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Arbitration

Baudouin Dupret & Yazid Ben Hounet

Summary (103 words)

Arbitration is a conflict-resolution device that differs from adjudication. In principle, it takes place outside the courts and is voluntary. Parties to a dispute agree to refer to one or many persons by whose statement they both have agreed to be bound. Two Arabic words are frequently used to refer to arbitration. The first, *tah/.ki/-m*, refers to the intervention of a third person, the arbiter, *h/.akam* or *muh/.akkam*, who is called by the litigants to intervene in their dispute and to issue a decision that they have accepted to consider as binding. The second, *s/.ulh/.*, has the meaning of peaceful and/or negotiated settlement.

Entry (2092 words)

Arbitration is a conflict-resolution device that differs from adjudication. In principle, it takes place outside the courts and is voluntary. Parties to a dispute agree to refer to one or many persons by whose statement they both have agreed to be bound.

Two Arabic words are frequently used to refer to arbitration. The first, *tah/.ki/-m*, is derived from the root *h/.km*. It refers to the intervention of a third person, the arbiter (*h/.akam* or *muh/.akkam*), who is called by the litigants to intervene in their dispute and to issue a decision that they have accepted to consider as binding. This root occurs 209 times in Qur'a/-n under 14 forms. Under its form II (*h/.akkama*), it has the factitive effect of "making someone judge" or "entrusting someone with judgment". "Qur'a/-n "4:65" stipulates: "but no, by your Lord, they will not believe until they make you the judge in what has erupted between them".

In Islamic tradition and history, *tah/.ki/-m* evokes the arbitration that took place in 37-8/658 between 'Ali/- b. Abi/- T/.a/-lib, the fourth Ra/-shidu/-n caliph, and Mu'a/-wiya b. Abi/- Sufya/-n, the forthcoming first Umayyad caliph. Following many battles and skirmishes, the two opponents had agreed to cease fighting and to resort to arbitration. 'Amr b. al-'A/-s/. was entrusted by Mu'a/-wiya, while Abu/- Mu/-sa/- al-Ash'ari/- was designated by 'Ali/- under pressure from the Qurra/-' (readers of the Qur'a/-n) faction. The circumstances and developments of this major episode of early Islamic history is described in EI1 and EI2 (art. 'Ali/-, *S/.iffi/-n*, *Tah/.ki/-m*). al-'A/-s/. succeeded in drawing al-Ash'ari/- into undermining the current caliph and accepting the removal from power of both adversaries, while himself eventually keeping supporting his own candidate. 'Ali/- rejected the decision and the war resumed until his assassination by the kha/-rijite (secessionist) 'Abd al-Rahma/-n b. al-Mujam in Ku/-fa on 17 Ramada/-n 40/24 January 661.

The second Arabic word used to refer to arbitration, *s/.ulh/.*, is derived from the root *s/.lh/.* The verb *s/.alah/.a* denotes the idea of reconciliation. In the Qur'a/-n, it has the meaning of peaceful and/or negotiated settlement. Qur'a/-n "4:128" stipulates: "and if a wife fears highhandedness or alienation on her husband's part, neither of them

will be faulted if they agree between themselves on a settlement". This word has a strong positive, moral connotation, as it refers to righteousness. Under the form IV (*isla/-h/*), it has the meaning of bringing order (and thus reforming) through reconciliation. For instance, Qur'a/-n "2:220" stipulates: "do not spread corruption on earth after it has been set right".

Both terms (*tah/.ki/-m* and *s/.ulh/*), have been the object of developments in Islamic doctrine (*fiqh/*). All scholarly definitions converge in making *tah/.ki/-m* the "process whereby the disputing parties agree to appoint someone to act as an arbitrator of the issue in dispute between them" (Zahraa and Hak, 2006). It is the Islam-compatible version of a concept that existed in pre-Islamic times. Tribes of the Arabian peninsula were known for resorting to *tah/.ki/-m* in order to solve their disputes. The Prophet was himself appointed as an arbiter in many occasions, including when, while still in Mecca, he was invited by the people of Yathri/-b (ultimately Medina) to settle the feuds between Arab tribes and Jewish clans. The Companions of the Prophet and the first caliphs frequently recommended and used this way of conflict resolution. Therefore, *tah/.ki/-m* can be considered as an Islamic institution consensually approved by Muslim scholars.

According to the doctrine, there are essential elements and conditions for a valid process of *tah/.ki/-m*. First, there must be an agreement between the disputing parties as to the settlement of their argument by way of arbitration instead of adjudication; as to the designation of the arbiter or the arbitration committee; as to the procedure that must be followed until the issuing of the decision. Second, the disputing parties (*muh/.akkimu/-n*) must decide voluntarily to resort to an arbiter in order to solve the conflict opposing them to each other. Third, they must appoint one or many person(s) (*muh/.akkam*) who are granted authority to settle their dispute. Arbiters must qualify, but doctrinal schools (*madha/-hib*) diverge as to know whether they must show the same qualities as judges (*quda/-t*) or not. Notwithstanding these controversies, it is generally agreed that an arbiter must be a Muslim, have a sound mind and full capacity, be male, be just and trustworthy, and be competent in the Islamic doctrine. Fourth, there must be an agreement of the parties as to the decision of engaging into an arbitration process. This agreement is called *si/-gha*. It is the pronouncement made by the disputing parties to the arbiter they have designated. The *si/-gha* is creating a legal binding relationship. Fifth, there must be a legitimate object submitted to arbitration. The majority of Muslim scholars consider that *tah/.ki/-m* is limited to matters concerning people's private rights (*huqu/-q al-na/-s*). According to the H/.anafi/- school, all matters that can be settled by *s/.ulh/* can be equally settled by *tah/.ki/-m*, and that excludes *qisa/-s* (equal retaliation) and *h/.udu/-d* (penalties stipulated by Qur'a/-n) but not *diya* (blood money). And sixth, the arbiter must issue a valid decision (*h/.ukm*), which means principally that it must be in accordance with the *shari/-'a* and issued at a time where the consent of the parties is still valid. The decision must be written and witnessed by a righteous person. While the majority of Muslim scholars consider that an arbitration decision is unchallengeable, there are scholars who argue that it may be referred to the judge

(*qa/-d/.i/-*) for confirmation. *Tah/.ki/-m* is terminated by one of the parties' withdrawal of consent before the issuing of the decision, the pronouncement of the decision, or the passing of time if a certain period was stipulated. Corruptions, mistakes or fraud are also causes of nullification of the procedure or the decision.

S/.ulh/., was also the object of developments in *fiqh/.* It can be defined as "a contractual obligation that requires one or both parties to concede certain of their rights" (Hallaq, 2009). It has origins in pre-Islamic times where private justice predominated. A famous poem (*mu'allaqa*) of Zuhayr b. Abi/- Sulma/- mentions the case of a mediator who produced the compensation out of his own pockets in order to persuade the litigants to stop their feud and resort to conciliation (Othman, 2007). There is an Arab maxim that says that "conciliation is the most honorable decision" (*al-s/.ulh/. sayyid al-ah/.ka/-m*). The Qur'a/-n and the Prophetic Tradition (*Sunna*) laud the role of mediators and uphold the value of compromise. The Prophet was said to have favored conciliation and to have mediated in many public and private disputes. His Companions and the first caliphs did the same. 'Umar b. al-Khat/.t/.a/-b is said to have preferred conciliation to adjudication: "Dispel the disputants until they settle amicably with one another". *S/.ulh/.* is an Islamic institution consensually approved by Muslim scholars. It has a specific meaning in the expression *da/-r al-s/.ulh/.* which exceeds the scope of this note.

According to the doctrine, *s/.ulh/.* is a form of contract (*'aqd*) consisting in an offer (*ija/-b*) and an acceptance (*qubu/-l*). Its object can be material or non-material, but it cannot be a prohibited commodity, as confirmed in the *h/.adi/-th*: "Conciliation is permissible except when it makes forbidden that what is permitted and makes permitted that what is forbidden (*h/.ara/-m*)". *S/.ulh/.* is both the procedure and the outcome to which it leads. Outside the scope of the judge's supervision, litigants might agree to compromise, but this is made conditional upon its not being inequitable or contradictory to the principles of the *shari/-'a*. But *s/.ulh/.* can also be decided by the judge, like in family matters where e.g. divorce cannot be pronounced without any attempt at reconciling the spouses.

The importance of *tah/.ki/-m* and *s/.ulh/.* varies from one doctrinal school to another. As a whole, H/.anafi/- and Sha/-fi'i/- schools are more favorable to the use of arbitration and conciliation than the Ma/-liki/- one, which subordinates both to the judge's supervision (Othman, 2007; Hentati, 2007). The rise of adjudication instead of conciliation is a phenomenon that can be historically observed with the rise of the modern state and the increasing influence of legislation. As a matter of fact, customary law (*'urf*) is more open to the practice of arbitration and conciliation, although state law proved permeable to the influence of customs (Berque, 1953; Chelhod, 1971; Dupret, 2005).

Actual cases of arbitration and conciliation are little studied for the pre-20th century period. However, the rise of legal studies focusing on social practices instead of theoretical doctrines made it possible to observe how these two modes of conflict resolution develop in the context of contemporary societies. Nowadays, arbitration and conciliation take place inside and/or outside courtrooms, following the principles

of state law, customary law or *shari/-'a* law, or a combination of them. In the Kingdom of Saudi Arabia, for instance, *tah/.ki/-m* is governed by a special law, which combines the Islamic and Western concepts of arbitration, while *s/.ulh/.* is encouraged by judges and practiced in the corridors of the courts, sometimes under the supervision of a board in the Ministry of Justice (Alsheikh, 2011). The notion of *s/.ulh/.* has also taken a political dimension within the frame of national reconciliation processes, like in Iraq and in Algeria. Moreover, very often, the reference to Islam recessed to the backstage, as is the case with commercial arbitration that is performed under the name of *tah/.ki/-m* but follows the principles of *lex mercatoria*. Within courtrooms and especially in family or personal-status law (*al-ah/.wa/-l al-shakhs/.iyya*), many national legislations make an obligation for the judge to appoint conciliators who must attempt at reconciling the spouses before he can issue a ruling of divorce. For instance, in Egypt, where personal-status cases are adjudicated by specialized circuits within the courts, judicial divorce on the ground of harm is organized by Article 6 of the Law No. 25 of 1929, which states: "If the wife alleges that the husband mistreated her in such a way as to make it impossible between people of their social standing to continue the marriage relationship, she may request that the judge separate them, whereupon the judge shall grant her an irrevocable divorce if the harm is established and conciliation seems impossible between them. If, however, he [viz., the husband] refuses the petition and she subsequently repeats the complaint without establishing the harm, the judge shall appoint two arbitrators and he shall judge according to the provisions of Articles 7, 8, 9, 10 and 11". In a similar way, Article 20 of law No. 1 of 2000 regulating unilateral divorce at the wife's request (*khul'*), stipulates that the court must not grant a divorce through *khul'* without a prior attempt at reconciliation (*muh/.a/-walat al-s/.ulh/.*). In case the attempt at conciliation fails, two mediators must be appointed by each party from among the members of their respective families. They must then try for a maximum period of 3 months to reconcile the couple (*al-s/.ulh/. baynahuma*). If they fail by the end of that deadline, and if the woman maintains her claim, the judge must dissolve the marriage, even if the husband does not agree (Bernard-Maugiron, 2007). Actual conciliations take generally the form of procedures conducted by specialized institutions accomplishing their task in a bureaucratic way (Dupret, 2007). What was said regarding Egypt holds true in most Muslim contexts, like Malaysia (Peletz, 2013), Israel (Abou Ramadan, 2006), or Sudan (Ben Hounet, 2012a).

Outside courtrooms, one observes in many Muslim societies the convening of customary assemblies adjudicating, in a formal or informal way, in variegated types of conflicts. This kind of justice co-exists or is intertwined with the state and its institutions. Actually, terms like customary assemblies (*maja/-lis 'urfiiyya*), assemblies of Arab men (*maja/-lis al-'arab*), conciliation (*s/.ulh/.*) and arbitration (*tah/.ki/-m*) refer an infinite variety of conflict-resolution devices. It is not only linked to the survival of tribal structures, like in Yemen (*al-^cA/-li/-mi/-*). It also concerns the domains of family, trade, and even crime. There is a dynamic of close influence of state, popular and customary norms. Often, official and unofficial procedures are

conducted in parallel by the litigants (Ben Hounet, 2012b). For instance, a commercial dispute can follow simultaneously a local, conciliatory path and a state, judicial one. It must be added that *s/ulh/* is most often a very mundane practice for solving mundane arguments. Therefore, it would be misleading to conceive of it as a formalized institution, whereas it has only a loose connection to either *fiqh/* or positive law, if any. It carries the positive connotation of *s/ulh/* in Arabic, but its shape proves much more empirical (Drieskens, 2005).

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