about the power of the arbitrator to subpoena witnesses and the witnesses to testify under oath. This situation reflects that the work/ role of the arbitrator has increase

manifold. So, inchoate nature of the legislative arrangements has watered the arbitration down under all statutes.

No doubt, the tone of the present law indicates a more positive conception of the role of the arbitrator and it is owing to this role of the arbitrator that the result of arbitration partakes of the nature of binding judgement. This role can be assumed, *inter alia*, by the expertise of the arbitrator and the way the parties enable the arbitrator to reach at a just conclusion. The best way, as has been calculated,[28] for the arbitrator to be informed of all facets of the dispute is to adopt an adversarial approach. (Shin, 1998) The *raisen deter* for making recourse to adversarial way in contrast to inquisitorial method has been stated to be the acquaintance of the interested parties with the dispute and fixation of the burden of proof.[29] (Shin, 1998) It enables the arbitrator to extract as much as information from the parties as would he deem expedient to exacerbate the disparity in information.[30] (Shin, 1998)

Award

Under the law, the term award has been defined to be determination by the Commission, Labour Court, Arbitrator or an Appellate Tribunal of competent jurisdiction of an industrial dispute or any matter relating thereto and includes an interim award.[31] (Industrial Relation Act, 2012 and Punjab Industrial Relations Act, 2010) The term includes not only interim or final determination of an industrial dispute but also embraces any question relating thereto. The term industrial dispute has been defined as any dispute or difference between employers, and workmen or between workmen and the workmen which is concerned with the employment or non-employment or the terms of employment or the conditions of work; and is not in respect of the enforcement of any right guaranteed or accrued to workers by or under any law, other than this Ordinance, or any award or settlement for the time being in force to.[32] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) As far as the jurisdiction to determine whether a particular dispute amounts to an industrial dispute, the labour court has the jurisdiction to determine but no such jurisdiction has been conferred upon the arbitrator. In this way, the arbitrator may make any appropriate award but he has no authority to make an order as to the costs and to find out whether a particular issue amounts to industrial dispute or not. As to the form of the award, it is submitted that unlike award of the Commission and Labour Court, no particular form of the award of the arbitrator has been prescribed. However, it is supposed to be in writing covering all aspect of the matter referred to arbitrator.

Publication of the Award

Under Pakistani labour law, the award rendered by the arbitrator shall not be effective unless the Federal or the Provincial Government has, in the Official Gazette, published it.[33] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) For this purpose, the law enjoins upon the arbitrator to send one copy of the award to the parties concerned and other copy thereof to the Federal or the Provincial Government.[34] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) The Provision seems to be inhibiting in the sense that no specific period for its publication has been prescribed which tantamount to downplay the efficacy of the arbitration. The traditional delaying tactics in bringing the issue to its logical end prompt tie difficulties between the

parties. So, in order to bring the existing law in tune with established norms, there should be time-bound network of publication of the award.

Nature the of Award

The award given by the arbitrator is final and no right of appeal on any ground what so ever has been given to the party aggrieved by such award.[35] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) The award has been rendered valid for a maximum period of two years or for such period as may be fixed by the arbitrator.[36] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) As to the coverage of the award in terms of contents is concerned, it shall be valid to the extent of matters in reference. However, as far as the parties bound by such award are concerned, the law makes comprehensive arrangements to that extent. It shall be binding not only on the parties to an industrial dispute, but shall equally be binding on all other parties summoned by the Labour Court to appear in any proceeding before the court.[37] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) It also binds the heirs, successors or assigns of employers on the one side and in case the Collective Bargaining Agent is a party to such dispute, it shall be binding not only on all the workers who are in the employment of the employer at the time of the award but on all potential workers as well.[38] (Industrial Relations Act, 2012 and Punjab Industrial relations Act, 2010) Apart from the apprehension of delay in publishing an award, another deficiency associated with the extant arrangements is that no right of appeal has been given against the award of the arbitrator. It is interesting to note that if the same matter is referred to the Labour Court for adjudication, the law makes ample provisions for appeal before the Full Bench of the National Industrial relations Commission or Labour Appellate Tribunal, but if the issue has been settled through the intervention of the arbitrator, no such right accrues to the aggrieved party. There should, it is submitted, have been provision permitting for de novo review of question of law. As to question of interpretation of the award, the same has been held to be the domain of the Commission or Labour Appellate Tribunal whose decision shall be final and binding on the parties.[39] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010)

Enforcement of Award

In Pakistan, the arbitrated decisions have traditionally been enforced in the Labour Courts via a quasi-criminal procedure supplemented by inspection process and penal sanctions. The penal provisions have been so meagre that practically they could not be turned out to be instrumental in changing the employers' behaviour. For instance, previously, the penalty for breach of any term of award was, for first offence, imprisonment for one year or fine upto five hundred rupees or both and in case of repeated violation, the imprisonment and fine were double.[40] (Industrial Relations Ordinance, 1969) However, under the present law the sentence of imprisonment has been abolished altogether and the amount of fine has been increased upto twenty thousand.[41] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) Similarly, in case of failure to implement the award without any reasonable cause was punishable with imprisonment for one year and fine upto five hundred rupees and in case of continuous offence, with a further fine upto two hundred per day.[42] (Industrial Relations Ordinance, 1969)

Under the present law the situation has been changed and the offender is liable to fine upto the amount of twenty thousand and in case of continuous offence with a further fine upto five thousand per day.[43] (Industrial Relations Act, 2012 and Punjab Industrial Relations Act, 2010) With abolishment of sentence of imprisonment, the chances of non-implementation coupled with the breach of the award have been increase manifold and the potential offender, perhaps; will not bother about the payment of fine.

Conclusion

Conspectus of the above discussion is that in Pakistan the basic urge behind the introduction of the arbitration was to put a check on the strikes and lockouts. The service, however, could not attaint required momentum due dearth of statutory backing in some areas highlighted in the body of this article. For instance, if on the persuasion of the conciliator, the parties are reluctant to refer their dispute to arbitration, the law doesn't provide adequate alternative. In such situation, the credibility of the conciliation service proves to be potent tool to save the situation from further escalation. On the other side of the equation, the worth of arbitrators plays a pivotal role in moulding the parties' attitude. Moreover, if seen from the point of view of coverage, the law doesn't present a healthy picture. In Pakistan, the arbitration is confined to disputes of interest. As far as the disputes of rights are concerned, they are out of the ambit of arbitration and the insolvent worker is compelled to be entangled in the webs of adversarial technicalities. Therefore, there is dire need to add more teeth to the service by providing acceptable, relevant and well-designed programmes.

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