

An Analytical Study Of The Necessity, Importance, History, And Legitimacy Of Arbitrate In Human Demography

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Abstract

This analytical study examines the necessity, importance, history, and legitimacy of arbitration in human demography. It explores the linguistic and terminological meanings of "Hakum" (arbitrate), the historical evolution of arbitration, and its role in pre-Islamic Arab society. The study highlights how Islam preserved and endorsed beneficial pre-Islamic customs, including arbitration, aligning them with its fundamental teachings. The legitimacy of arbitration is supported through the Quran, Hadith, consensus, and analogy. Furthermore, the research emphasizes arbitration as a swift, cost-effective, and efficient dispute resolution method that prioritizes mutual agreement and reconciliation. Unlike modern legal systems, arbitration decisions are final, preventing prolonged appeals and generational conflicts. This study underscores the wisdom behind the Islamic endorsement of arbitration as a solution to societal disputes.

Keywords: Arbitration, Hakum, pre-Islamic laws, Islamic law, Quran, Hadith, consensus, analogy, dispute resolution, reconciliation.

Introduction :

Linguistic Analysis of "Hakum" (Arbitrate):

"Hakum" is derived from the root "Tahkim," which is a form of the verb "Hakama Yahkumu" meaning "to arbitrate" between two parties. It also carries the connotation of "testing" or "examining." The Prophet Muhammad (ﷺ) said:
” حَكَمَ الْيَتِيمَ كَمَا تَحْكُمُ وَلَدَكَ ”

"Judge the orphan's case as you would judge the case of your own child,"

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implying that one should carefully assess an orphan's ability to manage their inheritance before handing it over. "Hakum" can also mean "to restrain" or "to prevent," which is why a ruler is called a "Hakim," as they are responsible for preventing injustice.¹

In Arabic, a third party involved in resolving a dispute is referred to as both "hukm" and "muhkim." The act of appointing a third party to mediate between two disputing parties is known as "tahkim"² as it is explained in Qamoos al-Mu'hit.³

The Terminological Meanings of “Hakum”

Jurists have defined the “Hakum” with many statements. The datial is as follows:

The parties to a dispute make someone a mediator with their mutual consent to resolve their mutual dispute and claim is called takheem. ⁴

Allama Al-BarQani has written its meaning as follows :

When the parties to the dispute appoint someone as a mediator to resolve a dispute, then the mediator becomes in favor of the parties, just as the judge has authority over all the people, but the position of the order is like a reformer for people other than the parties. ⁵

The above passage is explained as follows:

The fact of mediation is that the parties voluntarily choose a third person instead of the judge to decide between them in the light of their claims. ⁶

Some contemporary Arab scholars have defined the ruling as follows:

Translation: It is an agreement in which two or more people agree to give one person or more people the option to resolve an ongoing dispute or future dispute instead of going to the judge.⁷

The Need for and Importance of Arbitration in Human Populations:

Islam is a natural religion. It has always guided its followers in human populations towards a way of life that is easy to implement and follow. This is why, whenever the Prophet Muhammad (peace be upon him) was given a choice between two things, he chose the easier one to follow. Human beings cannot fulfill their basic needs without living in societies and communities. And in societal and communal life, conflicts arise among people over interests, a phenomenon that has been present since the first human generation. As a result of these conflicts, disputes arose in societal life, and the need to resolve these disputes gave rise to the concept of arbitration. Thus, the process of arbitration began in societal life, and people became accustomed to it. Disputes in people's societal lives began to be resolved without bloodshed, giving people a sense of security for their lives and property.

Allama Masoudi, in his statement, writes:

In ancient times, people believed that their well-being and interests lay in power, but this notion did not last long. Eventually, peace and arbitration replaced power when tribal leaders and wise individuals realized that their benefit was not in acquiring and using power. The pursuit of power often ignited wars and brought calamities. Particularly when there was the option of arbitration for resolving disputes, which could save people's lives and wealth, and foster better relationships among them.⁸

When people saw that arbitration was the easiest way to end disputes in settled life, they appreciated it. By appointing an arbitrator, a dispute could be resolved in a short time, not through coercion but with mutual consent and peace. Justice was served, and there were no extraordinary costs involved. They looked at this process with admiration, and until judicial

systems were established with organized governments, arbitration was the only means of achieving justice.⁹

In later historical periods, the Greek society was the first to benefit from arbitration. This led to the resolution of population-related, personal, and group differences. Through arbitration, they developed a method to solve religious, economic, and social problems. Over time, the form of arbitration changed during different eras. Initially, the claimant and the defendant were subjected to various difficult tests, such as placing their hand in boiling water, holding hot coals, or walking on them. Sometimes, the parties would fight, and the decision would be in favor of the victor.¹⁰

In pre-Islamic Arab society, there was no organized personal or public government to prevent social crimes with power, to strengthen settled life. Each tribe had a leader who would settle internal and external matters according to customary methods. Since the leader was wise and insightful for his time, people had no choice but to accept his decision. Occasionally, a dispute would arise between two tribes, and a third tribe's leader would be appointed as the arbitrator to resolve the issue. Sometimes, a dispute over leadership would occur between two individuals of the same tribe, and this would also be resolved by appointing a third tribe's leader. At times, they also sought the help of soothsayers for resolving disputes. Historians have mentioned several famous arbitrators, including Hajib bin Zurarah, Aqra' bin Habis, Qis bin Sa'idah, Aktham Saifi, and Abdul Muttalib bin Hashim.

Dr. Shehnaz writes that in pre-Islamic times, i.e., in the era of ignorance, it was customary in human settlements that the parties involved in a dispute would appoint someone as an arbitrator and wait for his decision. If the decision was not acceptable to either party, they would appoint another arbitrator. If the second decision was also unacceptable, they would appoint a third person as arbitrator, and this process continued until they found an arbitrator whose decision was acceptable to both parties. This practice continued until the time of the Prophet (PBUH).¹¹ Al Hujlani has Written:

In the beginning, people used to resolve their disputes through the method of arbitration, a practice they had learned from the time of ignorance (pre-Islamic era). They were free to accept or reject the decision of the arbitrator. Then, one of them presented his case to the Prophet Muhammad (PBUH), but he was not satisfied with the Prophet's decision. As a result, the following blessed verse was revealed¹².

فلا وربك لا يؤمنون حتى يحكموك فيما شجر بينهم... الخ¹³

No, by your Lord! These people cannot be believers unless they accept you as a judge in their disputes.

After the Prophet Muhammad (PBUH) assumed the role of judge and received divine support, the pre-Islamic custom of rejecting a judge or arbitrator's decision and going to another until a desired ruling was achieved came to an end. With the establishment of the Islamic state, it became mandatory for the residents of the state to resolve their disputes through the Prophet's court, and to humbly accept whatever decision was issued by this supreme court.

When we reflect deeply on the concept of arbitration, we find two forms of goodness in it. First, it resolves the disputed matter, and second, unlike the judicial courts, the issue is settled through reconciliation, which removes ill feelings and grievances from the hearts. Additionally, arbitration offers an ease in resolving matters, which aligns with the objectives of Islam.

Allah Almighty says:

”يريد الله بكم اليسر ولا يريد بكم العسر“¹⁴

Allah wants ease for you, he does not want hardship for you.

Arbitration offers ease, as the parties involved, no matter where they are, can appoint an arbitrator for a modest fee and resolve their dispute. This convenience is not available in the judicial system.

In a formal judicial system, a judge schedules a specific date for the hearing, and there is a specific office where one has to wait for their turn. This process involves effort, and results in the loss of both time and money.

A Brief History of Arbitration

Evidence of Arbitration in Pre-Islamic Laws:

After establishing that arbitration is sanctioned by Islamic teachings through the Qur'an, Hadith, consensus of the ummah, and analogy, we can also observe that arbitration was endorsed in previous religious laws. A narration from Hazrat Abu Huraira supports this.

The Prophet Muhammad (PBUH) said: "There were two women, each with her own child. During this time, a wolf came and took away one of the children. One woman said to the other, 'The wolf has taken your child,' but the other woman said, 'No, it has taken your child.' They took their case to Prophet Dawood (David, PBUH), who ruled in favor of the older woman. While they were on their way back, they passed by Prophet Suleiman (Solomon, PBUH) and told him what had happened. Suleiman said, 'Bring me a sharp knife so that I can divide the child into two and give each of you a half.' The younger woman quickly said, 'Do not cut him; he is her child.' So, Prophet Suleiman ruled in favor of the younger woman¹⁵".

This story clearly shows that arbitration was permitted in previous religious laws.

The Concept of Arbitration in Pre-Islamic Arab Society:

Before Islam, the concept of arbitration was well-established in the Arab society of the Age of Ignorance. The Arabs would consult soothsayers and diviners to seek the correct arbitrate in any issue or case that arose, and they would appoint them as arbitrators in their disputes.

Al-Raghib al-Isfahani writes: "Diviners (arraf) were similar to soothsayers (kahin). The only difference was that diviners foretold the future, while soothsayers would speak about past events¹⁶".

Masoudi wrote that diviners were considered of lower rank than soothsayers. He mentioned the following names among the famous diviners of Arabia:

Al-Ablaq Al-Azdy(الاذدى), Al-Aslah Al-Dahry(الاصلاج الدهرى), Urwa bin Zaid Al-Azdy(عروه بن زيد الازدى), Urra'f Riba'h bin Ajlah(عراف رباح بن عجله)¹⁷

The Role of Arbitrator in the Age of Ignorance:

During the Age of Ignorance, arbitrators were appointed to resolve significant disputes and unravel complicated issues. One of the best examples of this is the appointment of Ya'mar bin Auf al-Shaddakh as arbitrator in the dispute between the chiefs of Banu Khuza'ah and Qusay bin Kilab of the Quraysh over the custodianship of the Kaaba.

Ya'mar bin Auf al-Shaddakh's Decision as Arbitrator :

The Banu Khuza'ah had been the custodians of the Kaaba for centuries, but Qusay bin Kilab claimed his right to the custodianship, arguing that a son has a greater right to his father's inheritance than others. A bloody war erupted between Banu Khuza'ah and Qusay over the issue, causing significant casualties on both sides. Eventually, Ya'mar bin Auf was appointed as the arbitrator. He faced several issues that required resolution: should the custodianship of the Kaaba remain with Banu Khuza'ah, or did Qusay have a greater right to it? Who should be

entrusted with the leadership of Mecca? Which killings should be considered justifiable, and for which should blood money (diya) be paid?

While Qusay claimed his right to custodianship based on inheritance, this role had been in the possession of others for centuries. An important question arose: does the passage of time nullify a rightful claim?

Ya'mar bin Auf announced his decision in a few words in the courtyard of the Kaaba. As a result, after centuries of custodianship by Banu Khuza'ah, Qusay was granted control of the Kaaba, and he also gained leadership of Mecca. The deaths of Banu Khuza'ah's men were deemed justifiable, while blood money was owed for the men killed from Qusay's side. Political and spiritual authority was thus given to Qusay and the Quraysh tribe. The crown of honor and greatness was placed on the heads of Qusay and the Quraysh by all of Arabia, and no opposition arose from any side.

Another significant case is that of Nafil bin Adi, mentioned by Muhammad ibn Jarir al-Tabari in his *Tarikh al-Tabari*, Volume 2. Similarly, the case of the recovery of the Well of Zamzam and the issue of shared rights is noteworthy in the context of arbitration.

The Prophet's Decision Regarding the Placement of the Black Stone Before His Prophethood :

Approximately five years before the Prophet Muhammad's (PBUH) prophethood and the announcement of his mission, the Quraysh of Mecca decided to rebuild the Kaaba, raising its walls and adding a roof. Placing the Black Stone was considered a great honor by the Quraysh, and when the time came for this, a dispute arose over which tribe should have the honor of placing it. The Prophet (PBUH) resolved this dispute, saving the tribes from a major conflict. This event, which occurred just five years before his prophethood, saw the Prophet (PBUH) act as an arbitrator for the leaders of the Quraysh, delivering a decision so exceptional that it was impossible to improve upon¹⁸.

Islam Preserved the Concept of Arbitration in Arab Society :

Islam retained certain pre-Islamic Arab customs and traditions for the convenience of the people, if they did not conflict with its core teachings. This is why the newly converted Arabs found no sense of alienation when they saw that many Islamic rulings were in harmony with their traditional practices. Arbitration, like many other practices, became part of Islamic teachings, as it was already a part of pre-Islamic Arab society's values.

The core philosophy of Islamic teachings has always been to promote a positive and harmonious society, eradicating the causes of disputes and conflicts. If such undesirable situations do arise, Islam aims to resolve them as quickly as possible to foster peace and tranquility. The Qur'an provides clear guidance for rectifying situations of division and discord. The family is the fundamental unit of society. Multiple family units come together to form a society, which is why Islam emphasizes the importance of stability within the family. This stability can only be achieved when there is harmony between spouses. If there is discord between husband and wife, it can negatively impact the children and the families involved, complicating matters further. Islam, therefore, encourages arbitration as a means of resolving disputes within the family, aiming to preserve this essential unit of society. Allah Almighty says: *’وان خفتم شقاق بينهما فابعثوا حكما من أهله و حكما من اهلها ان يريدوا اصلاحا يوفق الله بينهما ان الله كان عليما خبيراً*¹⁹،

If you fear a split between them (the spouses), send one arbitrator from his people and one from her people. If they desire to set things right, Allah shall bring about harmony between them. Surely, Allah is All-Knowing, All-Aware.

Here, Allah Almighty entrusted the matter to two arbitrators (known as *hakam*), and these arbitrators should ideally be from the family members of the husband and wife so that, with a deep understanding of the situation, they can resolve the issue with goodwill and sincerity. Similarly, Allah has also placed the responsibility on Muslims to strive for reconciliation and understanding in cases of group or national disputes so that a just and fair society can be established, and Muslims can be protected from bloodshed among themselves. This reconciliation and understanding can be achieved through arbitration. However, if one party becomes rebellious or oppressive against the other, the Qur'an has provided the option of using force against the oppressor.

The Qur'an gives clear guidance on this matter.

”وان طائفتان من المؤمنين اقاتلوا فاصلحوابينهما فان بغت احدهما على الأخرى فقاتلوا التي تبغى حتى تفنى إلى أمر الله“²⁰

If two groups of the believers fight each other, seek reconciliation between them. And if one of them commits aggression against the other, fight the one that commits aggression until it comes back to Allah's command.

In this verse, the Qur'an clearly commands to bring about reconciliation, and those responsible for reconciliation cannot enforce it by force, as this is the role of a judge or the ruling authority. Those who mediate reconciliation are “*hakam*” (arbitrators), not rulers .

The Legitimacy of Arbitration:

The Qur'an and Arbitration :

Several verses in the Qur'an address the topic of arbitration. One key instance is when tensions arise between a husband and wife. Family disputes are particularly significant because families are the building blocks of society. If there is discord within families, the society can never achieve stability. In such situations, the Qur'an provides clear guidance: first, offer advice and counsel; if they do not comply, separate their sleeping arrangements; and if they still do not comply, administer a light reprimand.

”واللاتي تخافون نشوزهن فعظوهن واهجروهن في المضاجع واضربوهن فان اطعنكم فلا تبغوا عليهن سبيلا ان الله كان عليا كبيرا“²¹

As for women of whom you fear rebellion, convince them, and leave them apart in beds, and beat them. Then, if they obey you, do not seek a way against them. Surely, Allah is the Highest, the Greatest.

If such measures lead the wives to reform, then that's fine; otherwise, the command is to appoint arbitrators .

”وان خفتم شقاق بينهما فابعثوا حكما من اهله و حكما من اهلها ان يريدوا اصلاحا يوفق الله بينهما ان الله كان عليما خبيرا“²²

If you fear a split between them (the spouses), send one arbitrator from his people and one from her people. If they desire to set things right, Allah shall bring about harmony between them. Surely, Allah is All-Knowing, All-Aware.

This command shows that the negligence of those responsible in this regard is desirable in Islam. However, to fulfill this important duty, Allaah preferred mediation of mediator because the aspect of reconciliation prevails in it. Even if a decision is made between them by the oppression of the judge, then if the bitterness of their hearts is not removed, then it cannot be sustained.

Regarding the glorious revelation of these verses, it is narrated in hadiths that the Jews came to the Service of the Prophet (peace and blessings of Allaah be upon him) and asked for orders

about an adulterous man and woman. The Holy Prophet said, "What is the ruling on rajam in the Qur'an?"

"We only humiliate them and they are flogged," he said. 'Abd Allah ibn 'Abd al-Salam said, "If you lie, then there is a verse of Rajam in the Ra'ah, so the verse of Rajam was seen." The Holy Prophet ordered both of them to perform rajam and they were made to do rajam.²³

These verses clearly establish the legitimacy of tahkim (arbitration), as evidenced by the phrase **فاحكم بينهم** (so judge between them). Although the legitimacy of tahkim impacts the authority of the Islamic state and the judge, Islamic law has addressed this by assigning certain responsibilities to government officials and permitting arbitration to ease the judge's burden. However, it is important to clarify that arbitrators are only authorized to settle financial matters and are not permitted to adjudicate hudud (fixed punishments) or criminal cases. Additionally, since the Prophet Muhammad (PBUH) was both the Imam and the ruler of the Muslims, and the Jewish community was part of the Islamic government in Medina, the Prophet's command to implement hadd al-rajm (the punishment of stoning) was enforced.

Hadith and Arbitration

The legitimacy of tahkim (arbitration) is also clearly established through Hadith, and many hadiths related to this have been transmitted from the Prophet Muhammad (PBUH) .

Shurayh bin Hani' narrates from his father Hani' that when I came to the Prophet Muhammad (PBUH) with my people, the Prophet heard my people referring to me as Abu al-Hakam (Father of Arbitrate). The Prophet called me and said, "Judgment belongs to Allah alone, and only Allah's judgment is in effect. Why have you taken the title Abu al-Hakam ?" Hani' replied that when there is a dispute among my people, they come to me, and I decide between them, and both parties are satisfied. The Prophet said, "This is indeed a good thing, but do you have children?" I replied that Shurayh, Abdullah, and Muslim are my sons. The Prophet asked who is the eldest among them. I replied that Shurayh is the eldest. The Prophet then said, "You are Abu Shurayh ," and he prayed for me and my son. This hadith clearly indicates the legitimacy of tahkim (arbitration) because the Prophet was pleased upon learning the reason for the title Abu al-Hakam²⁴.

Another hadith narrated by Abu Sa'id al-Khudri confirms the legitimacy of tahkim through the actions of the Prophet. The Prophet approved and praised the arbitrate of Sa'ad bin Mu'adh, and the Prophet would not praise anything that contradicts the fundamental principles of religion.

Practice of the Companions and Arbitration :

The practice of arbitration by the Companions of the Prophet is also well-documented. Here, several brief narrations are mentioned.

- Jarir ibn 'Abd al-Hamid narrates from Abi Ishaq and Abi Ishaq from Sha'bi that 'Umar rode a horse to see it before buying it. In the meantime, the horse fell and got injured. Hazrat Umar said to Bai'ah, "Leave it." He didn't. Hazrat Umar said, "Then make someone a mediator." The owner of the horse said that Sharih is called a mediator. So both of them made him a mediator. Sharih said, "Amir al-Mu'minin, take what you have taken or return it the way you had taken it." ²⁵

Hazrat Umar said that this is the decision made. And he ordered him to go to Kufa and appointed him judge of Kufa.

- Hazrat Umar and Hazrat Abi Ibn Ka'b had given Hazrat Zaid bin Thabit the authority to decide their dispute .

Al-Bayhaqi, with his chain of narrators, has reported from Imam Shabi that there was a dispute between Umar and Ubayy bin Ka'b. Umar said:

"Appoint an arbitrator between me and yourself."²⁶

So, both parties appointed Zaid bin Thabit as the arbitrator. Both went to Zaid bin Thabit. Umar said:

"We have come to you for arbitrate."

Arbitration used to take place in the house of Zaid bin Thabit. The narrator says that Zaid told Ubayy bin Ka'b, "The oath is upon the Commander of the Faithful; if you wish, you can forgive him." The narrator adds that when they came to Zaid, he seated Umar in a prominent place on his bed. Umar said, "This is your first act of injustice. Seat me and my adversary together." Both parties presented their cases, and when Umar swore an oath, the decision was made in his favor.

During his caliphate, Umar issued a decree to the judges instructing them to return disputes between relatives to their own tribes so that they could sit together and find a way to reconcile. The words of your decree are:

Return the cases of relatives to them so that they can find a form of peace among themselves, because the decision of the judge causes hatred in the hearts.²⁷

The esteemed jurists have used this decree of Umar as a fundamental basis for arbitration, jirga, and panchayat decisions. They have also noted that although Umar's decree pertains to disputes between relatives, the reason and wisdom behind the decree—that judicial decisions can create enmity and animosity in hearts—is applicable to both relatives and non-relatives. Therefore, this method should also be applied to non-relatives²⁸.

7). After the Battle of Siffin between Ali and Amir Muawiya, both parties agreed to arbitration. Ali appointed Abu Musa al-Ash'ari, and Amir Muawiya appointed Amr ibn al-As as arbitrators, giving them the authority to decide²⁹.

The Legitimacy of Arbitration by Analogy

The principle of analogy (Qiyas) supports the permissibility of arbitration for two rational reasons:

1. Just as the parties involved in a dispute have the right to appoint an arbitrator to make decisions on their behalf, they also have the right to grant this authority to someone else. This means they can delegate the authority to arbitrate and decide to another person.
2. If the permissibility of arbitration were denied, it would create difficulty and hardship for people. It is well known that the default rule for things is permissibility unless there is evidence indicating prohibition or impermissibility. Since the permissibility of arbitration facilitates ease for people, saves time, and provides a solution for those who find it difficult to access a judge or feel uncomfortable appearing before one, the allowance of arbitration aligns with reason and analogy.

The Wisdom Behind the Legitimacy of Arbitration:

Every principle in Islam is backed by a philosophy and purpose, whether it concerns the individual, society, or government. In social life, people's rights and duties are interconnected and continuously evolving. Therefore, Islam has prioritized an easy method for resolving

disputes, and arbitration—meaning mediation—offers a level of convenience that the judicial system does not.

Arbitration not only resolves disputes but also helps to alleviate personal grudges and enmity, as it emphasizes reconciliation. As noted by Al-Masudi:

The need for arbitration has always existed because it alleviates people's difficulties. Allah desires ease for people and does not want them to face hardship. If arbitration were not accessible, people would face difficulties, as appearing in a court for every dispute can cause complications. Thus, the legitimacy of arbitration is essential.

Specifically, presenting a case in a court can lengthen the process, as judges are occupied with an ongoing series of judicial matters. This wastes the time of the parties involved and adds unnecessary burden to the ruling authority, potentially leading to the loss of some rights. Therefore, Sharia allows for arbitration to prevent difficulties and provide ease for people³⁰.

Conclusion:

1. The legitimacy of arbitration is established through the Quran, Sunnah, consensus, and analogy.
2. Islam has maintained the practice of arbitration from the pre-Islamic era.
3. Pre-Islamic laws also used arbitration for decision-making.
4. Islam has endorsed the beneficial customs of pre-Islamic Arabia that do not conflict with its fundamental teachings.
5. Analogy shows that if arbitration were not permitted in human societies, it would cause difficulty and hardship for the public.
6. This research also reveals that arbitration is a quick, cost-effective, and efficient method. Dispute resolution through arbitration occurs through mutual agreement and reconciliation, rather than coercion.
7. Decisions made through arbitration cannot be challenged, unlike in the current system where appeals lead to waste of time, resources, and prolonged disputes across generations.

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