ISLAMIC ARBITRATION PROSPECTIVE THROUGH ANALYSIS OF THE EARLIEST GREEK ARBITRARY CASE FROM HOMER'S ILIAD: MENELAUS VS. ANTILOCHUS

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ABSTRACT

The primary objective of this paper is twofold. First is to show the free choice of alternative dispute resolutions, especially arbitration in contractual cases, existed during the ancient Greek period when Homer's mythical Iliad was written. The Homer's arbitration case, Menelaus vs. Antilochus, successfully fulfilled the main mission of alternative dispute resolutions by illustrating an elimination of conflict without litigation. The entire work relating above part is to support the idea that a faith based Islamic arbitration is far more effective to solve modern disputes in both local and international cases.

Keywords: Islam, arbitration, dispute, myth, Iliad, Homer.

INTRODUCTION

The first part of this paper attempts to find out if myth contains any benefits in legal research in the example of Homer's work. Along with background information about the author and his work's life, the second part contains illustrations and analyses of the earliest arbitration case between Menelaus and Antilochus. To relate the benefits of the analysis to modern notions of jurisprudence and find contractual nature of the case, the dispute is tried to be interpreted through contemporary body of laws in the third part of this paper. Lastly, reasons trying to prove needs and demands of using Islamic alternative dispute resolution are briefly stated.

Greek myth and legality

The notions clarifying preliminary origins of 'arbitration' are difficult to track down as historians in different fields have brought up various concepts. For instance, Derek Roebuck claims that the absence of general history of arbitration can only be found in the studies of general historians, while legal historians, in accordance with their rich primary sources, devoted their concentration on development of arbitration throughout history [1]. In other words, everlasting alterations of arbitration both in process and definition refuses to relate contemporary arbitration as an inheritance of which from the past. There are only rare historical data found illustrating early traces of arbitration [2]. On the other hand, just after the birth of Islam, in the beginning of 7th century, Islamic documents shows the traces of Islamic arbitration and official formalization of Islamic alternative dispute resolution mechanisms through *Qur'an*, holy book of Muslims, and *Sunnah*, life and teachings of the prophet *Muhammad* (s.a.v.) [3].

Some claim, mythology of ancient Greek origins has the first spots of alternative dispute resolutions in classic form of contemporary arbitration from a couple of poems passed down orally, composed by *Hesiod (Theogony; Works and Days)* and *Homer* (*Iliad; Odyssey*) during so-called Dark Ages, from 10th to 8th century B.C. In order to have mutual understanding of reasons behind referring to ambiguous fiction-like myths, it is important to identify the definition, potential benefits and usage of Greek myths as legal academic material, before going further. There is a common paradox as myths are not facts, but, in reality, even some nations believed them, of course not as a true history. Maybe thus, Greek Odyssey and Iliad have survived until now. The existence of them without written literature was with the help of oral medium of songs performed by ancient singers called *rhapsodes* [4]. Despite, many attempts to get rid of their activities, due to some political reasons, they managed to survive until the end of the 3rd AD [5].

Illustration 1: "Homer" by Jean-Baptiste Auguste Leloir at Musée du Louvre [6]

They would compete with each other with recitations at various events like festivals and races with big audiences [7]. In addition, Hesiod and Homer did not live during the Trojan wars and when rhapsodes started to perform poems, they song lines from Hesiod and Homer's work. Even there is a claim to be accentuated that Homer was sightless [8].

Illustration 2: "Blind Homer at the Edge of the Sea" by Jean Baptiste Raphaël Urbain Massard at Princeton University Art Museum [9]

Basically, this means that they are not true and at the same time big crowds spent hours to listen passionately and believed throughout history as if there is a bit of truth inside. Moreover, due to desire of gaining public attention and recognition, in the singing battles, they did whatever they could. According to professors of classics, Greek myths does not represent history, so they cannot be factual documents. Nevertheless, they are historical masquerades and the fact that it has the possession of a great deal of cultural importance makes them more than entertainment, so they are not only for entertainment purposes. Furthermore, Greeks did not search for guidance enlightening the way of living, nor shaped their beliefs from them, so they are not religious scriptures expressing social creeds or reasons of morals. Greeks had some views about god and man, for sure, and the tragedians included the ideas inside those myths, but they were never considered them as representatives of faith. So myths are not statements that must be believed which makes them unable to be dogmatic. Hitherto, it is clear what myths are not – they are not historic facts or entertainment or a religion. Unfortunately, the exact definition of what myths are, which can be freely used, simply does not exist. However, supposedly, it is rational to accept myth as significant collection of data as any others, which may give a researcher only hypothetical varying explanations that hopefully assist them to understand a subject matter [10].

Arbitration case from Iliad – book xxiii: Menelaus vs Antilochus

To begin with, Homer, the author of Iliad and Odyssey (in heroic and fantastic genres, in turn), is assumed to be from Ionia (Anatolia or Asia Minor Asian Turkey). Homer's Iliad consists of 24 books of epic and mythical poems that narrates the story about Trojan War between Greeks and Troy, west Anatolia, dated back, by some historians, to 12th and 13th century B.C.E. Primarily, it focuses on *Achilles*, the greatest Greek warrior, hero and the Homer's work only included few final months of the Trojan War, particularly, last moments of Troy siege including Greek trial descriptions. One legal concern is related to the place, *Agora* which was a holy destination where elders sit in circle to see conflicting cases and there is an epic scene about two men agreeing to bring their case for them to settle over blood-price of a murder. For some historians this is one of the earliest examples of Greek law activities of trial in action [11]. As instances of avoiding litigation is the main topic of this paper, details of this case is far from being so necessary. Thus, one other story of Homer's Iliad, in book 23, is always pointed as an example of arbitration practice avoiding legal trials. It happens after the death of Patroklus who was a close friend of Achilles and that's why book 23 was called *"Of the athlete-strife at the funeral-feast of the dead Patroclus"*. The case was between Menelaus and Antilochus where the dispute arose due to a race competition. Famous chariot races were quite important event comparing to others and thus it was described in an in-detailed way [11]. After Diomedes, a leader during Trojan War, won the race and he got a woman and tripod as an award, but conflict was about the next place. The Pylos' king Nestar's son, Antilochus, won the second place by passing Menelaos, the Spartan king, by trick. Aggrieved Menelaos complained and requested Argives to judge this dispute without considering personal standings. *(a classical scholar and translator, Arthur Sanders Way's version of the Iliad)*

> *"Antilochus, once thou wert wise: - what sayest thou now of thy deeds?*
> *Thou hast poured contempt on my prowess, and thwarted my chariot-steeds,*
> *Thrusting before me thine own: - thou know'st they be worser far.*
> *Come now, ye lords of the Argive men, and captains of war.*
> *Judge ye betwixt us twain - yet accept not persons, I pray,*
> *Lest one of the brazen-harnessed Achaians haply should say:*
> *'By lies did the lord Menelaus Antilochus overbear.*
> *And hath taken the mare away, yet worser his own steeds were,*
> *Howbeit in prowess and strength himself was the mightier one.'"*[12]

After a while he changed his mind expressing the mistrust to Argives and he offered individual settlement using oath swearing that was composed by himself. He announced to determine the case by himself, without others, but with the oath. He called, Antilochus to stand according to their customs, to put his hand on his steeds and swear by Poseidon that he did not deliberately and with tricks get in the road of his horses.

"Nay, but myself will be judge: of the Danaan host there is none,
I ween, shall upbraid me herein, for that upright my judgment shall be.
Antilochus, fostered of Zeus, draw nigh, as behoveth thee:
Stand thou in front of thine horses and car, in thine hands hold thou
The lithe whip, even the same wherewithal thou wert driving but now.
By the Earth-shaker, Girder of Lands, swear, laying thine hand the while
On the steeds, that thou didst not foul my chariot by wilful guile."[12]

However, Antilochus rejects swearing the oath, but apologizes and admits his ignorance, hasty temper because of his young age and he gave up, after which Menelaos forgives him.

"But to him Antilochus prudent of spirit made reply:
"Bear with me now: far younger, O King Menelaus, am I
Than thou, for in might and in majesty greater thou art, O King.
Thou knowest a young man's wit, and whence his offences spring;
For hasty he is of his purpose, and light of his counsel is he.
Let therefore thine heart be patient: the mare, I will give her to thee,
The mare which I won: yea, though of the wealth in my tent thou shouldst
Some greater thing, I were fain straightway to give thee the same, claim
Rather than, O thou fostered of Zeus, to be cast evermore
Out of thine heart, and to stand a transgressor the Gods before.""[12]

All in all, intended legality of this dramatized case can be detected, at least, in the following ways. First, both disputed parties accepted that there was a dispute between them as the blamed party did not reject anything. Second, both of them accepted to solve their disputes without formality. Despite obscurity of the reasons behind the lack of trust for Argives, choosing alternative way of settlement was a pure example of avoiding judicial trial. Third, they reconciled in public since the process occurred in the presence of witnesses after one had chosen an oath-challenge. Fourth, the oath-challenge, in our case, dropped owing to great fear of gods' possible punishment for the perjury. Fifth, one of the vital points to note is that the faith and customs of parties acted as the only governing law in the case. This shows the legitimate approach towards vindication of this manner was a totally approved social norm in informal dispute resolution. Next, procedural dominance was hold by one of the litigants who himself expressed as justice. This may be because he was a king and historically decisions of rulers with this title were final and binding. Alternatively, he might be someone among people to whom conflicting parties would refer as a mediator or arbitrator. Another reason could be the vivid breach of a wrongdoer with a big number of witnesses. Whatever reason it might be the one member of conflicting party successfully played the role of a judge. The final point is that, not only agreement of the other side, but also approval of the audience, who were capable of creating massive protests in case if there is injustice, played the main role.

Identifying and interpreting body of law

Turning to the other side of the coin, there are different views on attaching a particular substantive body of law to the nature of the case in which dispute arose from chariot races. In particular, if the case is brought to present time, the challenge would be to identify the domains of law that this dispute encompasses. Nowadays, it is insisted that despite an astringent debate over its existence, there are not any body of laws which exclusively make up "Contest law" or "Sports law", and if allegedly, there is one it is argued to be totally a misleading misnomer. In

general, identifying legal bodies is commonly done just as it is carried out in many other areas, various principles of law from appropriate laws are adapted to be applied in [13]. Simply put, the amalgamation of laws constituting competition and/or sports law are related to impressively a big list of issues in domains of contract, constitution, tax, tort, … and crime and they are just applied to the industry of contest or sport [14]. Although, matters as such involve the most diverse lawful aspects of legal discipline, it is claimed that, in contemporary competition and sports world, the utmost and fundamental legal role is played by contact law [15].

In the case of Menelaus and Antilochus, the first argument causing the conflict was due to disobedience to the rules of the game by using tricks. This was definitely a breach of racing agreement, which in any form, oral or written, was from nature of a contract. Moreover, contractual considerations were a prize and the fame to the winners and thus Menelaus included an honor in his oath and during reconciliation, Antilochus asked for forgiveness as a compensation for the honor and fame, after which he agreed to give back the prize and announced his readiness for more reimbursement if required. There might be an argument that a tort law as the most vital body of law principles which would have been referred to. It is due to a reason such as liability for an injury resulting from racer-to-racer conducts are part of the tort law. However, there were not any injuries, although, a clear attempt existed from which Menelaus protected himself and due to this he lost the second place. Furthermore, the development of the argument lied under contractual nature.

Regarding the notion of arbitration, whenever there was a dispute, before going to official litigations, ancient Greeks used to be advised by their elder family members, would negotiate, reconcile or involve arbitrators for both private and public matters. Firstly, the term informal negotiation, reconcilement, mediation and arbitration were used interchangeably meaning unofficially solving the dispute. The term *diaita* (or rarely *epitrope*) was used to represent all of them [16]. Thus, it might be concluded that they had a free choice to solve their contractual conflicts privately or through arbitrators without going to official courts.

Relating the Homer's case to Islam

It has been clear that solving contractual conflicts through arbitration, and/or conciliation existed in ancient Greek according to Homer's Iliad. It is a prove, despite being myth, that belief, honor, oath swearing, customs, witnesses and fear from gods were fundamental elements of arbitration which solved the dispute fast, without any cost and official courts. This supports power and effectiveness of belief and culture in informal dispute resolution which proves Islam as a great platform. As regards Islam, the notion of avoiding official courts were started to be developed just after the birth of Islam, during 7th century. In Islam there are various types and methods or mechanisms of alternative dispute resolutions. They include (1) negotiation and/or conciliation – sulh, (2) third party advising, and/or compromise – nasihah, (3) mediation – vasaata and (4) arbitration – tahkim by which conflicting sides try to solve their dispute in a mutually agreed and peaceful manner. Nasihah and vasaata principles constitute aspects of sulh, but with its more formal nature formed by fixed rules and laws for arbitration procedure, tahkim (arbitration) is dissimilar from sulh. Moreover, (5) there are combination of sulh and tahkim that is currently called med-arb, (6) ombudsman – muhtasib, (7) using chancellors - vali ul-mazalim and (8) expert determination – fatwa of muftis and decisions of experts are other sorts of ADRs in Islam [17].

As for arbitration, the concept itself existed and practiced during pre-Islamic Arabia for matters involving conflicts on civil and commercial cases, in many instances, without clear fixed rules and strict and fair enforceability of an arbitral decision. However, Islam revolutionized the idea

with fixed fundamental rules. For example, in the Surah Al-Nisa (ayats 35, 58 and 65) of the Quran is about arbitration matters and the Prophet Muhammad (s.a.v) supported and recommended arbitration by himself through solving disputes as an arbitrator, appointing arbitrators and accepting their decision [17]. Generally, Islam has well developed base for alternative means for dispute resolution with advanced law schools and it is the fastest growing religion having more than 1.8 billion followers [18]. This means that the shared culture and strong belief system along with love for Prophet Muhammad (s.a.v) and fear from punishment play pivotal role in solving today's local and international disputes without going to courts.

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